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THE STATUTES RELATING TO

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JUDGMENTS

LIMITATION OF ACTIONS

CONVEYANCING

MARRIED WOMEN'S PROPERTY

SETTLED LAND

PAYMENT OF DEBTS

PARTITION

OUT OF REAL ESTATE

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WITH NOTES OF DECIDED CASES.

SECOND EDITION.

BY

THOMAS H. CARSON,

OF LINCOLN'S INN, ONE OF HIS MAJESTY'S COUNSEL,

AND

HAROLD B. BOMPAS,

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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PREFACE.

IN the case of a book dealing with so varied a range of subjects as the present, the publication of a new edition renders some words necessary as to the changes which have been made in the work, and as to the more important of the recent cases which are now inserted.

As regards prescription, it will be found that the notes to the Act have been rearranged, and to some extent rewritten. The decision of the House of Lords in *Colls v. The Home and Colonial Stores* (1904, A.C. 179) necessitated considerable alteration in the statements as to the law of light (see pp. 11 and 104). Alteration has also been made in the general note on prescription at Common Law and lost grant, and in the particular notes on Water rights and Foreshore (pp. 21, 74, and 92). Again, while the note on Highways and the relation thereto of public bodies has been enlarged (pp. 53 and 59, *post*), a reference has been inserted (p. 60, *post*) to the most recent case in which the Court of Appeal has defined the nature of the estate in a highway taken by the local authority (*Foley's Charity Trustees v. Dudley Corporation*, 1910, 1 K. B. 322, 325).

On the subject of Custom (the note on which has been rearranged; see p. 29, *post*), light has since the last edition been thrown by the judgments of Farwell, J., and the Court of Appeal (*Mercer v. Denne*, 1904, 2 Ch. 534; 1905, 2 Ch. 538), dealing with a custom for fishermen to dry their nets on the sea-shore; and by the judgment of Parker, J. (*Johnson v. Clark*, 1908, 1 Ch. 303), dealing with an alleged custom for married women to alienate land without a separate examination.

In the case of the Acts relating to the Limitation of Actions, there has also been some rearrangement and addition (see the Tables inserted at pp. 112, 113, and 185). Thus the material sections of the Real Property Limitation Act, 1874, have been printed in the places where the corresponding sections of the Real Property Limitation Act, 1833, for which the later sections were substituted, formerly occurred (see pp. 125, 153, 159, 169, and 185). And having regard to their increasing importance,

the material sections of the Public Authorities Protection Act, 1893, with a statement of the substance of the decisions thereon, have been inserted (p. 257). References have also been added to numerous recent decisions of the Irish Courts on the Statutes of Limitation; and in particular references to the cases in which those Courts have expressed their view of sect. 34 of the Real Property Limitation Act, 1833. The most authoritative exposition which the last-mentioned section has as yet received in England occurs in the judgments (referred to at p. 179, *post*) in *Re Nisbet and Potts* (1905, 1 Ch. 391; 1906, 1 Ch. 386), where the English Courts decided that certain restrictive covenants were binding on a person who subsequently acquired title to the land by adverse possession. Lastly, mention may be made of the case of *Re Lacey; Howard v. Lightfoot* (1907, 1 Ch. 329; see pp. 195 and 215, *post*), in which the effect of payment in keeping alive a specialty debt, which was also charged on land, received careful consideration from the Court of Appeal.

As regards the Fines and Recoveries Act, the note as to base fees has been developed (p. 264). And attention may be called to *Re Gaskell and Walters* (1906, 2 Ch. 1; see p. 276, *post*), in which the law as to barring the estate tail of a felon was discussed. The general note on Merger has also been enlarged (p. 295).

In connection with the Married Women's Property Acts, there should be noticed the opinion of Farwell, L.J., to the effect that the doctrine of paraphernalia has been abolished (*Masson Templier v. De Fries*, 1909, 2 K. B. 831; see p. 347, *post*). The recent Married Women's Property Acts have also been inserted, or their effect given (see pp. 364, 367).

The ancient doctrine of seisin has been recently discussed in a case where the Courts had to ascertain who was "seised" within the meaning of a custom which arose prior to the statute *Quia Emptores* (*Copestake v. Hoper*, 1907, 1 Ch. 366; 1908, 2 Ch. 10). The notes on this doctrine have been enlarged (see pp. 374, 520, *post*).

In connection with settled land, an attempt has been made to classify the numerous cases relating to compound settlements (pp. 670, 671). And the effect has been given of the Lunacy Act, 1908, which has set at rest doubts which previously existed as regards the powers as to settled land of the quasi committee of a lunatic not so found (see pp. 713, 718, and 812).

As regards Trustees, the law as to investments by trustees on mortgage has received illustration from the recent decisions

(referred to at p. 765, *post*) in *Re Dive*; *Dive v. Roebuck*, 1909, 1 Ch. 328; and *Shaw v. Cates*, *ib.* 389. Attention may also be called to those cases in which the Court has been asked to appoint new trustees, and to make vesting orders as regards land previously held by a company which has been dissolved (see pp. 779, 784). The decisions on this subject under the Trustee Act, 1893, must now be compared with the recent decision of the King's Bench Division in *Hastings Corporation v. Letton*, 1908, 1 K. B. 378.

Throughout the book the cases have by means of the Addenda been brought down to May, 1910.

The additional matter inserted required considerable room, and on the other hand it was important not to increase the bulk of the volume. Accordingly there have been omitted from the present edition the general notes as to Tenancy at Will and Tenancies from year to year, which in the last edition were appended to sects. 7 and 8 of the Real Property Limitation Act, 1833. The law on these subjects will be found fully stated in the well-known text books on Landlord and Tenant. There have also been omitted the Infants' Settlement Act, 1855, and the Sales of Reversions Act, 1867; subjects which seem to fall more properly within the scope of other text books.

The reader is requested to insert in their proper places the notes contained in the list of Addenda et Corrigenda.

I have again to thank Mr. Harold B. Bompas of the Inner Temple for much valuable assistance in the preparation of this edition. I have also to thank Mr. Ivimey Cook of Lincoln's Inn for assistance in reading the proof sheets.

THOMAS H. CARSON.

6, NEW SQUARE,
LINCOLN'S INN,
June, 1910.

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ADDENDA ET CORRIGENDA.

PAGE	LINE	
3	22	<i>Add</i> , "But the lessee can take steps necessary to preserve game from fire (<i>Cope v. Sharpe</i> , 1910, 1 K. B. 168)."
8	46	<i>Instead of the words</i> , "constructed for a temporary purpose," insert "the user of which was permissive only."
22	38	} <i>Foley v. Dudley</i> is now reported "1910, 1 K. B. 317."
60	19	
120	13	
121	12	
26	38	<i>For</i> "45 Ch. D. 38" <i>read</i> "45 Ch. D. 98."
27	30	<i>For</i> "Goldsmith" <i>read</i> "Goldsmid."
36	36	<i>For</i> "Smithson" <i>read</i> "Smith."
39	16	<i>Omit</i> , "and upon the lands of other persons within the same manor."
46	31	<i>For</i> "Oxford" <i>read</i> "Orford."
52	49	<i>Add</i> , "Questions as to the distribution of compensation between the owners of commonable rights have been dealt with by the Chancery Division in <i>Nash v. Combs</i> , 6 Eq. 51; <i>Fox v. Amhurst</i> , 20 Eq. 403; <i>Austin v. Amhurst</i> , 7 Ch. D. 689; <i>Weatherley v. Layton</i> , 1892, W. N. 165. But unless the parties are agreed in invoking the jurisdiction of the High Court, the action may fail (<i>Richards v. De Winton</i> , 1903, 1 Ch. 507; <i>Salmon v. Edwards</i> , 1910, 1 Ch. 552)."
65	7 and 45	<i>Add</i> , "See <i>S. E. R. Co. v. Associated Manufacturers</i> , 1910, 1 Ch. 12."
72	9	<i>For</i> "Pritcard" <i>read</i> "Prichard."
72	38	<i>Add</i> , "For the Scotch law as to substitution of ways, see <i>Young v. Kinloch</i> , 1910, A. C. 169."
115	9	<i>For</i> "33 Ch. Div. 139" <i>read</i> "30 Ch. D. 139."
116	47	<i>For</i> "Dundoe" <i>read</i> "Dundee."
129	10	<i>In marginal note</i> , <i>for</i> "c. 17" <i>read</i> "c. 27."
137	53	<i>For</i> "299" <i>read</i> "290," and <i>add</i> "Compare <i>Re Lewis</i> ; <i>L. v. L.</i> 1904, 2 Ch. 656."
153	last line	<i>For</i> "1823" <i>read</i> "1623."
188	50	<i>For</i> "1899" <i>read</i> "1900."
189	19	<i>For</i> "1833" <i>read</i> "1874."
191	29	<i>Add</i> " <i>Hanly v. Carroll</i> , 1907, 1 I. R. 166."
204	33	<i>For</i> "5 M. and G." <i>read</i> "5 D. M. and G."
205	53	<i>Add</i> , "A husband who takes possession of his wife's separate money is <i>prima facie</i> a trustee. If she knows of the act, his estate will be liable to repay to her the money with interest at 4 per cent. from his death (<i>Wassell v. Leggatt</i> , 1896, 1 Ch. 559). If she did not know of the act, interest may run from the taking possession (see <i>Dixon v. D.</i> , 9 Ch. D. 593)."
210	26	The manorial custom giving rise to such an implied contract must be a special one. In ordinary cases a copyhold tenant is liable to forfeiture for non-repair which amounts to waste; but is not liable to pay damages (<i>Galbraith v. Poynton</i> , 1905, 2 K. B. 258).
245	41	<i>Add</i> , " <i>Re Dive</i> , <i>Dive v. Roebuck</i> , 1909, 1 Ch. 336."
253	59	} <i>Read</i> " <i>Lacons v. Warmoll</i> , 1907, 2 K. B. 364, 366."
254	2	
366	44	<i>For</i> "484" <i>read</i> "424."
374	17	<i>Add</i> , " <i>Eager v. Furnivall</i> , 17 Ch. D. 120."

PAGE	LINE	
377	5	Add, "Section 5 of the act gives directions for estimating the value of real estate, and, having regard to this section, an inquiry was directed (<i>Re Manser, Killick v. Manser</i> , 1910, W. N. 6)."
383	19	Read "Seisin in deed."
396	24	Form of order in an action by a specialty creditor to enforce his debt against real assets in the hands of the devisees of the debtor is given (<i>Worthington & Co. v. Abbott</i> , 1910, 1 Ch. 588).
407	60	{ Add, "Assets are applicable in payment of testamentary expenses in the same order in which they are applicable in payment of debts (<i>Re Pullen, Parker v. Pullen</i> , 1910, 1 Ch. 564)."
426	36 and 42	
409	52	Add, "Calls on shares in a company incorporated by a Colonial Act only give rise to a simple contract debt (<i>Welland Co. v. Blake</i> , 6 H. & N. 415; 30 L. J. Ex. 161)."
410	16	For "Betty" read "Betts."
410	30	Add, "see post, p. 515."
425	22	Add, " <i>Re Scott and Alvarez</i> ," 1895, 1 Ch. 596."
468	34	Compare <i>Re Boxer, Morris v. Woore</i> , 1910, W. N. 132.
474	10	Add, "See <i>Re Thursby; Grant v. Littledale</i> , 1910, W. N. 151."
525	36	Add, "A gift taking effect on forfeiture was held to be an executory devise, not a contingent remainder (<i>Blackman v. Fyssh</i> , 1892, 3 Ch. 109)."
583	29	Add, "See <i>Stubbs v. Slater</i> , 1910, 1 Ch. 632."
599	21	For "1902, W. N. 166" read "1901, W. N. 166."
603	42	Add, "See the earlier authorities reviewed, Norton on Deeds, 329—332. And see <i>Re Thursby; Grant v. Littledale</i> , 1910, W. N. 151."
603	47	Add, "See <i>Re Ford and Ferguson</i> , 1906, 1 I. R. 607."
604	9	Add, " <i>Nottidge v. Dering</i> , 1910, 1 Ch. 305."
625	7	Add, "The section applies to an executory limitation in defeasance of an equitable fee (<i>Re Shrubb; S. v. S.</i> , 1910, W. N. 143)."
627	42	<i>Evans v. Levy</i> , now reported "1910, 1 Ch. 452." See <i>Willmott v. London Road Car Co.</i> , 1910, 1 Ch. 754.
628	35	Add, "Relief was refused where the under-lessee had been negligent (<i>Matthews v. Smallwood</i> , 1910, 1 Ch. 777)."
677	17	Add "See <i>Ellis v. Kerr</i> , 1910, 1 Ch. 529."
685	21	Add, "But it has been recently decided by the C. A. that clause (ii) does not extend to mortgages or charges made by beneficiaries upon their interests (whether in possession or remainder) under the settlement (<i>Re Davies and Kent</i> , 1910, W. N. 104)."
688	37	{ <i>Re Peel</i> , now reported "1910, 1 Ch. 389."
706	34	
716	33	
732	25	For "1882" read "1881."
732	25	<i>Re Davies and Kent</i> , affirmed in C. A., 1910, W. N. 104.
747	38	Add, " <i>Re Dyson, Challinor v. Sykes</i> , 1910, 1 Ch. 750."
750	17	Add, " <i>Catton v. Banks</i> was followed; <i>Carroll v. Harrison</i> , 1910, W. N. 104."
795	2	For "1854" read "1855."

Statutes relating to Real Property.

PREScription.

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I.—THE PRESCRIPTION ACT, 1832.

2 & 3 WILL. IV. c. 71.

An Act for shortening the Time of Prescription in certain Cases (a).
[1st August, 1832.]

- § 1. *Time limited for establishing rights of common and other profits à prendre...*1.
- § 2. *Ways, easements, and watercourses...*4.
- § 3. *Light...*10.
- § 4. *How periods of limitation are to be computed...*13.
- § 5. *Pleadings...*15.
- § 6. *Period less than that provided by statute not to be allowed...*17.
- § 7. *Saving in favour of persons under disabilities...*18.
- § 8. *Time excluded in computation of period of forty years...*19.

WHEREAS the expression “Time Immemorial, or Time whereof the Memory of Man runneth not to the contrary,” is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First, whereby the title to matters that have been long

2 & 3 Will. 4,
c. 71, s. 1.

2 & 3 Will. 4,
c. 71, s. 1.

Claim to right
of common
and other
profits *à prendre*
not to be
defeated after
thirty years'
enjoyment by
showing the
commence-
ment.

After sixty
years' enjoy-
ment the
right to be
absolute,
unless had by
consent or
agreement.

enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice; for remedy thereof, be it enacted, That no claim which may be lawfully made at the common law, by custom, prescription, or grant (*b*), to any right of common (*c*) or other profit or benefit, to be taken and enjoyed from or upon any land of our sovereign lord the King, his heirs or successors, or any land being parcel of the Duchy of Lancaster or of the Duchy of Cornwall (*d*), or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years, be defeated or destroyed by showing only that such right, profit, or benefit was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and when such right, profit, or benefit shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

(a) By 21 & 22 Vict. c. 42, this act was extended to Ireland.

(b) The reader is referred to Note II. at the end of this act (pp. 19, *et seq.*) dealing (A) with the question whether the above act has superseded the common law; (B) with prescription generally, including prescription at common law and by lost grant; (C) with custom; and (D) with grants, express and implied, of incorporeal rights, and with licences in relation to real estate.

(c) As to rights of common, see Note III. at the end of this act, p. 38, *post*.

(d) The provisions of this act are not affected by the Act for limiting Actions and Suits by the Duke of Cornwall, in relation to Real Property (23 & 24 Vict. c. 53, s. 2).

(1) *Subject-matter of the Section...2.*

(2) *Enjoyment under the Section...3.*

(1)
Subject-
matter of the
first section.

The first section of this act includes different subjects from those in the second, and distinguishes easements from rights of common or profits *à prendre*; a different limitation is established for the former and latter cases (*Bailey v. Appleyard*, 8 Ad. & Ell. 167; *Lawson v. Langley*, 4 Ad. & Ell. 890; *Jones v. Richard*, 5 Ad. & Ell. 413). The right to receive air, light, or water, passing across a neighbour's land, may be claimed as an easement; but the right to take "*something out of the soil*" is a profit *à prendre*, and not an easement (*Manning v. Wasdale*, 5 Ad. & Ell. 764; *Blewitt v. Tregonning*, 3 Ad. & Ell. 554). A profit *à prendre* is a right to take something off another person's land (*Sutherland v. Heathcote*, 1892, 1 Ch. 484). This section applies only to profits *à prendre* in the land of another, and has no application to a copyholder's acts on his copyhold tenement (*Hunmer v. Chance*, 4 D. J. & S. 626).

Profits *à prendre*.

The right to kill and carry away wild duck is a profit *à prendre* (*Fitzhardinge v. Purcell*, 1908, 2 Ch. 139: see *Davies' case*, 3 Mod. 246). The liberty to hawk is one species of *ancupium*, the taking of birds by hawks, and seems to be also a profit *à prendre*. The liberty of fishing appears to be of

the same nature; it implies that the person who takes the fish, takes for his own benefit, and may carry them away (*Anon.*, Hardr. 407; *Fitzgerald v. Firbank*, 1897, 2 Ch. 96; see *Grove v. Portal*, 1902, 1 Ch. 727; *Fitzhardinge v. Purcell*, *sup.*). The liberty of hunting is open to more question, as it does not of itself import the right to the animal when taken; and if it were a licence given to one individual, either on one occasion or for a time, or for his life, it would amount only to a mere personal licence of pleasure, to be exercised by the individual licensee. But in the case of a grant by deed—"of free liberty with servants or otherwise to enter lands and there to hunt, hawk, fish, and fowl"—to persons, "their heirs and assigns," where it is apparent that not merely the particular individual named, but any to whom they or their heirs choose to assign it, should exercise the right, it has been considered that an interest or profit à prendre was intended to be granted (*Wickham v. Hawker*, 7 M. & W. 78, 79; see *Hooper v. Clark*, L. R. 2 Q. B. 200). The property in animals *feræ naturæ*, while they are on the soil, belongs to the owner of the soil (*Blades v. Higgs*, 11 H. L. C. 621). He may grant a right to others to come and take them by a grant of hunting, shooting, fowling, and so forth, and such a grant is a licence of a profit à prendre (*Ewart v. Graham*, 7 H. L. C. 344; *Radcliff v. Hayes*, 1907, 1 I. R. 101). The lessee of a right of shooting cannot interfere with the ordinary management of the land even if injurious to the shooting (*Gearns v. Baker*, 10 Ch. 355). In substance a profit à prendre may be reserved by the owner of the fee simple when he alienates, although it is considered that, technically speaking, in such a case it is a re-grant of the right by the alienee of the fee simple to the alienor (*Ewart v. Graham*, 7 H. L. 344, 345; see *Houston v. Sligo*, 52 L. T. 870; 55 L. T. 614). The following are other instances of profits à prendre which have been dealt with by the Courts; viz. As regards things renewable by nature; the right to cut down and carry away trees growing in another's close (*Bailey v. Stevens*, 12 C. B. N. S. 91; *Dowglass v. Kendal Cro. Jac.* 256); the right to cut and carry away litter (*De la Warr v. Miles*, 17 Ch. Div. 535); and see the rights to common of pasture estovers and turbary mentioned in Note III., *post*, p. 39. As regards things not renewable by nature; the right to take clay from another's close (*Clayton v. Corby*, 5 Q. B. 420); and see the commonable rights of taking stone, coal, and sand mentioned in Note III., *post*, p. 47.

Rights to profits à prendre may exist as annexed or appurtenant to particular land, and only exercisable by the landowners. Or they may exist in gross, that is, apart from the ownership of land. See for instances, *Barrington's case*, 8 Rep. 36b; *Welcome v. Upton*, 6 M. & W. 536; *Johnson v. Barnes*, 8 C. P. 527; *Devonshire v. Pattinson*, 20 Q. B. Div. 274; *Neill v. Devonshire*, 8 A. C. 153; *Goodman v. Saltash*, 7 A. C. 633. In the former case (that is, as annexed to land), profits à prendre cannot be prescribed for without stint and for commercial purposes: but only when connected with the enjoyment of the land and limited accordingly (*Chesterfield v. Harris*, 1908, 2 Ch. 397; see *Bailey v. Stevens*, 12 C. B. N. S. 91; *Hoskins v. Robins*, 2 Wms. Saund. 727 n.). In the latter case (that is, in gross) it seems that profits à prendre may be claimed as exclusive rights. See *Shuttleworth v. Le Fleming*, 19 C. B. N. S. 687, and the cases as to profits à prendre in gross quoted above.

Profits à prendre in gross may be claimed by common law prescription (*Johnson v. Barnes*, L. R. 8 C. P. 527). An attempt was made to claim them under this act, but the Court of C.P. held that having regard to sect. 5, prescriptive rights in gross were not within the scope of section 1 (*Shuttleworth v. Le Fleming*, 19 C. B. N. S. 687; see *Foster v. Warblington*, 1906, 1 K. B. 664; *Ramsgate v. Debling*, 22 Times L. R. 369). A different view of the act was raised before the C. A., but the point was not decided (*Mercer v. Denne*, 1905, 2 Ch. 574, 586).

Before this act, a prescriptive claim was a claim of immemorial right; the evidence in support of it was such as a party might be able to give in such a case; and the jury were to draw their inference from such proof as could be shown. (2) Enjoyment under the section.

2 & 3 Will. 4, c. 71, s. 1. be produced. Now in the case of claims under the act, the proof is limited to thirty years. But the party must prove his enjoyment for that whole period (*Bailey v. Appleyard*, 8 Ad. & Ell. 161). Undoubted enjoyment for twenty-nine years and three-quarters will not be sufficient (*Bailey v. Appleyard*, 8 Ad. & Ell. 164; see *Flight v. Thomas*, 11 Ad. & Ell. 688; and compare *Battersea v. Commrs. of Sewers*, 1895, 2 Ch. 708). Taking the first, fourth, and fifth sections together, the period mentioned in the act is thirty years next before some action in which the claim shall be brought into question (*Richards v. Fry*, 7 Ad. & Ell. 698; *Wright v. Williams*, 1 M. & W. 77). See further the note to sect. 4, *post*.

Period of enjoyment. Where on the ground of prescription profits *à prendre* are claimed under this section, the ordinary rules as to claims to prescriptive rights apply (see Note II., pp. 20, 26, *post*). Thus a grant of the right must be presumed. And a claim in respect of a tenement to common over a forest grounded on thirty years' enjoyment was defeated by showing that a grant of any right over the forest would have been void by statute (*Mill v. New Forest*, 18 C. B. 60). Nor can a tenant acquire a profit *à prendre* in other land belonging to his landlord (*Warburton v. Parke*, 2 H. & W. 64). Nor is an enjoyment sufficient which can be referred to an agreement in writing made by the owner of the servient tenement (*Lowry v. Crothers*, 1 R. 5 C. L. 98). The enjoyment under this section must be enjoyment as of right (*De la Warr v. Miles*, 17 Ch. Div. 591; as to enjoyment as of right, see *post*, p. 8). But where the acts were done as of right it was immaterial that they were done under a mistaken supposition of title (*De la Warr v. Miles*, 17 Ch. Div. 585; *Dawson v. MacGroggan*, 1903, 1 I. R. 92).

As to the nature of the evidence to be given in claiming a right under this section to common appurtenant, see *Commrs. of Sewers v. Glasse*, 19 Eq. 150, 151. A declaration by a tenant in derogation of the title of the reversioner was inadmissible (*Papendick v. Bridgwater*, 5 Ell. & Bl. 166; distinguish *Blandy Jenkins v. Dunraven*, 1899, 2 Ch. 121; and see *Scholes v. Chadwick*, 2 Moo. & R. 507; *Reg. v. Bliss*, 7 Ad. & Ell. 550).

Pleading. As to pleading the section, see the note to sect. 5, *post*, and the early cases of *Welcome v. Upton* (6 M. & W. 401), and *Jones v. Price* (3 Bing. N. C. 52).

In claims of right of way or other easement the periods to be twenty years and forty years.

2. No claim which may be lawfully made at the common law (*e*), by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing.

Modes of claiming easements.

(*e*) As to the modes of claiming an easement by prescription at common law, and by non-existing grant, which were used before the passing of this

act, see Note II., *post*, p. 21. The act has provided an additional mode of 2 & 3 Will. 4, claiming easements, but has not abolished the former modes (see *post*, p. 19), c. 71, s. 2. As to the law of ways, see *post*, p. 53; and as to watercourses, see *post*, p. 74. As to the right to a pew, which is an easement, see *post*, p. 98.

(1) *Definition and nature of Easements*...5.

(2) *Subject-matter of the Section*...7.

(3) *Enjoyment under the Section*...7.

An easement (from the French word *aïse*, i.e. *commoditas*) is defined to be a privilege that one neighbour hath of another by writing or prescription without profit, as a way, or a sink through his land, or such like (Termes de la Ley. adopted, *Hewlins v. Shippam*, 5 B. & C. 229; *Mounsey v. Ismay*, 3 H. & C. 497; *Metropolitan R. Co. v. Fowler*, 1892, 1 Q. B. 180). "A servitude is a charge imposed upon one heritage for the use and advantage of a heritage belonging to another proprietor" (Code Civ. Art. 637). There can be no easement, properly so called, unless there be both a servient and a dominant tenement (*Rangeley v. Midland R. Co.*, 3 Ch. 310; *Hawkins v. Rutter*, 1892, 1 Q. B. 671; see *post*, p. 23). The servient tenement is that over which a right claimed by custom, prescription, or grant is exercised, and the dominant tenement is that to which such right is attached. An easement must be connected with the enjoyment of the dominant tenement (*Ackroyd v. Smith*, 10 C. B. 164). It may benefit other tenements (*Simpson v. Godmanchester*, 1897, A. C. 696). The servient owner, however, cannot insist on a benefit therefrom (*Mason v. Shrewsbury Co.*, L. R. 6 Q. B. 587). It must be an incident of a known and usual kind (*Hill v. Tupper*, 2 H. & C. 121; see *Aspden v. Seddon*, 1 Ex. Div. 509). The public right of passage over a highway was said not to be a dominant tenement in respect of which they could acquire an easement of discharging water from the road on to other land (*A.-G. v. Copeland*, 1901, 2 K. B. 101; see *S. C.*, 1902, 1 K. B. 690). On the other hand, a right of way may be appurtenant to a several fishery in gross (*Hanbury v. Jenkins*, 1901, 2 Ch. 401; see *Edgar v. Fishery Commrs.*, 23 L. T. 732). It is essential that the two tenements should belong to different owners; for the owner of two tenements can have no easement over one of them in respect of the other (*Roe v. Siddons*, 22 Q. B. Div. 236; *Bolton v. Bolton*, 11 Ch. D. 970). You cannot have an easement over your own land (*Metropolitan R. Co. v. Fowler*, 1892, 1 Q. B. 171; *Kilgour v. Gaddes*, 1904, 1 K. B. 461). And, if the ownership was originally separate, upon the two tenements becoming vested in the same person the inferior right of easement is merged in the superior title of ownership (*Holmes v. Goring*, 2 Bing. 83). Where there is an unity of seisin of the land and of the way over the land in one person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way (*James v. Plant*, 4 Ad. & Ell. 761).

As regards their legal character, easements are incorporeal hereditaments (*Bryan v. Whistler*, 8 B. & C. 293; *Jones v. Watts*, 43 Ch. Div. 585; *Re Sanders*, 1896, 1 Ch. 494; *Hastings v. N. E. R.*, 1898, 2 Ch. 678; see *Re Brotherton*; *B. v. B.* 1907, W. N. 230, where they are said to be rather "rights"; see further, 24 L. Q. R. 199, 259, 264). A contract to grant a right of way was held to be a contract for sale of real estate (*Rowe v. London School Board*, 36 Ch. D. 619).

It has been doubted whether there can be a grant of an incorporeal hereditament, such as an easement, subject to a perpetual payment in the nature of a fee farm rent (*Gardner v. Hodgson's Co.*, 1901, 2 Ch. 217, 220; see *S. C.* 1903, A. C. 239). It is settled that rent cannot issue out of a mere easement (*Buzzard v. Capel*, 8 B. & C. 141; 2 M. & R. 197; 6 Bing. 150; 3 M. & P. 480; 3 Y. & J. 344; *Re Gerard and Beecham*, 1894, 3 Ch. 315; see *Gardner v. Hodgson's Co.*, 1900, 1 Ch. 601; 1901, 2 Ch. 217). But payment of money in respect of an easement may be secured by agreement (see *Hastings v. N. E. R.*, 1898, 2 Ch. 674; 1899, 1 Ch. 656; 1900, A. C. 260; see *Aspden v. Seddon*, 1 Exch. Div. 504); and where the easement is granted

(1) Definition and nature of easements.

Servient and dominant tenements.

Easements are incorporeal hereditaments.

2 & 3 Will. 4. for a term the reversioner of the land may sue for the money (*Ib.*). See **c. 71, s. 2.** further, p. 120, *post*.

There are a great variety of easements. The following may be enumerated:—

Instances of easements. Right of way. Right to place over neighbouring soil clothes on lines (*Drewell v. Towler*, 3 B. & Ad. 735); or telephone wires (*Lancashire Co. v. Manchester*, 14 Q. B. Div. 267; see *Wandsworth v. United Telephone Co.*, 13 Q. B. Div. 904; *Midland R. Co. v. Wright*, 1901, 1 Ch. 783; *Finchley Co. v. Finchley Council*, 1903, 1 Ch. 437). The right to move a timber traveller through air over neighbouring land (*Harris v. De Pinna*, 33 Ch. D. 251); or to build so as to project over neighbouring land (*Lemmon v. Webb*, 1894, 3 Ch. 11, 18; 1895, A. C. 1, distinguishing the case of overhanging trees). The right of landing nets on another's ground (*Gray v. Bond*, 2 Brod. & B. 667). Right to make spoil banks upon the surface in working mines (*Rogers v. Taylor*, 1 H. & N. 706; see *Ramsay v. Blair*, 1 App. Cas. 701); or quarries (*Middleton v. Clarence*, 1 I. R. 11 C. L. 499). The right to mix muck on another's land (*Pye v. Mumford*, 11 Q. B. 666). The right to place a pile in the soil of a river (*Lancaster v. Eve*, 5 C. B. N. S. 717; *Cory v. Greenwich*, L. R. 7 C. P. 499); or to place stones on the foreshore for protection of adjoining land (*Philpot v. Bath*, 1905, W. N. 114). The right to place a signpost on a common (*Hoare v. Metropolitan Board*, L. R. 9 Q. B. 296); or to affix a signboard to the walls of another's house (*Moody v. Steggles*, 12 Ch. D. 261); or to use a fascia on another's house (*Francis v. Hayward*, 22 Ch. Div. 177); or to place an advertisement hoarding on land (*R. v. S. Pancras*, 2 Q. B. D. 581; see *Kerrison v. Smith*, 1897, 2 Q. B. 445). The right to go on the soil of another to clear a mill stream and repair its banks (*Beeston v. Weate*, 5 E. & B. 996); or to fish (*Hanbury v. Jenkins*, 1901, 2 Ch. 401). The right to open locks on another's river (*Simpson v. Godmanchester*, 1897, A. C. 696). The right in the occupier of a messuage to water cattle at a pond, and to take water for domestic purposes (*Manning v. Wasdale*, 5 Ad. & Ell. 758; see *Fitch v. Rawling*, 2 H. Bl. 395). The right to go on a neighbour's close and to draw water from a spring there (*Race v. Ward*, 4 El. & Bl. 702); or from a pump (*Polden v. Bastard*, L. R. 1 Q. B. 156). The right to conduct water across a neighbour's close by an artificial watercourse (*Beeston v. Weate*, *sup.*). The right to discharge polluted water into another's watercourse (*Wright v. Williams*, 1 M. & W. 77). The right to discharge rain-water by spout or projecting eaves (*Harvey v. Walters*, L. R. 8 C. P. 162). The right to commit a private nuisance by discharging coal dust over another's land (*Royal Mail Co. v. George*, 1900, A. C. 980), or by creating noise (*Elliotson v. Feetham*, 2 Bing. N. C. 134; *Ball v. Ray*, 8 Ch. 471), or by polluting water (*Bazendale v. McMurray*, 2 Ch. 790), or by polluting air by smoke or smell (*Crump v. Lambert*, 3 Eq. 413). The right to use the chimney of another's house for the passage of smoke (*Hervey v. Smith*, 1 K. & J. 389; 22 Beav. 299; see *Tebb v. Cave*, 1900, 1 Ch. 643; *Jones v. Pritchard*, 1908, 1 Ch. 630). The right to receive air by a defined channel (*Bass v. Gregory*, 25 Q. B. D. 481). Or to receive light by ancient windows (*Tapling v. Jones*, 11 H. L. C. 290). The right of support from land (*Dalton v. Angus*, 6 A. C. 740); or from buildings (*Tone v. Preston*, 24 Ch. D. 739; *Waddington v. Naylor*, 60 L. T. 480). The right to let down the surface of land (*Sitwell v. Londesborough*, 1905, 1 Ch. 460). The above rights in respect of air, light and support are sometimes referred to as negative easements; that is, a right to prevent the owner of the servient tenement from exercising over such tenement his ordinary rights of ownership, as he would have been entitled to do but for the easement. Compare restrictive covenants which have been said to bind the land in equity, as being in the nature of negative easements (*Re Nisbet & Potts*, 1906, 1 Ch. 402, 406).

Negative easements.

The undertakers of a navigation, in whom the soil of the river is not vested, have a mere easement in the soil (9 B. & C. 109; *Hollis v. Goldfinch*, 1 B. & C. 205). And the following have been held to be easements: The licence to make a vault in a church, and to have the exclusive use of it (*Bryan v. Whistler*, 8 B. & C. 288). The right to sit in a pew in a church annexed to a house (*Mainwaring v. Giles*, 5 B. & Ald. 361; *Hinde v.*

Other easements.

Chorlton, L. R. 2 C. P. 104; *Brumfitt v. Roberts*, L. R. 5 C. P. 224; see 2 & 3 Will. 4, *Crisp v. Martin*, 2 P. D. 15; *Halliday v. Phillips*, 23 Q. B. Div. 53). The c. 71, s. 2. right to a fishing weir in non-tidal waters (*Rolle v. Whyte*, L. R. 3 Q. B. 286; *Leighton v. Lonsdale*, L. R. 5 C. P. 657).

(2)
The second section refers to easements properly so called, and it has been Subject-matter of the held that to be within its protection an easement must be in some way appurtenant to a dominant tenement (*Shuttleworth v. Le Fleming*, 19 C. B. 2d second section. N. S. 687; 34 L. J. C. P. 309). Accordingly, the section was held not to extend to a custom for the freemen of a town to enter on land, to hold horse-races (*Mounsey v. Ismay*, 3 H. & C. 486), or to a custom for fishermen to dry nets on the beach (*Mercer v. Denne*, 1904, 2 Ch. 540, 554; see *Foster v. Warblington*, 1906, 1 K. B. 664; *Ramsgate v. Debling*, 22 Times L. R. 369). A different view of the section was raised before the C. A., but not decided (1905, 2 Ch. 574, 586).

The above section extends to other easements besides ways and water-courses (*Dalton v. Angus*, 6 App. Cas. 798; *Simpson v. Godmanchester*, 1897, A. C. 709). Thus it extends to support for buildings from land (*Dalton v. Angus*, 6 App. Cas. 798), or from buildings (*Le Maître v. Davies*, 19 Ch. D. 281); and to a right to open locks (*Simpson v. Godmanchester*, 1897, A. C. 696); and to easements of every description (*Ib.* 709); except light (*Perry v. Eames*, 1891, 1 Ch. 665; *Wheaton v. Maple*, 1893, 3 Ch. 48). A claim to a watercourse within this section includes a claim to send through another's watercourse polluted water (*Wright v. Williams*, 1 M. & W. 77); or sand and rubble (*Carlyon v. Lovering*, 1 H. & N. 784); also a claim to have water which would otherwise flow down to the plaintiff's land diverted over other land (*Mason v. Shrewsbury Co.*, L. R. 6 Q. B. 578; see *Staffordshire Co. v. Birmingham Co.*, L. R. 1 H. L. 254), but not a claim to have water allowed to percolate through the banks of a stream (*Roberts v. Fellowes*, 94 L. T. 279).

(3)
Sect. 2 provides a method of claiming easements (other than light) Enjoyment alternative to the methods of claiming them at common law or by lost grant under the (*Gardner v. Hodgson's Co.*, 1903, A. C. 238). Where these easements are section. claimed in either of the two last-mentioned methods, a grant must be Presuming a presumed (*Gardner v. Hodgson's Co.*, 1903, A. C. 239). Where they are grant. claimed under this section, and the claim is based on user for twenty years, a grant must also be presumed (*Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 315). If the claim is based on user for forty years it seems that the same presumption must be made (*Staffordshire Co. v. Birmingham Co.*, L. R. 1 H. L. 260, 278; and see *Kilgour v. Gaddes*, 1904, 1 K. B. 457, deciding that enjoyment as of right is in this case necessary. See *contra*, *Tapling v. Jones*, 11 H. L. C. 290, and compare the language of sect. 7, *post*, p. 18).

Where in the case of claims under sect. 2 a grant must be presumed, the Enjoyment enjoyment must be such as will justify the presumption. In general the must justify rules as to presuming a grant (see note on prescription, *post*, p. 27) apply. the presumption In particular the presumed grant must be an absolute one. For the ease- of an ab- ment must be acquired in favour of the dominant as against the servient solute grant. tenement, in respect of the fee simple in both cases (*Kilgour v. Gaddes*, 1904, 1 K. B. 466). So in a leading case decided in 1834 it was held that under sect. 2 an enjoyment of twenty years, which cannot give a good title against all having estates in the lands in question, will not confer any title at all, even as between the parties having partial interests under leases. And where for more than twenty years the plaintiff, holding a lease from a bishop of one close, enjoyed without interruption a way over another close occupied by the defendant holding a lease under the same bishop, such enjoyment did not give to the plaintiff a right of way over the defendant's close (*Bright v. Walker*, 1 C. M. & R. 211; where see the discussion of the Act by *Parke*, B.).

Bright v. Walker was a decision on the part of the section relating to twenty years' enjoyment (see *Harris v. De Pinna*, 33 Ch. D. 251). And (apart from questions respecting light under section 3; as to which, see p. 11, *post*) it is clear in general that under this Act the tenant of one close

2 & 3 Will. 4,
c. 71, s. 2.

No presumption of grant where it would have been *ultra vires* as regards the grantee, or the grantor ;

or where servient owner incapable of preventing user ;

or where enjoyment was not "as of right."

cannot as such acquire a prescriptive easement over another close belonging to the same landlord either by twenty years' user (*Gayford v. Moffatt*, 4 Ch. 133; *Russell v. Harford*, 2 Eq. 507; *Bayley v. G. W. R.*, 26 Ch. D. 441; *Daniel v. Anderson*, 31 L. J. Ch. 610; *Sturges v. Bridgman*, 11 Ch. D. 855; *Macnaghten v. Baird*, 1903, 2 I. R. 731) or by forty years' user (*Kilgour v. Gaddes*, 1904, 1 K. B. 457; disapproving *Fahey v. Dwyer*, 4 L. R. Ir. 271, and the dictum of *Chitty, J.*, in *Harris v. De Pinna*, 33 Ch. D. 252. As to the presumption of a lost grant in such a case, see *Timmons v. Hewitt*, 22 L. R. Ir. 627.

Since an absolute grant must be presumed, a person claiming an easement under sect. 2 must show that the right might have been granted by a person capable of making the grant (*Rochdale Co. v. Radcliffe*, 18 Q. B. 315). And the claim cannot be sustained where such a grant would have been *ultra vires* either as regards the grantee (*National Manure Co. v. Donald*, 4 H. & N. 28; 28 L. J. Ex. 185) or as regards the grantor (*Rochdale Co. v. Radcliffe, sup.*; *Stafford-hire Co. v. Birmingham Co.*, L. R. 1 H. L. 278; see *Mill v. New Forest*, 18 C. B. 60).

The various cases in which the Courts have refused to presume a grant are collected, *post*, p. 27. It may be mentioned here that a grant will not be presumed where the servient owner is incapable of preventing the user (*Sturges v. Bridgman*, 11 Ch. D. 852). Accordingly the owner of a wind-mill cannot under this section claim by twenty years' user a free passage of air to his mill (*Webb v. Bird*, 10 C. B. N. S. 283); nor can the right of access of air to chimneys over the unlimited surface of a neighbour be acquired (*Bryant v. Lefever*, 4 C. P. Div. 172; see as to the passage of air through a defined channel, *Bass v. Gregory*, 25 Q. B. D. 481; *Chastey v. Ackland*, 1895, 2 Ch. 389; 1897, A. C. 155). Nor can subterranean water percolating in no known channels be acquired as an easement by user (*Chasemore v. Richards*, 7 H. L. C. 349). Nor can the right to annoy neighbours by noise be acquired by user, unless during the user the noise has amounted to an actionable nuisance (*Sturges v. Bridgman*, 11 Ch. D. 852; see *Murgatroyd v. Robinson*, 7 E. & B. 391).

Nor will a grant be presumed where the enjoyment was not "as of right" (*Hanna v. Pollock*, 1900, 2 I. R. 671). There must be enjoyment "as of right" whether the claim is made on the ground of forty, or of twenty, years' enjoyment (*Kilgour v. Gaddes*, 1904, 1 K. B. 457).

In the case of prescription, long enjoyments, in order to establish a right, must have been "as of right," and therefore neither by violence nor by stealth, nor by leave asked from time to time (*Mills v. Colchester*, L. R. 2 C. P. 486). The enjoyment must be "*nec per vim, nec clam, nec precario*" (Co. Litt. 113 b; *Gardner v. Hodgson's Brewery*, 1903, A. C. 238). It is not sufficient if it be "*per vim*" (*Eaton v. Swansea*, 17 Q. B. 267); or if it be "*clam*," as where there was no open and visible enjoyment of an unusual support for a dock from underground rods (*Union Co. v. London Dock Co.*, 1902, 2 Ch. 557); or if it be "*precario*," as in the case of an artificial water-course constructed for a temporary purpose (*Burrows v. Lang*, 1901, 2 Ch. 502). Acts done under a mistaken supposition of title have been held to amount to enjoyment as of right (*De la Warr v. Miles*, 17 Ch. Div. 535; *Dawson v. MacGroggan*, 1903, 1 I. R. 92). On the other hand, where a watercourse was made and enjoyed by a tenant, the landlord and tenant both being under the mistaken belief that this was authorized by the lease, there was no enjoyment as of right (*Chambers v. Hopwood*, 32 Ch. D. 549; see *Rivers v. Adams*, 3 Ex. D. 361; *Campbell v. Wilson*, 3 East, 294).

The words in section 5, "enjoyment as of right," must have the same sense as the words in section 2, "claiming right thereto" (*Tickle v. Brown*, 4 Ad. & Ell. 382). They do not mean rightful apart from the act (*Gardner v. Hodgson's Co.*, 1900, 1 Ch. 596). An enjoyment which the owner of the servient tenement cannot stop is not an enjoyment as of right (*Winship v. Hudspeth*, 10 Exch. 5; see *Sturges v. Bridgman*, 11 Ch. D. 852; *Sanders v. Manley*, 1878, W. N. 181). It was said by Lord Denman that the words "enjoyment thereof as of right," must mean an enjoyment

had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time on each occasion, or even on many occasions of using it; but an enjoyment had openly and notoriously, without particular leave at the time, by a person claiming to use it, without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user or by deed conferring the right, or though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing not under seal, in case of a plea for forty years, or by such writing or parol consent or agreement, contract or licence, in case of a plea for twenty years (*Tickle v. Brown*, 4 Ad. & Ell. 369; see as to this dictum, *Gardner v. Hodgson's Co.*, 1900, 1 Ch. 599; 1901, 2 Ch. 217; and see *Beasley v. Clarke*, 2 Bing. N. C. 705; *Bright v. Walker*, 1 C. M. & R. 219; *Arkwright v. Gell*, 5 M. & W. 333).

Where an easement was enjoyed during part of the period in exercise of a statutory right, and, the statutory right having ceased, the enjoyment was continued for the rest of the period, no easement was acquired (*Kinloch v. Neville*, 6 M. & W. 806). The use of waste water from a canal was held not to be an enjoyment as of right (*Staffordshire Co. v. Birmingham Co.*, L. R. 1 H. L. 254; compare *Bankart v. Tennant*, 10 Eq. 141; *McEvoy v. G. N. R.*, 1900, 2 I. R. 325; *A. G. v. Grand Junction Co.*, 1909, 2 Ch. 505). It was said by *Blackburn, J.*, that *Wood v. Waud* (3 Ex. 748) was in effect a decision that an active enjoyment in fact for more than the statutable period is not an enjoyment as of right, if during the period it is known that it is only permitted so long as some particular purpose is served (*Mason v. Shrewsbury, &c., R. Co.*, 6 Q. B. 584; compare *Tone v. Preston*, 24 Ch. D. 739; see *Gaved v. Martyn*, 19 C. B. N. S. 732).

Where the simple issue is, whether there has been a continued enjoyment of a way for twenty years, any evidence negating the continuance is admissible. "Every time that the occupiers asked for leave, they admitted that the former licence had expired, and that the continuance of the enjoyment was broken" (*Monmouthshire Co. v. Harford*, 1 C. M. & R. 615). In the case of twenty years' enjoyment it was said by *Alderson, B.*, that if a parol permission extends over the whole of the twenty years, the party enjoys the way as of right and without interruption for the twenty years; not so, if the leave be given from time to time within the twenty years (*Kinloch v. Neville*, 6 M. & W. 795). In the case of a forty years' enjoyment annual payments were made for the use of a cartway during the whole forty years. These payments were treated as having been made for permission to use the way during each successive year; and accordingly there was no user as of right (*Gardner v. Hodgson's Co.*, 1903, A. C. 229, see p. 238).

No interruption for less than a year breaks the period when once the enjoyment as of right has begun. But interruptions acquiesced in for less than a year may show that the enjoyment never was of right (*Eaton v. Swansea Co.*, 17 Q. B. 275; see *Brook v. Archer*, 1868, W. N. 5). See further, as to interruptions in the enjoyment, the note to sect. 4, *post*.

The enjoyment of an easement as of right for twenty years next before the commencement of the suit, within this statute, means a continuous enjoyment as of right for twenty years next before the commencement of the suit, of the easement as an easement, without interruption acquiesced in for a year. It is therefore defeated by unity of possession during all or part of the period of enjoyment, although such unity of possession has its inception after the completion of twenty or forty years (*Battishill v. Reed*, 18 C. B. 696). Where a plaintiff had enjoyed a way as of right and without interruption from 1800 to 1855, when the action was brought, it was held, that his claim under this statute was defeated by an unity of possession from 1843 to 1853 (*Ib.*; *Damper v. Bassett*, 1901, 2 Ch. 350; *Hulbert v. Dale*, 1909, 2 Ch. 576). And such unity of possession need not be specially replied under the 5th section (*Onley v. Gardiner*, 4 M. & W. 496; see *Monmouthshire Co. v. Harford*, 1 C. M. & R. 631; *Richards v. Fry*, 7 Ad. & Ell. 698). Easements were defeated by showing unity of possession in *Clay v. Thackrah*, 9 C. & P. 47, and *Wilson v. Stanley*, 12 Ir. C. L. Rep. N. S. 345.

2 & 3 Will. 4,
c. 71, s. 2.

Easement
must have
been enjoyed
as such.
Effect of
unity of pos-
session.

2 & 3 Will. 4, c. 71, s. 2. To support a plea framed on the 2nd section of this statute, of a right of way enjoyed for forty years, evidence may be given of user more than forty years back (*Lawson v. Langley*, 4 Ad. & Ell. 890; see *Beeston v. Weate*, 5 E. & B. 986). As to pleading licences, see *Tickle v. Brown*, 4 Ad. & Ell. 369; *Davies v. Williams*, 16 Q. B. 546. See further, as to evidence of user, the note to sect. 4, *post*.

Claim to the use of light enjoyed for twenty years indefeasible, unless shown to have been by consent.

3. When the access and use of light to and for any dwelling-house, workshop, or other building, shall have been actually enjoyed therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible, any local usage or custom to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing.

As to the law of light generally and the modes of claiming it apart from the act, see *post*, p. 102.

- (1) *Period of Twenty Years*...10.
- (2) *Subject-matter of the Section*...10.
- (3) *Nature of the Enjoyment*...11.
- (4) *Custom of London*...12.

(1)
Period of twenty years.

The period of twenty years is not limited to the period next before the pending action, but is, by the 4th section, the period next before any action wherein the claim to the right was brought into question (*Cooper v. Hubbuck*, 12 C. B. N. S. 456). Until such an action is commenced, the right remains inchoate (*Hyman v. Van den Bergh*, 1908, 1 Ch. 171). It was said that this inchoate right was not an interest in land or easement known to the law (*Greenhalgh v. Brindley*, 1901, 2 Ch. 328). Compare, however, the compensation granted in such a case, *Re London and Tilbury R. Co.*, 24 Q. B. Div. 326; *Barlow v. Ross*, *Ib.* 381. The court will not interfere to protect the inchoate right before the expiration of the full twenty years (*Battersea v. Commissioners of Sewers*, 1895, 2 Ch. 708; *Bridewell v. Ward*, 62 L. J. Q. B. 270). If, however, there has been an enjoyment for nineteen years and a fraction, and then an interruption takes place, the right may be established at the end of the twentieth year, inasmuch as the interruption, under the 4th section, in order to defeat the twenty years' user, must have been acquiesced in or submitted to for a whole year (*Flight v. Thomas*, 8 Cl. & Fin. 231).

(2)
Subject-matter of the section.

No right can, under this section, be acquired as against the Crown which is not bound thereby (*Perry v. Eames*, 1891, 1 Ch. 658; *Wheaton v. Maple*, 1893, 3 Ch. 48). There can be no prescription under the statute for light to open ground forming a garden (*Potts v. Smith*, 6 Eq. 311). Compare the case of a timber yard (*Roberts v. Macord*, 1 M. & Rob. 230). Under the statute light must be claimed in respect of a "building" (*Scott v. Pape*, 31 Ch. Div. 554); and a structure for storing timber is not such a "building" (*Harris v. De Pinna*, 33 Ch. Div. 238). Before the act, light was held not acquired where the building was not permanent (*Maberley v. Dowson*, 5 L. J. (K. B.) 261). The right may be acquired for a church (*Ecc. Comm. v. Kino*, 14 Ch. D. 213; *Anderson v. Francis*, 1906, W. N. 160; but see *Norfolk v. Arbutnot*, 5 C. P. Div. 392); an unconsecrated chapel (*A.-G. v. Queen Anne Co.*, 60 L. T. 759); a picture gallery (*Ib.*); a greenhouse (*Clifford v. Holt*, 1899, 1 Ch. 698). The building need not be occupied, or fit for occupation, during the period (*Courtauld v. Legh*, L. R. 4 Ex. 126; *Collis v. Laughner*, 1894, 3 Ch. 659). And even where the building has been pulled down, an injunction may be granted if the right has not been abandoned (*Ecc. Comm. v. Kino, sup.*). Structural identity between the building which

"Building."

acquires the right, and the building which, after the period, is to enjoy the right, is not necessary (*Scott v. Pape, sup.*). 2 & 3 Will. 4, c. 71, s. 3.

"Access," in the section, refers not to access through the aperture of the dominant tenement, but to freedom of passage over the servient tenement. "Access." The aperture defines the free area (*Scott v. Pape*, 31 Ch. Div. 554). The aperture may be a skylight (*Easton v. Isted*, 1903, 1 Ch. 405), and the light may come through an arch (*Myers v. Catterson*, 43 Ch. D. 470). The access must be by one and the same definite channel (*Harris v. De Pinna*, 33 Ch. Div. 238).

Sect. 3 provides a method of claiming light alternative to the methods of claiming it at common law or by lost grant (*Aynsley v. Glover*, 10 Ch. 283; *Gardner v. Hodgson's Co.*, 1903, A. C. 238). Where light is claimed in either of the two last-mentioned methods, a grant must be presumed (1903, A. C. 239) and the enjoyment must be as of right (*Colls v. Home Stores*, 1904, A. C. 206). Where light is claimed under sect. 3, it is not necessary either to presume a grant (*Tapling v. Jones*, 11 H. L. C. 290; *Jordeson v. Sutton*, 1898, 2 Ch. 636), or that the "actual enjoyment" should be as of right (*Colls v. Home Stores*, 1904, A. C. 205). (3) Nature of the enjoyment.

Sect. 3 converts into a right such an enjoyment only of access of light over contiguous land as has been had for twenty years in the character of an easement, distinct from the enjoyment of the land itself (*Harbidge v. Warwick*, 3 Exch. 552). During unity of possession of the dominant and servient tenements there is no such enjoyment (*Ladyman v. Grave*, 6 Ch. 763). And it was said that during such unity the running of the twenty years is suspended (*Id.* 768; but see *Hyman v. Van den Bergh*, 1907, 2 Ch. 526). There is no such unity of possession of glebe and church by a rector as to prevent the acquisition of an easement of light for the church (*Ecl. Comm. v. Kino*, 14 Ch. Div. 213).

Where the servient tenement was in the occupation of a lessee for years, and different persons owned the fee simple of the dominant and servient tenements, light was enjoyed for the statutory period, and a right was claimed under sect. 3. The claim was dealt with by Wood, V.C., who laid down in effect that where there has been an enjoyment of light for a sufficient period as against the owner of a leasehold interest, the right is under sect. 3 acquired against all persons interested in the servient tenement, including the owners in fee (*Simper v. Foley*, 2 J. & H. 564; *Ladyman v. Grave*, 6 Ch. 769). The rule on this point where light is claimed by prescription at common law or by lost grant is different, no right being acquired unless the owner in fee has acquiesced for twenty years (*Daniel v. North*, 11 East. 370; *Barker v. Richardson*, 4 B. & Ald. 579; *Cross v. Lewis*, 2 B. & C. 686). Light claimed under statute, where servient tenement is in occupation of lessee for years. Dominant and servient tenements owned in fee; (a) by different persons,

The case where the fee simple in the dominant and servient tenements is owned by the same person, but the two tenements are in the occupation of different lessees, and the enjoyment has taken place during such occupation, has also been considered. In dealing with this case, it is necessary to bear in mind two rules of the old law:—(1) If the claimant of an easement be a lessee for years, he must show seisin of the dominant tenement in his lessor and prescribe in him, for a prescription in himself is bad (*A.-G. v. Gauntlett*, 3 Yon & J. 99; *Anon. v. Stringer*, 2 Cro. Car. 599; *Bean v. Bloom*, 2 W. Bl. 928; *Grimsted v. Marlowe*, 4 T. R. 718; *Wheaton v. Maple*, 1893, 3 Ch. 63). (2) A man cannot have an easement over his own land (*Metrop. Co. v. Fowler*, 1892, 1 Q. B. 71; *Rowe v. Siddons*, 22 Q. B. D. 236; *Ladyman v. Grave*, 6 Ch. 768). Having regard to these rules, it is clear that by an enjoyment under the circumstances above described, an easement other than light cannot be acquired either by prescription at common law or lost grant (*Large v. Pitt, Peake*, 152; *Gayford v. Moffatt*, 4 Ch. 133), or under sect. 2 of the Prescription Act (*Kilgour v. Gaddes*, 1904, 1 K. B. 462, and other cases, *ante*, p. 8). As regards the easement of light, it seems clear that by prescription at common law, this easement also could not be claimed on the ground of an enjoyment under the above circumstances (see *Fear v. Morgan*, 1906, 2 Ch. 416). The words of sect. 3, however (which differ (b) by the same person.

2 & 3 Will. 4, from sect. 2), give rise to a new and exceptional result. It has been held c. 71, s. 3. by the H. L., that under sect. 3 the right to light can be acquired by a termor over land held by another termor under the same reversion (*Morgan v. Fear*, 1907, A. C. 429). This holding was based upon earlier authorities which were referred to in the C. A. as laying down that the rights so acquired enure not only as between the two lessees, but as against all owners of the servient tenement and in favour of all owners of the dominant tenement (*Fear v. Morgan*, 1906, 2 Ch. 422; see *Frewen v. Philipps*, 11 C. B. N. S. 449; *Mitchell v. Cantrill*, 37 Ch. Div. 56; *Robson v. Edwards*, 1893, 2 Ch. 146; *Richardson v. Graham*, 1908, 1 K. B. 45). The C. A. also approved *Wheaton v. Maple*, where *Lindley, L.J.*, laid down (1893, 3 Ch. 65) that under sect. 3 a right to light cannot be acquired for a term of years. It seems difficult to reconcile these holdings with the old rule that a man cannot have an easement over his own land.

"Actual enjoyment." The question whether there has been an "actual enjoyment" of light is a question of fact depending on the circumstances of each case (*Smith v. Baxter*, 1900, 2 Ch. 138). Continuous user is not necessary (*Cooper v. Straker*, 40 Ch. 26). The owner of a building having windows with moveable shutters acquires the right if, during twenty years, he opens the shutters at any time he pleases (*Ib.*). Boarding over apertures for more than a year was such a discontinuance of user as prevented the acquisition of a right (*Smith v. Baxter, sup.*). See *Hollins v. Verney* (13 Q. B. Div. 314) and other cases, *post*, p. 14.

Interruption. "Interruption" in the section bears the same meaning as in sect. 4, and refers to adverse obstruction, not discontinuance of user (*Smith v. Baxter*, 1900, 2 Ch. 138; *Ladyman v. Grave*, 6 Ch. 768). A fluctuating interruption to light is not sufficient (*Presland v. Bingham*, 41 Ch. Div. 268). A hoarding for the purpose of an interruption may be erected by a railway company (*Bonner v. G. W. R.*, 24 Ch. Div. 1; see *Myers v. Catterson*, 43 Ch. Div. 470; *Foster v. L. C. D. R.*, 1895, 1 Q. B. 711) or by a local authority on a Metropolitan Open Space (M. O. S. Act, 1881), the hoarding not being a "building" prohibited by the last-mentioned act (*Paddington v. A.-G.*, 1906, A. C. 1).

Payment of rent or verbal permission. Mere payment of rent by the occupier of a house for the use of lights is not an interruption of the enjoyment within this section (*Plasterers' Co. v. Parish Clerks' Co.*, 6 Exch. 630; see *Gardner v. Hodgson's Co.*, 1901, 2 Ch. 215). An actual enjoyment of light for twenty years, even under permission verbally given by the person having right to obstruct, may create an easement (*London v. Pewterers' Co.*, 2 M. & Rob. 409; see as to a verbal agreement, *Judge v. Lowe*, 1 R. 7 C. L. 291). On the other hand, a writing signed by A., the owner of the dominant tenement, but not by B., the owner of the servient tenement, declaring that A. would at B.'s request block up windows, and in the meantime pay B. sixpence a year, was a sufficient "consent" to prevent an easement (*Bewley v. Atkinson*, 13 Ch. Div. 283). So a letter signed by the occupier of the dominant tenement was a sufficient "consent" (*Hyman v. Van den Bergh*, 1907, 2 Ch. 531). But an inscription on a stone placed in the wall of the dominant tenement by its owner was not a sufficient agreement (*Ruscoe v. Grounsell*, 89 L. T. 426). In the case of a lessee claiming the right to light, a reservation in the lease of the right to obstruct was a sufficient "agreement" (*Haynes v. King*, 1893, 3 Ch. 439); secus an exception in the lease of any right restricting the free use of adjoining land (*Mitchell v. Cantrill*, 37 Ch. Div. 56). An agreement to pay rent for windows overlooking property included a skylight (*Easton v. Isted*, 1903, 1 Ch. 405).

(4)
Custom of London.

By the custom of London (which is stated in the case of *Wynstanley v. Lee*, 2 Swanst. 339, 340; see *Perry v. Eames*, 1891, 1 Ch. 658), an occupier of a house has not an absolute property in light, but the adjoining owner may build to any height, unless precluded by writing between them. The custom is not repealed merely by the length of the time of enjoyment (2 Swanst. 341; see *Privilegia Londini*, p. 101, cited *Mood. & Malk.* 351; and see

Godb. 183; Yelv. 215; 1 Bulstr. 115; Com. R. 273; 1 Burr. 248; 3 C. & P. 2 & 3 Will. 4, 317; *Shadwell v. Hutchinson*, 2 B. & Ad. 97). This custom remains binding where light is claimed by prescription at common law. But where the claim is under the statute, this section controls the custom (*Perry v. Eames*, 1891, 1 Ch. 667; *Salters' Co. v. Jay*, 3 Q. B. 109; *Truscott v. Merchant Taylors' Co.*, 11 Exch. 855).

4. Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question, and no act or other matter shall be deemed to be an interruption within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.

Before-men-
tioned periods
to be deemed
those next
before suit for
claims to
which such
periods relate.

- (1) *Enjoyment required by the Section...*13.
- (2) *Interruptions...*14.

This section is nothing but an exposition of the proof required to establish the right (*Jones v. Price*, 3 Bing. N. C. 52). The enjoyment of the occupier which gives right under this statute is enjoyment for thirty, sixty, twenty, or forty years, according to the nature of the case, next before the commencement of some suit, and not before the act complained of (*Ward v. Robins*, 15 M. & W. 242; *Richards v. Fry*, 7 Ad. & Ell. 707; see *Wright v. Williams*, 1 M. & W. 98; *R. v. Calow*, 3 M. & S. 22). A plea of forty or twenty years' user, under the 2nd and 4th sections of this statute, is not supported by proof of a user from a period of fifty years before the commencement of the action down to within four years of it (*Parker v. Mitchell*, 11 Ad. & Ell. 788).

(1)

Enjoyment
required by
the section.

Where a right of way was claimed by prescription at common law, it was necessary to show user for at least twenty years as of right; but not necessarily for the twenty years next before the commencement of the suit (*Darling v. Clue*, 4 F. & F. 329).

The period referred to in sect. 4 is not limited to the period next before the pending action, but may be the period next before any action in which the right is brought in question (*Cooper v. Hubbuck*, 12 C. B. N. S. 456). Until such an action is commenced, the right remains inchoate (*Hyman v. Van den Bergh*, 1908, 1 Ch. 171). In an action relating to light claimed under the statute, the Court refused in computing this period to exclude a time during which the light had been enjoyed by written consent (*Hyman v. Van den Bergh*, 1907, 2 Ch. 528; 1908, 1 Ch. 171). As to whether in such an action the Court can exclude from the period a time of unity of possession, see the dicta of Lord Hatherley, *Ladyman v. Grave*, 6 Ch. 768. In an action relating to a right of way claimed under the statute the Courts have held that a time of unity of possession cannot be excluded from the period (*Battishill v. Reed*, 18 C. B. 696; *Onley v. Gardiner*, 4 M. & W. 496).

It was said in earlier cases that some act of user must be shown to have been exercised in the year in which the action was brought (*Lowe v. Carpenter*, 6 Exch. 825; see *Ennor v. Barwell*, 2 Giff. 420); and also during the first year (*Bailey v. Appleyard*, 8 Ad. & Ell. 161). *Curr v. Foster* (3 Q. B. 581) seemed to intimate that the intermediate time was not so material (but see *De la Warr v. Miles*, 17 Ch. Div. 593). The C. A., however, recently denied any distinction between non-user for a year at the beginning or end or in the middle of the statutory period. Proof of actual user in every year is not

Requisite
evidence of
user during
the first
statutory
period.

2 & 3 Will. 4, c. 71, s. 4. essential, but the absence of user for any year will be fatal, unless explained in such a way as to warrant the inference of continual actual enjoyment, notwithstanding such temporary non-user (*Hollins v. Verney*, 13 Q. B. Div. 314, the case of right of way. See, in the case of light, *Smith v. Baxter*, 1900, 2 Ch. 138). The C. A. further laid down that no actual user can be sufficient to satisfy the statute, unless during the whole statutory term (whether user be proved in each year or not) the user is enough at any rate to carry to the mind of a reasonable person who is in possession of the servient tenement the fact that a continuous right to enjoyment is being asserted and ought to be resisted if such right is not recognised (*Hollins v. Verney*, 13 Q. B. Div. 315; see *MacInroy v. Athole*, 1891, A. C. 633). If there be ten years' enjoyment of a right of way, and then a cessation under a temporary agreement for another ten years, this may be a sufficient enjoyment of the old right for twenty years to make it indefeasible under this statute (*Payne v. Shedden*, 1 M. & Rob. 383; see *Carr v. Foster*, 3 Q. B. 585).

(2)
Interruption.

An easement was established under this act which had only been enjoyed for nineteen years and a fraction, and then interrupted during the remainder of the twentieth year and down to the commencement of the action, the action, however, having been commenced within a year from the notice of the interruption (*Flight v. Thomas*, 8 Cl. & Fin. 231; see *Eaton v. Swansea Co.*, 17 Q. B. 272). But the inchoate right will not be protected before the expiration of the full twenty years (*Battersea v. Commrs. of Sewers*, 1895, 2 Ch. 708; see *Greenhalgh v. Brindley*, 1901, 2 Ch. 324). The interruption which defeats a prescriptive right under the Prescription Act is an adverse obstruction, not a mere discontinuance of user by the claimant himself (*Carr v. Foster*, 3 Q. B. 581; see note to sect. 6, *post*). Mere intermission of user for more than a year, in the middle of the prescriptive period, is not necessarily an "interruption": such an intermission may be explained, and it is for the jury to say whether there has notwithstanding been substantial enjoyment for the requisite period (*Ib.*; see *Plasterers' Co. v. Parish Clerks' Co.*, 6 Exch. 630; *Hollins v. Verney*, 13 Q. B. Div. 314; *Smith v. Baxter*, 1900, 2 Ch. 138). An interruption from natural causes of the flow of a stream did not prevent prescription. "If such were the rule, the accident of a dry season, or other causes over which the party could have no control, might deprive him of a right established by the longest course of enjoyment" (*Hall v. Swift*, 4 Bing. N. C. 381; see *Carr v. Foster*, 3 Q. B. 585, 586). The interruption may be caused by the act of a stranger, as well as by that of the person in whose land the easement is claimed (*Davies v. Williams*, 16 Q. B. 558). A fluctuating interruption was held not sufficient to prevent a right to light being acquired (*Presland v. Bingham*, 41 Ch. Div. 268, where the onus of proof as to interruptions was considered).

An interruption in the enjoyment may cause the acquisition of a qualified easement instead of preventing the acquisition of any easement (*Rolle v. Whyte*, L. R. 3 Q. B. 286; see *Brook v. Archer*, 1868, W. N. 5). Although, under this section, no interruption will be sufficient, unless acquiesced in for a year, yet an interruption for a shorter period may show that the enjoyment never was as of right, and thereby prevent a right being acquired under section 2 (*Eaton v. Swansea Co.*, 17 Q. B. 267; see *Brook v. Archer*, 1868, W. N. 5).

Acquiescence
in interrup-
tions.

Where an obstruction to an ancient light had existed more than twelve months, but a promise had been given to remove the obstruction, and twelve months had not elapsed from that promise before proceedings were taken, it was held, that there had not been such an interruption of the enjoyment as would deprive the owner of the light of his remedy (*Gale v. Abbott*, 10 W. R. 748). It was said by *Kindersley*, V.-C., that if the plaintiff had allowed twelve months to elapse without taking proceedings, even though he had continued to complain, that would have been a submission to the interruption within sect. 4 (*Ib.*). It has, however, been held that, in order to negative submission to the interruption to light, it is not necessary to bring an action

or actively remove the obstruction (*Glover v. Coleman*, L. R. 10 C. P. 108). 2 & 3 Will. 4, Non-acquiescence in an interruption is a question of fact for a jury (*Bennison v. Cartwright*, 5 B. & S. 1). An interruption acquiesced in for four years before action barred the right (*Tilbury v. Silva*, 45 Ch. D. 98). A person asserting an interruption must prove that some notice other than the mere existence of a physical obstruction was given to the person interrupted of the person interrupting (*Seddon v. Bank of Bolton*, 19 Ch. D. 462).

As to evidence of interruptions to the right of common, see *Davies v. Williams*, 16 Q. B. 558; *Welcome v. Upton*, 6 M. & W. 536. Where the lord claimed to stop the user of a common, the fact that some of the tenants yielded was not an "interruption" so as to bar the rights of freeholders, who never acquiesced in the claim (*Warrick v. Queen's College*, 10 Eq. 105).

5. In all actions upon the case and other pleadings, wherein the party claiming may now by law allege his right generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient, and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and in all pleadings to actions of trespass, and in all other pleadings wherein before the passing of this act it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof as of right by the occupiers of the tenement in respect whereof the same is claimed for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment, the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation.

In actions on the case the claimant may allege his right generally as before the act.

In pleas to trespass and other pleadings, where the party used to allege his claim from time immemorial, the period mentioned in this act may be alleged; and exceptions or other matters to be replied to specially.

Before this act a prescription in a *que estate* must always have been laid in the person who was seised of the fee simple. A tenant for life, for years, or at will, or a copyholder, could not prescribe in this manner, by reason of the imbecility of their estates; for as prescription was deemed to be always beyond time of memory, it would have been absurd that those whose estates commenced within the memory of man should have prescribed for any thing. Therefore, a tenant for life must have prescribed under cover of the tenant in fee simple, and a copyholder under cover of his lord (6 Rep. 60 a; Fortesc. 340). The practice, in a plea justifying under a right of common, was to show a seisin in fee of the land in respect of which the defendant claimed a right of common, to have been either in himself or in some other person under whom he claimed, and then to prescribe in the *que estate* by showing the right to have been in the party seised in fee, and all those whose estate he had in the land from time immemorial (*Grimstead v. Marlow*, 4 T. R. 718; 1 Wms. Saund. 346, n. (1)). If the defendant was lessee for years, he must have shown the seisin in his lessor, and prescribed in him; for if he laid the prescription in himself it was bad (*A.-G. v. Gauntlett*, 3 Y. & Jer. 93).

Pleading before 2 & 3 Will. 4, c. 71.

2 & 3 Will. 4,
c. 71, s. 5.

Pleading
under 2 & 3
Will. 4, c. 71.

Evidence
admissible
under a
general denial
of enjoyment
as of right.

Matters to be
replied
specially.

Pleading pre-
scriptive
rights under
the Jud. Acts.

By the above section, the claimant might allege his right generally; and in pleading to actions of trespass, it was sufficient to allege enjoyment as of right by the occupiers of the dominant tenement during the proper period. In the cases mentioned in the act enjoyment "as of right" must be alleged in those words (*Stamford v. Dunbar*, 13 M. & W. 827; *Holford v. Hankinson*, 5 Q. B. 584). For the meaning of "enjoyment as of right," see *Tickle v. Brown*, 4 Ad. & Ell. 369, and other cases quoted *ante*, p. 8.

Under a general denial of the enjoyment as of right, evidence of unity of possession was under this section admissible, inasmuch as such proof went to show that the enjoyment was not as of right (*Onley v. Gardiner*, 4 M. & W. 496; *Clayton v. Corby*, 2 Q. B. 813; *England v. Wall*, 10 M. & W. 699; *Clay v. Thackrah*, 9 C. & P. 47). Under such a general denial "the plaintiff is at liberty to show the character and description of the user and enjoyment of the way during any part of the time—as, that it was used by stealth, and in the absence of the occupier of the close, and without his knowledge; or that it was merely a precarious enjoyment by leave and licence, or any other circumstances which negative that it was an user or enjoyment under a claim of right; the words of the 5th section 'not inconsistent with the simple fact of enjoyment,' being referable to the fact of enjoyment as before stated in the act, viz., an enjoyment claimed and exercised as of right" (*Beasley v. Clark*, 2 Bing. N. C. 709). So, under a general denial, evidence might be given of asking leave within the period (*Monmouthshire Co. v. Harford*, 1 C. M. & R. 614), or of an agreement commencing within the period (*Tickle v. Brown*, 4 Ad. & Ell. 383). As to whether a parol permission extending over the whole period could be shown, see *Kinloch v. Neville*, 6 M. & W. 806.

It was said that where a defendant justified under an enjoyment for a statutory period if the plaintiff relied on a licence covering the whole period, it must be replied specially (*Tickle v. Brown*, 4 Ad. & Ell. 369; see *Lowry v. Crothers*, 1 R. 5 C. L. 98). Where a defendant pleaded an enjoyment for a statutory period, and the plaintiff relied on the existence of a life estate, &c. (see sect. 7), such life estate had to be replied specially (*Pye v. Mumford*, 11 Q. B. 666).

The above section and the decisions under it must now be read in connection with the rules of pleading established under the Jud. Acts, and so far as inconsistent therewith the section must be taken to have been repealed (Jud. Act, 1875, sects. 17, 21, 33). R. S. C., Ord. 19, provides (r. 4) that every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies; and further (r. 15) that a party must raise by his pleading all matters which show the action or counterclaim not to be maintainable, and all such grounds of defence or reply as, if not raised, would be likely to take the opposite party by surprise; and further (r. 17), that in a defence or reply a general denial shall not be sufficient, but the party must deal specifically with each allegation of fact of which he does not admit the truth. Pleadings need not state inferences of law (*Hammer v. Flight*, 24 W. R. 347).

The forms of pleading contained in the appendices to R. S. C. (see Ord. 19, r. 5)—which are not to be slavishly adhered to (*The Isis*, 8 P. D. 228), but illustrate the meaning of the act (*Turquand v. Fearon*, 40 L. T. 545)—include a statement of claim in an action for obstruction of light (App. C. sect. 6, No. 10), which contains the simple allegation, "The plaintiff is the owner of a house in which are the following ancient lights, &c." Further, to the defence in an action for polluting water given in App. D. sect. 6, there is added the following note:—"If the defendant claims the right by prescription or otherwise to do what is complained of, he must say so, and must state the grounds of his claim, *i.e.* whether by prescription, grant, or what."

As to pleading a claim in various forms, see further the note, *post*, p. 20.

It would seem from Ord. 19, that the general allegations and denials which were sufficient within sect. 5 of the Prescription Act, 1832, are now insufficient. Accordingly, in an action to restrain the obstruction of an alleged private right of way, the plaintiff was held bound in pleading to state the title

by which he claimed, and whether by grant or by prescriptive user (*Harris* 2 & 3 Will. 4, v. *Jenkins*, 22 Ch. D. 483; *Farrell v. Coogan*, 12 L. R. Ir. 14; see *Pledge v. Pomfret*, 1905, W. N. 56). Where in trespass the defendants pleaded that the *locus in quo* was a highway, they were ordered to show the mode in which they claimed that it had become a highway, and to give particulars of dedication (*Spedding v. Fitzpatrick*, 38 Ch. Div. 410).

Under the R. S. C., Ord. 19, r. 18, a joinder of issue operates as a denial of every material allegation of facts in the defence or reply, as the case may be. See also Ord. 23, r. 1; Ord. 27, r. 13. Where a party justifies the acts complained of by an allegation of a prescriptive right, it is doubtful whether a mere joinder of issue will include a denial of the allegation that the acts were done in exercise of the right (see *Bullen & Leake*, 5th ed. 1000).

According to the practice before the Jud. Acts, it was a rule that in cases of prescription the allegation must be proved as laid (2 Roll. Abr. 706; 5 Rep. 79; 4 Rep. 29 b; 1 Campb. 313; see *Brook v. Willet*, 2 H. Bl. 221). It was not material that a party proved a larger right than he alleged (*Cro. Eliz.* 722; 1 Taunt. 142; *West v. Andrews*, 1 B. & C. 77; *Bailey v. Appleyard*, 8 Ad. & Ell. 167; *Manifold v. Pennington*, 4 B. & Cr. 161; *Pigott v. Bayley*, 6 B. & C. 16); but if he alleged a larger right than he proved, he could not amend (*Drewell v. Towler*, 3 B. & Ad. 735; see *Ricketts v. Salway*, 2 B. & Ald. 363; *Beadsworth v. Torkington*, 1 Q. B. 782; *Brunton v. Hall*, *Ib.* 792). If the allegation of right was divisible, the plaintiff was entitled to a limited verdict for a divisible part of the right alleged, though he failed to prove the residue (*Giles v. Groves*, 12 Q. B. 721). Compare the difference between allegation and proof in *Farquhar v. Newbury*, 1909, 1 Ch. 12; *A.-G. v. G. N. R.*, *id.* 775.

Since the Jud. Acts, a much wider liberty of amendment has been introduced. R. S. C., Ord. 28, r. 1, provides that all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties. And this wider liberty of amendment has been allowed in pleading prescriptive rights (*Budding v. Murdoch*, 1 Ch. D. 42; *Laird v. Briggs*, 19 Ch. D. 22; *Bourke v. Alexandra Co.*, 1877, W. N. 30). As to amending at the trial by pleading lost grant, see *Brown v. Dunstable*, 1899, 2 Ch. 387; *Gardner v. Hodgson's Co.*, 1900, 1 Ch. 601; *Smith v. Baxter*, 1900, 2 Ch. 147.

As to new assignment under the old practice, see *Cowling v. Higginson*, 4 M. & W. 245; *Lane v. Hone*, I. R. 6 C. L. 232; and the old rule, Ord. 23, r. 6.

6. In the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act as may be applicable to the case and to the nature of the claim.

Restricting the presumption to be allowed in support of claims herein provided for.

This section forbids a presumption in favour of a claim to be drawn from a less period of enjoyment than that prescribed (*Bright v. Walker*, 1 C. M. & R. 222). Compare the refusal of the court to recognise inchoate easements (*Battersea v. Commrs. of Sewers*, 1895, 2 Ch. 708; *Greenhalgh v. Brindley*, 1901, 2 Ch. 324). The meaning of this section seems to be that no inference in support of the claim shall be derived from the bare fact of enjoyment for less than the prescribed number of years; but when there are other circumstances in addition, the statute does not take away from the fact of enjoyment for a shorter period its natural weight, so as to preclude a jury from taking it along with other circumstances into consideration as evidence of a grant (*Hammer v. Chance*, 4 D. J. & S. 626). Thus acquiescence on the part of the owner of a servient tenement over which an easement is in fact used, in the expenditure of money by the owner of the dominant tenement with a view to such user, might prevent the former from

2 & 3 Will. 4, interfering with such user although the easement may not have been enjoyed for the full period (see *Rochdale Canal Co. v. King*, 2 Sim. N. S. 88; *Bankart v. Tennant*, 10 Eq. 141).

In a case under the 1st section, if proof be given of a right of enjoyment at the time of action brought, and thirty years before, but disused during any part of the intermediate time, it is a question for the jury whether at that time the right had ceased or was still substantially enjoyed. The inference from the facts proved on this point is not a presumption within the 6th section. Where a commoner has ceased to use the common during two years of the thirty, having no commonable cattle at the time, but had used it before and after, a jury were justified in finding a continued enjoyment of the right (*Carr v. Foster*, 3 Q. B. 581; see *Hall v. Swift*, 4 Bing. N. C. 381; *Dare v. Heathcote*, 25 L. J. Ex. 245).

In the case of a profit *à prendre*, a lost grant might before the act have been inferred from twenty years' user. Since the act it seems that, having regard to sects. 1 and 6, the minimum period for which the user should be proved must in all methods of claim be thirty years.

Proviso for persons under disabilities.

7. Provided also, That the time during which any person otherwise capable of resisting any claim to any of the matters before mentioned shall have been or shall be an infant, idiot, *non compos mentis*, *feme covert*, or tenant for life, or during which any action or suit shall have been pending, and which shall have been diligently prosecuted, until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned, except only in cases where the right or claim is hereby declared to be absolute and indefeasible.

It is the intention of the act that as against a party under disability an enjoyment of thirty years, or twenty years, shall be of no avail, but one of sixty or forty years shall confer an absolute title (*Wright v. Williams*, 1 M. & W. 77). This section in express terms excludes the time that the person capable of resisting the claim is *tenant for life*. During a tenancy for life the exercise of an easement will not affect the fee; in order to do that there must be enjoyment *against* an owner of the fee (*Bright v. Walker*, 1 C. M. & R. 222). A claim was defeated by proof of an outstanding life estate (*Hale v. Oldroyd*, 14 M. & W. 739; *Roberts v. James*, 89 L. T. 282). Under sects. 1, 4 and 7 of this act an enjoyment as of right for thirty years next before the commencement of an action may be proved by showing that the party has enjoyed for several periods amounting together to thirty years, and that during the whole time between such periods, and between the last of them and the action (if such period intervened), the estate over which the right has been exercised was in the hands of a tenant for life (*Clayton v. Corby*, 2 Q. B. 813).

Cases where right is declared absolute.

The cases in which the right is declared by the statute to be absolute and indefeasible are as follows:—By the 1st section, where the right, profit or benefit shall have been taken as required for the full period of sixty years, the right shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing. By the 2nd section, where any way or easement, or any watercourse, or the use of any water, shall have been enjoyed as therein mentioned for the full period of forty years, the right thereto is made absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing. By the 3rd section, the enjoyment of light for the full period of twenty years without interruption is made absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing.

8. Provided always, and be it further enacted, That when any land or water upon, over, or from which any such way or other convenient (*f*) watercourse or use of water shall have been or shall be enjoyed or derived, hath been or shall be held under or by virtue of any term of life, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be excluded in the computation of the said period of forty years, in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof (*g*).

2 & 3 Will. 4,
c. 71, s. 8.

What time to
be excluded
in computing
the term of
forty years
appointed by
this act.

(*f*) The question whether "easement" should in this section be substituted for "convenient" was treated by C. A. as open (*Laird v. Briggs*, 19 Ch. Div. 26, 33).

Omission of
easement in
8th section.

(*g*) The 8th section applies expressly to the computation of an enjoyment for forty years; and it would be contrary to all rules of construction to hold that it applies also to twenty years (*Palk v. Skinner*, 18 Q. B. 568). The effect of the 8th section is not to unite discontinuous periods of enjoyment, but to extend the period of continuous enjoyment, which is necessary to give a right, by so long a time as the land is out on lease, subject to the condition therein mentioned (*Onley v. Gardiner*, 4 M. & W. 500). A tenancy for life is excluded from the period of forty years by the 8th section on condition that the reversioner shall bring his action within three years after its determination; a user of forty years confers a *prima facie* title, which is good, unless the reversioner in resisting the claim to an easement pursues his remedy within the three years (*Wright v. Williams*, 1 M. & W. 77).

The word "reversion" at the end of the section does not include remainder (*Symons v. Leaker*, 15 Q. B. D. 629; see *Laird v. Briggs*, 16 Ch. D. 440; 19 Ch. D. 22). As to the distinction between a "reversion" and a "remainder," see note to sect. 3 of the Inheritance Act, 1833 (*post*).

Where a replication to a plea of enjoyment of an easement for forty years, under this act, sets up a life estate in order to bring the case within the 8th section of the act, it must show that the plaintiff is the party entitled to the reversion expectant upon such life estate (*Wright v. Williams*, 1 M. & W. 100).

Replication of
life estate.

9. This act shall not extend to Scotland.

Not to extend
to Scotland.

This act has been extended to Ireland by 21 & 22 Vict. c. 42.

II.—MODES OF CLAIMING INCORPOREAL RIGHTS APART FROM THE PRESCRIPTION ACT, 1832.

A. *Whether the Prescription Act, 1832, has superseded the Common Law...*19.

B. *Of Prescription generally; and herein of Prescription at Common Law and by Lost Grant...*20.

C. *Of Custom...*29.

D. *Of Grants, Express and Implied, of Incorporeal Rights; and herein of Licences in Relation to Real Estate...*35.

A. *Whether the Prescription Act, 1832, has superseded the Common Law.*

There is nothing in the Prescription Act, 1832, to interfere with a claim Prescription of a right of way or other easement by express grant (*Bright v. Walker*, Act has not

Prescription.

superseded
common law.

1 C. M. & R. 223; *Livett v. Wilson*, 3 Bing. 115; *Plant v. James*, 4 Ad. & Ell. 749, 765; *Blewitt v. Tregonning*, 3 Ad. & Ell. 554). Nor has that statute superseded the common law; so that a party may proceed either under the statute or according to the common law (*Holford v. Hankinson*, 5 Q. B. 584; *Gardner v. Hodgson's Co.*, 1903, A. C. 238). In *Onley v. Gardiner* (4 M. & W. 496), where the defendant failed in proving under the statute a right of way in consequence of unity of possession, the court allowed a right of way immemorially to be pleaded by amendment (*Richards v. Fry*, 3 Nev. & P. 72; *Welcome v. Upton*, 5 M. & W. 403, 404; *Parker v. Mitchell*, 11 Ad. & Ell. 788; *Lowe v. Carpenter*, 6 Ex. 825). Rights of common were established by prescription at common law, independently of the statute (*Warrick v. Queen's College*, 6 Ch. 728).

The case of light is specially dealt with by sect. 3, and it has been suggested that by that section the earlier methods of claim were taken away or limited. (See Lord Westbury's judgment, *Tapling v. Jones*, 11 H. L. C. 290; and the remarks thereon of Farwell, L.J.; *Hyman v. Van den Bergh*, 1908, 1 Ch. 176; *Truscott v. Merchant Taylor's Co.*, 11 Exch. 863.) In a case, however, where unity of possession was raised as an objection to the plaintiff's title under the statute, he established his title independently of the statute by proof of enjoyment from time immemorial (*Aynsley v. Glover*, 10 Ch. 283); *Mellish*, L.J., remarking that the Prescription Act, 1832, had not taken away any of the modes of claiming easements which previously existed (*Ib.* 285; see *Dalton v. Angus*, 6 App. Cas. 814; *Smith v. Baxter*, 1900, 2 Ch. 146; *Gardner v. Hodgson's Co.*, 1903, A. C. 238). In *Norfolk v. Arbutnot* (5 C. P. Div. 392), and *Ecc. Commrs. v. Kino* (14 Ch. Div. 213), both the former modes of claiming light were treated as still existing.

In the case of tithes, where a party pleads a modus existing from time immemorial, he may proceed just in the same way as he might have done before the Tithe Act, 1832, was passed (*Stamford v. Dunbar*, 13 M. & W. 822).

Pleading.

It is frequently advisable to plead together in the same case alternative claims of (1) prescription by statute, (2) prescription at common law, and (3) lost grant. For if on the evidence the enjoyment could not be brought down to the commencement of action, prescription by statute could not be relied upon. Again, if the enjoyment were shown to have commenced within the period of legal memory, prescription at common law could not be relied upon. See Bullen & Leake, Pleadings. The three alternative claims were pleaded together in *Bailey v. Stevens*, 12 C. B. N. S. 91; *Norfolk v. Arbutnot*, 4 C. P. D. 293. See as to pleading lost grant, *post*, p. 22.

In stating a claim under the statute it may be also advisable to plead prescription both for the longer and shorter periods mentioned in sects. 1 and 2 (*Stamford v. Dunbar*, 13 M. & W. 827); the reason being to meet a possible difficulty arising from failure of proof by reason of interruption, &c. (see *Welcome v. Upton*, 5 M. & W. 398; 6 M. & W. 536; *Hollins v. Verney*, 13 Q. B. Div. 304, and cases quoted in the judgment).

**B. Prescription generally: and herein of Prescription at
Common Law, and by Lost Grant.**

**Prescription
generally.**

Prescription (referred to in the above act as a ground on which the claims mentioned in sects. 1 and 2 can be made) is a title taking his substance of use and time allowed by law. "Præscriptio est titulus ex usu et tempore substantiam capiens ab autoritate legis." To prescription two things are incidents inseparable, viz. possession or usage and time. Possession must have three qualities, it must be long, continual, and peaceable. (Co. Litt. 113 a & b.) According to the common law, all prescription presupposes a grant (*Gardner v. Hodgson's Co.*, 1903, A. C. 239; *Goodman v. Saltash*, 7 App. Cas. 654.) And where the above incidents are found, the court will if possible presume a grant of the right in question. For where there has been long-continued possession in assertion of a right, the right should be presumed to have had a legal origin if such a legal origin was

**Presupposes
grant.**

possible. And the court should presume that those acts were done and **Prescription.** those circumstances existed which were necessary to the creation of a valid title. (*Philipps v. Halliday*, 1891, A. C. 231; *Clippens v. Edinburgh*, 1904, A. C. 69.) The rule with regard to prescription is, that every prescription is good, if by any possibility it can be supposed to have had a legal commencement (*Pelham v. Pickersgill*, 1 T. R. 667). For supposing this, the court has "a great power of imagination" (*Neaverson v. Peterborough Council*, 1902, 1 Ch. 573). But for such things as can have no lawful beginning, nor be created by grant, reservation or deed, no prescription is good (*Dalton v. Angus*, 6 A. C. 795; *Goodman v. Saltash*, 7 A. C. 655; *A.-G. v. Antrobus*, 1905, 2 Ch. 198). As to presuming a legal origin in support of a claim to prescriptive rights, see further, *Tilbury v. Silva*, 45 Ch. Div. 98; *Simpson v. Godmanchester*, 1896, 1 Ch. 218; *A.-G. v. Simpson*, 1901, 2 Ch. 698; *A.-G. v. Copeland*, 1902, 1 K. B. 690; *Foster v. Warblington*, 1906, 1 K. B. 679.

The common law doctrine of prescription was adopted for the convenience of the community (see *Union Co. v. London Dock Co.*, 1902, 2 Ch. 569; *Dalton v. Angus*, 6 A. C. 818); and rests upon acquiescence (*Sturges v. Bridgman*, 11 Ch. Div. 863; *Dalton v. Angus*, 6 A. C. 773).

The three legal methods in which prescriptive rights can be claimed are: Three (1) prescription at common law; (2) claims based on lost grant; and (3) methods of prescription under the Prescription Act, 1832. The most important disclaiming distinction between these methods relates to the period during which evidence of acts of user must be given. This distinction is to a certain extent historical, and historically speaking the method which came earliest into use was prescription at common law. prescriptive rights.

As regards prescription at common law, Littleton laid down (sect. 170) that Prescription time out of mind and title by prescription were all one in law. And the at common time prescribed by law is time whereof there is no memory of man to the law. contrary (Co. Litt. 114 b). There was originally no fixed period of prescription, but by several statutes periods were limited for the bringing of actions for the recovery of real estate; and in particular by the Statute of Westminster (3 Edw. I. c. 39) provision was made for protecting the possession of real estate when as old as the reign of Richard I. The Courts applied this analogy to claims to incorporeal hereditaments based on prescription (*Angus v. Dalton*, 3 Q. B. D. 103; *Bryant v. Foot*, L. R. 2 Q. B. 180), and fixed the term of legal memory at 1189, the first year of the reign of Richard I.; see *Chapman v. Smith*, 2 Ves. Sen. 511. According to the rule first adopted, they required the evidence of enjoyment to be carried back to that year (*Linn Regis v. Taylor*, 3 Lev. 160; see recital in Prescription Act, 1832, p. 1, *sup.*). As time went on this became impossible, and according to the rule next adopted the evidence was sufficient if carried back as far as living memory would go (*Angus v. Dalton*, 3 Q. B. D. 104). Later on a third rule followed the analogy of the statute, 21 Jac. 1, c. 16, which in the case of real estate limited the time for bringing possessory actions to twenty years; and the courts laid down that if evidence could be given of twenty years' enjoyment, the prescriptive right would be presumed to have existed from 1189 (*Angus v. Dalton*, 3 Q. B. D. 105; see notes to *Yard v. Ford*, 2 Wms. Saund. 503; *Bealey v. Shaw*, 6 East, 214). In effect, they presumed a grant of the right executed in or before that year.

It was found in practice that a claim by prescription at common law could often be defeated; *e.g.* by showing that the user originated in an existing deed executed since 1189 (*Welcome v. Upton*, 5 M. & W. 398), or by showing that a building for which the right to light was claimed was erected since 1189 (*Norfolk v. Arbuthnot*, 5 C. P. D. 393), or by showing unity of ownership since 1189 (*Mounsey v. Ismay*, 3 H. & C. 486; 34 L. J. Ex. 55). To meet this difficulty of proof, the courts adopted a new device, and held that evidence of user for twenty years was sufficient to raise the presumption of a lost grant executed at some date since 1189 (*Angus v. Dalton*, 3 Q. B. D. 105). And juries were directed to find the execution of such a deed although known to be a fiction. These difficulties gave rise to the Prescription Act, 1832 Claims based on lost grant.

Prescription. (*Angus v. Dalton*, 3 Q. B. D. 105; *Bryant v. Foot*, L. R. 2 Q. B. 181; *Mounsey v. Ismay*, 34 L. J. Ex. 55), which provided that a claim to rights which had been enjoyed for certain specified periods before action should not be defeated merely by showing that the enjoyment began at any time prior to such period but since 1189.

Prescription under the statute. As to prescription under the statute, see the notes to the several sections set out above. The remainder of the present note relates primarily to prescription at common law and lost grant.

Doctrine of presuming lost grant. The doctrine of lost grant was thus stated by *Parke, B.* (*Bright v. Walker*, 1 C. M. & R. 217): "For a long series of years prior to the passing of the Act 2 & 3 Will. 4, c. 71, judges have been in the habit, for the furtherance of justice, and for the sake of peace, to leave it to juries to presume a grant from a long exercise of an incorporeal right, adopting the period of twenty years, by analogy to the Statute of Limitations (21 Jac. 1, c. 16). Such presumption did not always proceed on a belief that the thing presumed had actually taken place, but (2 Stark. on Ev. 669) a technical efficacy was given to the evidence of possession beyond its simple and natural force and operation. And though in theory it was mere presumptive evidence, in practice and effect it was a bar. The Act 2 & 3 Will. 4, c. 71, is intended to make that possession a bar or title of itself, which was so before only by the intervention of a jury" (see *Holcroft v. Heel*, 1 Bos. & P. 400; *Campbell v. Wilson*, 3 East, 294; *Read v. Brookman*, 3 T. R. 591; *Brown v. Dunstable*, 1899, 2 Ch. 387). In the older cases uninterrupted enjoyment of an easement for twenty years was treated sometimes as a bar to an action on the case, sometimes as evidence from which the jury were directed by the court to presume a grant, licence or agreement (*Yard v. Ford*, 2 Wms. Saund. 503; *Cross v. Lewis*, 2 B. & C. 689; see *Livett v. Wilson*, 3 Bing. 118). It was said that the lost grant doctrine was ancillary to common law prescription, and only applicable where common law prescription could not be applied (*Bryant v. Lefever*, 4 C. P. Div. 177; *Dalton v. Angus*, 6 App. Cas. 816). Since the Prescription Act, 1832, the doctrine has been resorted to as an alternative not only to prescription at common law, but also to prescription under the act (*Simpson v. Godmanchester*, 1897, A. C. 696; and see *Gardner v. Hodgson's Co.*, 1903, A. C. 229; *Neaverson v. Peterborough Council*, 1902, 1 Ch. 557). The court has presumed lost grants in the nature of an agreement substituting one way for another (*Hulbert v. Dale*, 1909, 2 Ch. 570), or of an agreement as to paying a quit rent (*Bomford v. Neville*, 1904, 1 L. R. 474; *Foley v. Dudley*, 1909, W. N. 250). It may presume not only a grant from an individual, but an award (*East Stonehouse Council v. Willoughby*, 1902, 2 K. B. 332), or a faculty from the Ordinary (*Philipps v. Halliday*, 1891, A. C. 228), or a regulation of a Port Authority (*A.-G. v. Wright*, 1897, 2 Q. B. 318), or a grant from the Crown (*Somersetshire v. Bridgwater*, 89 L. T. 732, where the right of a corporation to discharge sewage into a tidal river was thus supported). So a grant from the Crown of a lost charter may be presumed (*Goodtitle v. Baldwin*, 11 East, 490; *A.-G. v. Horner*, 14 Q. B. Div. 263; *Rivers v. Adams*, 3 Ex. D. 365, and compare the cases as to lost grants by the Crown, *post*, p. 124). Where the right was capable of being granted but the enjoyment is shown to have had in fact an invalid origin, a subsequent lost grant may possibly be presumed (*Philipps v. Halliday*, 1891, A. C. 236).

Present extent of doctrine.

Rebutting presumption. As to rebutting this presumption by giving evidence that no grant was in fact made, the better opinion seems to be that such evidence cannot be given. (See the opinion of *Lord Blackburn*, 6 App. Cas. 812; *Lindley, J.*, *ib.* 765; *Thesiger, L.J.*, 4 Q. B. Div. 172; *Cotton, L.J.*, *ib.* 187. See *contra*, *Cockburn, C.J.*, in *Angus v. Dalton*, 3 Q. B. D. 130; *Brett, L.J.*, in *Angus v. Dalton*, 4 Q. B. Div. 201; and compare the opinion of *Bowen, J.*, *Dalton v. Angus*, 6 App. Cas. 783.)

Pleading lost grant. According to modern practice, a lost grant, if relied upon, should be pleaded (*Smith v. Baxter*, 1900, 2 Ch. 147); but claims based on lost grant have been added by amendment at the trial (*Brown v. Dunstable*, 1899, 2 Ch. 380, 387; *Gardner v. Hodgson's Co.*, 1900, 1 Ch. 601). Formerly, the names of the parties to, and the date of, the supposed grant had to be

stated (*Hendy v. Stephenson*, 10 East, 55; see *Livett v. Wilson*, 3 Bing. 115; *Doe v. Reed*, 5 B. & Ald. 232); but on averment that the deed had been lost profert was excused (*Read v. Brookman*, 3 T. R. 151). The statement of date and parties is no longer necessary (see the pleadings in *Norfolk v. Arbuthnot*, 4 C. P. D. 293; *Brown v. Dunstable*, 1899, 2 Ch. 380). But a statement whether the supposed grant was before or after a private act was required (*Palmer v. Guadagni*, 1906, W. N. 165).

As regards the nature of the rights which can be claimed by prescription, Nature of these rights are of two sorts,—either a personal right, which has been exercised by a man and his ancestors; or a right attached to the ownership of particular land, and only exercisable by those who are seised of the land. The first is termed a prescription in the person, and the rights are called prescriptive rights in gross. The second is called a prescription in a *que estate*, which means a right or privilege claimed by prescription as annexed to and going along with particular land (Co. Litt. 113 b, 121 a; 3 Gwill. 1291; *Austin v. Amhurst*, 7 Ch. D. 692; *Constable v. Nicholson*, 14 C. B. N. S. 230; 32 L. J. C. P. 240).

Every prescription presupposing a grant (p. 20, *sup.*), prescription by immemorial usage can in general only be for incorporeal hereditaments, which may be created by *grant*, such as commons, ways, waifs, estrays, wreck, warren, park, treasure trove, royal fishes, fairs, markets, and the like (Co. Litt. 114 a; 5 Rep. 109 b; 1 Ventr. 387; Bac. Abr. Customs (B.); Com. Dig. Prescription (C.); *Ib.* Franchises (A.1)). A prescription to have a free warren in a manor and in the demesnes thereof is good (*R. v. Talbot*, Cro. Car. 311; Jones, 320; as to franchises, see Cruise's Dig. tit. XXVII.; 2 Bl. Comm. 37—40).

A prescription ought to be certain; a prescription which was pleaded for a right every year, and at all times of the year, to turn cattle into a certain close, is too vague (*Bailey v. Appleyard*, 8 Ad. & Ell. 161). Again, a claim to carry from a close so much clay as might at any time be required for making bricks at a brick kiln in every year, and at all times of the year, was held bad (*Clayton v. Corby*, 5 Q. B. 415; see *A.-G. v. Mathias*, 4 K. & J. 592). And a prescription ought to be reasonable; and therefore a man cannot prescribe for an heriot upon the death of every stranger within his manor (Com. Dig. Prescription (E. 4)). But it may be reasonable, although unusual or inconvenient, as for a way over a churchyard, or through a church (2 Roll. Abr. 265, l. 40). There can be no prescriptive right in the nature of a servitude or easement so large as to preclude the ordinary uses of property by the owner of the lands affected (*Dyce v. Hay*, 1 Macq. H. L. C. 305).

The most important classes of rights which can be claimed by prescription are profits *à prendre* (as to which see *ante*, pp. 2, 3) and easements (as to which see *ante*, p. 5). Profits *à prendre* may exist as rights in gross (as to profits and easements, see *Shuttleworth v. Le Fleming*, 19 C. B. N. S. 687); and be acquired in gross by prescription (*Johnson v. Barnes*, L. R. 8 C. P. 527). As regards easements, it seems that in a wide sense an easement in gross (in the nature of a right to discharge sewage into a tidal river or sea) might be acquired by the corporation of a town (on behalf of the inhabitants), the right being based on a lost grant from the Crown (*Somersetshire v. Bridgwater*, 81 L. T. 732) or possibly on prescription at common law (*Foster v. Warblington*, 1906, 1 K. B. 664). But in the strict sense of the word there cannot be an easement in gross (*Rangeley v. Midland Ry. Co.*, 3 Ch. 311; see *ante*, p. 5). As rights annexed to land, both profits *à prendre* and easements may be prescribed for. But such a profit *à prendre* cannot be without stint (*Chesterfield v. Harris*, 1908, 2 Ch. 397).

Besides profits *à prendre* and easements, there are a number of miscellaneous rights claimable by prescription which may be referred to here. Thus there may be prescriptive burdens. A corporation, or an individual, may be bound by prescription to repair a highway (Co. Rep. XIII. 435) or a bridge (*R. v. Lincoln*, 8 Ad. & Ell. 65; *Hertfordshire Council v. New River Co.*, 1904, 2 Ch. 521). As to presumptions in such a case, see *Simpson v. A.-G.*, 1904, A. C. 491; and *Esher v. Marks*, 86 L. T., 222, where liability

Prescription.

Nature of rights claimable by prescription.

Prescription must be certain and reasonable.

Profits *à prendre* and easements.

Prescriptive burdens.

Prescription. to repair a highway was established on the ground of a licence presumed to have been granted by the Crown. Again, the owner of one close may be bound by prescription to maintain a fence between his close and an adjoining close (*Lawrence v. Jenkins*, L. R. 8 Q. B. 274). And the owner of land fronting the sea may be similarly bound to maintain a sea-wall for the protection of an adjoining owner (*Hudson v. Tabor*, 2 Q. B. Div. 292; *R. v. Essex*, 14 Q. B. Div. 561; 11 App. Cas. 449; *L. & N. W. R. v. Fobbing Levels*, 66 L. J. Q. B. 127). As to the duty of a riparian proprietor on a tidal river in this respect, see *Nitro-Phosphate Co. v. London and S. Katharine's Dock Co.*, 9 Ch. Div. 503; *Burt v. Victoria Co.*, 47 L. T. 378.

Fees. A claim to visitation fees may be supported by prescription (*Shepherd v. Payne*, 16 C. B. N. S. 132; 33 L. J. C. P. 158); also a claim to marriage fees (*Bryant v. Foot*, L. R. 3 Q. B. 497).

Markets. The right to hold a fair or market may be acquired by grant and by prescription (2 Inst. 220). A market held immemorially in certain places within a manor may be presumed to have been granted to be held in any convenient place within the manor (*De Rutzen v. Lloyd*, 5 Ad. & E. 456). So from immemorial enjoyment it was presumed that a market was granted to be held at any place in a parish to which the grantee could have access (*Gingell v. Stepney*, 1908, 1 K. B. 115, 144); and streets were presumed to have been dedicated to the public subject to the market (*Ib.*; *A.-G. v. Horner*, 11 A. C. 66). A market and a fair may be held on the same day in the same manor (*Newcastle v. Workson Council*, 1902, 2 Ch. 145). Where a royal charter granted a market on two days of the week, and a usage to hold the market also on additional days was proved, the court refused to presume a lost grant of the market for the additional days (*A.-G. v. Horner*, 14 Q. B. Div. 245). The grant of a market does not imply a right in the grantee to prevent persons selling marketable articles on market days in their own houses within the limits of the franchise (*Macclesfield v. Chapman*, 12 M. & W. 18; *Penryn v. Best*, 3 Ex. Div. 292). But such a right may be acquired by prescription (*Ib.*; *Fearon v. Mitchell*, L. R. 7 Q. B. 696; *Moseley v. Walker*, 7 B. & C. 40; *Macclesfield v. Pedley*, 4 B. & Ad. 404). A right to market tolls was held to have been acquired by prescription in *Lawrence v. Hitch*, L. R. 3 Q. B. 521. The lord of the manor, to whom a grant of a market is made, has a right to remove the market-place from one situation to another within the precincts of his grant (*Curwen v. Salkeld*, 3 East, 538; see *De Rutzen v. Lloyd*, 5 Ad. & Ell. 456; *London v. Lowe*, 42 L. T. 16). As to the enlargement of a market, see *A.-G. v. Cambridge*, L. R. 6 H. L. 303; *A.-G. v. Horner*, 14 Q. B. Div. 245. Where an old market franchise has been increased in strength and character by statute, the old franchise is gone, and the statute is alone to be looked to (*Abergavenny v. Straker*, 42 Ch. D. 89; see *Birmingham v. Foster*, 1894, W. N. 43). A statutory market will be protected by injunction even where the statute provides a particular remedy (*Stevens v. Chown*, 1901, 1 Ch. 894).

A market may be disturbed by establishing a new market, either within or without the limits of the franchise (*Dorchester v. Ensor*, L. R. 4 Ex. 341). If a new market is held on the same day as an old market, it is presumed to be a disturbance of the old market, but if on a different day actual damage must be shown (*Ib.*; *Elwes v. Payne*, 12 Ch. D. 472; *Yard v. Ford*, 2 Wms. Saund. 500). A market may also be disturbed by establishing a rival place of sale, though not technically a market (*London v. Lowe*, 42 L. T. 16; *Goldsmid v. G. E. Ry. Co.*, 25 Ch. D. 541; 9 App. Cas. 927; *Abergavenny v. Straker*, 42 Ch. D. 83; *Wilcox v. Steel*, 1904, 1 Ch. 212); and the rival place of sale may be outside the limits of the franchise (*S. CC.*). But as an ordinary rule, the sale of a man's own goods in the ordinary course of business, in his own shop, outside the limits of the franchise, is not a disturbance (*Manchester v. Lyons*, 22 Ch. Div. 307). Where the grantee of a market from the Crown suffered another to erect a market in his neighbourhood, and to use it for twenty-three years without interruption, such user was a bar to an action on the case for disturbance (*Holcroft v. Heel*, 1 Bos. & P. 400; see 2 Wms. Saund. 502, n.; and *Campbell v. Wilson*,

3 East, 294). See, however, *London v. Lowe* (42 L. T. 16), where acts of disturbance were held not justified, although they had continued for more than half a century. The Markets and Fairs Clauses Act, 1847, consolidates the provisions usually contained in acts for regulating markets and fairs. As to the meaning of "fair," see *Collins v. Cooper*, 68 L. T. 450. And as to markets generally, see Pease & Chitty on Markets.

There is a distinction between market tolls which are paid for the use of a market, and stallage which is paid for the occupation of lands within the market (*London v. St. Sepulchre*, L. R. 7 Q. B. 313; *R. v. Casswell*, Id. 382; *Yarmouth v. Groom*, 1 H. & C. 102). The test is, has a man any occupation beyond what the general public has? (*R. v. Bedford*, 45 L. T. 616, 621). Stallage tolls are rateable, but market tolls are not (*S. CC.*; and see *Percy v. Ashford Union*, 34 L. T. 579). As to occupiers of stands within a market being entitled to franchise, see *Hall v. Metcalfe*, 1892, 1 Q. B. 208. Payments made to the owner of the soil for stalls on fair days were held to be stallage, not fair tolls (*Newcastle v. Workop Council*, 1902, 2 Ch. 145). An exemption from stallage for the inhabitants of a town can be only by way of custom, not by grant or prescription (*Lockwood v. Wood*, 6 Q. B. 50).

Toll-traverse is defined to be a sum demanded for passing over the private soil of another (Com. Dig. tit. Toll (A.)); see *A.-G. v. Simpson*, 1901, 2 Ch. 692), or a duty which a man pays for passing over the soil of another in a way not a high street (Vin. Abr. tit. Toll (A.)), or for a passage over the private ferry, bridge, &c. of another (1 Sid. 454). Toll-traverse may be claimed by prescription by a corporation or an individual, without alleging any consideration, and payment time out of mind is sufficient to support the prescription (2 Wils. 296; see *Brecon Co. v. Neath Co.*, L. R. 7 C. P. 555; 8 C. P. 157; *New Windsor v. Taylor*, 1899, A. C. 41). One kind of toll traverse is said to arise where the owner of the soil dedicates it to the use of the public as a road, but reserves toll at the time of dedication (*Brett v. Beales*, Moody & Malkin 428). It seems that a subject cannot without a grant from the Crown or a statute dedicate a road to the public subject to a toll (*Austerberry v. Oldham*, 29 Ch. Div. 750). And it is essential that the reservation of the toll should be contemporaneous with the dedication (*A.-G. v. Simpson*, 1901, 2 Ch. 693, see *Lawrence v. Hitch*, L. R. 3 Q. B. 521). Where the soil of a highway and tolls claimed for the use of it were before the time of legal memory in the same hands though severed since, it was presumed that the soil was originally dedicated to the public in consideration of the tolls, and the toll traverse was supported (*Pelham v. Pickersgill*, 1 T. R. 660; *Brecon Co. v. Neath Co.*, L. R. 7 C. P. 567).

Toll-thorough is a toll for passing over the public highway. And where a prescription against public right is claimed a consideration must be proved (*Nottingham v. Lambert*, Willes, 111; *Brett v. Beales*, 10 B. & C. 508; *A.-G. v. Simpson*, 1901, 2 Ch. 692; 1 T. R. 660). See further as to the distinction between toll-thorough and toll-traverse, *Brecon Co. v. Neath Co.*, L. R. 7 C. P. 555; 8 C. P. 157.

A right of distress is incident to every toll (Bac. Abr. Distress, F. pl. 6), but it cannot be sold, except in the case of turnpike tolls under 3 Geo. 4, c. 126, s. 39. Tolls may be recovered in assumpsit, without proving a contract by the defendant; and stallage, which is a satisfaction to the owner of the soil for the liberty of placing a stall upon it, may be recovered in the same way (*Newport v. Saunders*, 3 B. & Ad. 411). The exemption from toll may also be claimed by prescription or by the king's grant (4 Inst. 252; 1 H. Bl. 206; *London v. Linn. Regis*, 4 T. R. 130; 1 Bos. & P. 512; 7 Br. P. C. 126; *Truro v. Reynolds*, 8 Bing. 275; *Middleton v. Lambert*, 1 Ad. & Ell. 401). The citizens or burgesses of a city, borough, &c., may prescribe to be quit of tolls (F. N. B. 226, l.; 1 H. Bl. 206; Com. Dig. Toll (G. 1)). As to whether inhabitants of a place may prescribe to be quit of toll, see *Baker v. Brereman*, Cro. Car. 418; recognized, 6 Q. B. 63. Port or anchorage tolls may be claimed by prescription (*Foreman v. Whitstable*, L. R. 4 H. L. 266).

No prescriptive right can be acquired to justify a public nuisance (*A.-G. v.*

Prescription. *Barnsley*, 1874, W. N. 37; see *Brown v. Russell*, L. R. 3 Q. B. 251; *Mumford v. Oxford, &c., R. Co.*, 1 H. & N. 34; *Mott v. Shoolbred*, 20 Eq. 24; *Butterworth v. West Riding*, 1909, A. C. 57). Nor can a claim be made by prescription to anything which could not have had a lawful beginning (*Goodman v. Saltash*, 7 App. Cas. 648). But it is not necessary that the thing should be legal through all the time of prescription (*Millington v. Griffiths*, 30 L. T. 65, 68). The *jus spatiandi* cannot be prescribed for (*A.-G. v. Antrobus*, 1905, 2 Ch. 198). Nor by prescription at common law can an easement for a term of years be acquired (*Wheaton v. Maple*, 1893, 3 Ch. 65). Nor can a profit *à prendre* without stint be prescribed for as annexed to land (*Chesterfield v. Harris*, 1908, 2 Ch. 397). Land cannot be claimed by prescription (*Beauchamp v. Winn*, L. R. 6 H. L. 238; see *Brooke*, Prescription, 122; Vin. Abr. Pres. B. pl. 2; Dr. & St. dial. 1, c. 8; Finch, 132). The right to a given substratum of coal lying under a certain close is a right to land, and cannot be claimed by prescription. It is otherwise of a right to take coal in another man's land (*Wilkinson v. Proud*, 11 M. & W. 33; see *Stoughton v. Leigh*, 1 Taunt. 402). What arises by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchises of deodands (which are now abolished by stat. 9 & 10 Vict. c. 62), felons' goods, and the like. These not being forfeited till the matter on which they arise is found by the inquisition of a jury, and so made a matter of record, the forfeiture itself cannot be claimed by an inferior title (Co. Litt. 114; 2 Bl. Comm. 265). A prescription for a right common to all the subjects of the realm cannot be supported (*Pell v. Towers*, Noy, 20; Br. Abr. Pres. pl. 71). One prescription cannot be prescribed against another prescription, for the one is as ancient as the other; as if a man prescribe for a way, light or other easement, another cannot prescribe for liberty to stop it when he pleases (*Aldred's case*, 9 Rep. 58 b; 2 Mod. 105; Com. Dig. Prescription (F. 4)).

Persons by whom prescriptive rights can be claimed.

As regards the persons by whom prescriptive rights can be claimed, inasmuch as (generally speaking) every prescription supposes a grant (*ante*, p. 20), and as every grant supposes a capable grantee, prescriptive rights must be claimed by defined persons. Accordingly neither profits *à prendre* nor easements can be prescribed for by "inhabitants" (*Fox v. Venables*, Cro. Eliz. 180; *Constable v. Nicholson*, 14 C. B. N. S. 230, 32 L. J. C. P. 240; *Chilton v. London*, 7 Ch. D. 735). Nor can profits *à prendre* be prescribed for by "owners and occupiers" of ancient tenements in a manor (*Tilbury v. Silva*, 45 Ch. D. 38); or in a parish (*Baylis v. Tyssen Amhurst*, 6 Ch. D. 500); nor by "occupiers" of lands or houses (*Davies v. Williams*, 16 Q. B. 551, 559; *Austin v. Amhurst*, 7 Ch. D. 689; *Knight v. King*, 20 L. T. 494); nor by "dwellers" in a manor (*Allgood v. Gibson*, 25 W. R. 60; 34 L. T. 583).

Persons against whom prescriptive rights can be claimed.

As regards the persons as against whom prescriptive rights can be claimed, the necessary grant supposing a capable grantor, this grantor must be an owner capable of disposing of the fee (*Wheaton v. Maple*, 1893, 3 Ch. 48; *Rochdale Canal Co. v. Ratcliff*, 18 Q. B. 315). And enjoyment as against an owner who cannot dispose of the fee is not sufficient (*Roberts v. James*, 89 L. T. 282; *Daniel v. North*, 11 East, 372).

Prescription against the Crown.

Formerly a prescription could not run against the king, as no delay in resorting to his remedy would bar his right. The maxim was *nullum tempus occurrit regi* (2 Inst. 273; 2 Roll. 264, l. 40; Com. Dig. Prescription (F. 1); Broom's Maxims, p. 61, 6th ed.). This rule, however, was subject to various exceptions (see Co. Litt. 114 a and b, and Hargrave's note, 119 a). Liberties and franchises were excepted in the Crown Suits Act, 1769, limiting the claims of the Crown to sixty years (see *post*, note on the limitation of the rights of the Crown). By 32 Geo. 3, c. 58, the Crown is barred in informations for usurping corporate offices or franchises by the lapse of six years (see Bac. Abr. 7th ed., Prerogative (E. 6), 467, and stat. 7 Will. 4 & 1 Vict. c. 78, s. 23; *R. v. Harris*, 11 Ad. & Ell. 518). By the Prescription Act, 1832, ss. 1, 2 (*ante*, pp. 1, 4), the Crown is placed upon the same footing with the subject as to the rights affected by those sections. *Secus*,

as to the rights affected by sect. 3 (*Perry v. Eames*, 1891, 1 Ch. 658; **Prescription.** *Wheaton v. Maple*, 1893, 3 Ch. 48).

As regards the presumption of a grant. This presumption is necessary in all cases where a prescriptive right is claimed by prescription at common law or by a lost grant (see *ante*, p. 20). A presumption is also necessary where profits à prendre or easements (other than light) are claimed under the Prescription Act, the claim being based on user for the shorter periods mentioned in sects. 1 and 2. As to whether the presumption is necessary as regards claims based on the longer periods mentioned in those sections, see *Staffordshire Co. v. Birmingham Canal Co.*, L. R. 1 H. L. 260, 278; *Kilgour v. Gaddes*, 1904, 1 K. B. 457; *Topling v. Jones*, 11 H. L. C. 290. The presumption is not necessary in the case of a claim to light under sect. 3 of the act (*Topling v. Jones*, *supra*).

Where the claim is based on prescription at common law, the presumed grant must be an absolute one by an owner in fee to an owner in fee (*Wheaton v. Maple*, 1893, 3 Ch. 63; *Kilgour v. Gaddes*, 1904, 1 K. B. 466). It seems that the same rule applies where the claim is based on lost grant (*Bright v. Walker*, 1 Cr. M. & R. 211; *Wheaton v. Maple*, 1893, 3 Ch. 48; see, however, in England, *Bright v. Walker*, 1 Cr. M. & R. 201; *East Stonehouse Council v. Willoughby*, 1902, 2 K. B. 332; and in Ireland, *Timmons v. Hewitt*, 22 L. R. Ir. 627; *Hannah v. Pollock*, 1900, 2 I. R. 664). As to the character of the presumed grant where the claim is made under sect. 2 of the statute, see *supra*, p. 7.

In dealing with the presumption (where necessary) the court has refused to presume a grant in the following cases, viz.:—

(1) Where the grant would have been contrary to a statute of a public nature. (*Neaverson v. Peterborough Council*, 1902, 1 Ch. 557; *Mill v. New Forest Commrs.*, 18 C. B. 60; *Goodtitle v. Baldwin*, 11 East, 488; see *Campbell v. Wilson*, 3 East, 294.) As regards a statute of a private nature, a waiver may be presumed (*Goldsmith v. G. E. R. Co.*, 25 Ch. D. 511; 9 A. C. 927; *A.-G. v. Grand Junction Co.*, 1909, 2 Ch. 516).

(2) Where it would have been inconsistent with a custom (*Winstanley v. Lee*, 2 Sw. 333; *Perry v. Eames*, 1891, 1 Ch. 667).

(3) Where the owner of the dominant tenement could not take by way of grant (*National Manure Co. v. Donald*, 4 H. & N. 8; 28 L. J. Ex. 185). See the rule that prescriptive rights can only be claimed by defined persons because there must be a capable grantee, *ante*, p. 26.

(4) Where the owner of the servient tenement could not make a grant, e.g. on the ground of *ultra vires* (*Rochdale Canal Co. v. Ratcliffe*, 18 Q. B. 315; *Staffordshire Co. v. Birmingham Canal Co.*, L. R. 1 H. L. 287; *A.-G. v. G. N. R.*, 1909, 1 Ch. 775), or on the ground of the deficiency of his estate, e.g. where he was a rector (*Barker v. Richardson*, 4 B. & Ald. 579), or a tenant for life (*Roberts v. James*, 89 L. T. 282), or a tenant for years (*Daniel v. North*, 11 East, 372), none of whom could make an absolute grant.

(5) Where the owner of the servient tenement was incapable of preventing the enjoyment (*Sturges v. Bridgman*, 11 Ch. D. 852; *Bryant v. Lefever*, 4 C. P. D. 173; *Chasemore v. Richards*, 7 H. L. C. 349, 370).

(6) Where the owner of the servient tenement had no knowledge (actual or presumptive) of the enjoyment (see *Ambler v. Gordon*, 1905, 1 K. B. 424). The mere knowledge of a tenant of the servient owner is not sufficient (*Daniel v. North*, 11 East, 372). But if the enjoyment has been for a long time, it may be presumed the landlord was aware of it (*Davies v. Stevens*, 7 C. & P. 570; *Simpson v. A.-G.*, 1904, A. C. 507).

(7) Where the enjoyment was not as of right (*Hannah v. Pollock*, 1900, 2 I. R. 671), e.g. where it was *per vim* (*Eaton v. Swansea Waterworks*, 17 Q. B. 267), or *clam* (*Union Co. v. London Dock Co.*, 1902, 2 Ch. 557; *Partridge v. Scott*, 3 M. & W. 229), or *precario* (*Burrows v. Lang*, 1901, 2 Ch. 502), or where there was unity of possession (*Battishill v. Reed*, 18 C. B. 706; *Outram v. Maude*, 17 Ch. D. 405; *Damper v. Bassett*, 1901, 2 Ch. 354).

Enjoyment under a mistake may be enjoyment as of right (*De La Warr v. Miles*, 17 Ch. D. 535; *Dawson v. MacGrogan*, 1903, 1 I. R. 92; see

General rules as to the presumption of a grant.

Cases where court has refused to presume grant.

Prescription. *contra*; *Rivers v. Adams*, 3 Ex. D. 361; *Campbell v. Wilson*, 3 East, 301; *Chamber Co. v. Hopwood*, 32 Ch. Div. 549.

(8) Where the enjoyment was capable of other explanation (*A.-G. v. Simpson*, 1901, 2 Ch. 698; *A.-G. v. Antrobus*, 1905, 2 Ch. 199; *Gardner v. Hodgson's Co.*, 1901, 2 Ch. 216; 1903, A. C. 240), e.g. as being an extension of rights expressly granted by a document in evidence (*A.-G. v. Horner*, 14 Q. B. D. 258; *Sheringham v. Holsey*, 1904, W. N. 83). See *Penrhyn v. Best*, 3 Ex. Div. 297, 299. And compare *R. v. Hudson*, Strange, 909; *Labrador Co. v. Reg.*, 1903, A. C. 104; and *Wheaton v. Maple*, 1893, 3 Ch. 69, where it was said that prescription at common law is not maintainable where we know the whole truth. A claim to a prescriptive right may be defeated by showing the origin of the user, and that it is not in accordance with the right claimed (*Commsrs. of Sewers v. Glasse*, 19 Eq. 155; see *Neill v. Devonshire*, 8 App. Cas. 135).

Effect of
ancient grant.

An ancient grant without date did not necessarily defeat a claim to a prescriptive right; for it might be either before time of memory, or in confirmation of such prescriptive right, which is matter to be left to a jury (*Addington v. Clode*, 2 Bl. Rep. 989); but if the ancient grant is clearly not antecedent to the time of legal memory it will disprove immemorial prescription (*Welcome v. Upton*, 5 M. & W. 398; see *R. v. Westmark*, 2 M. & Rob. 305). Where a bishop, having free warren by prescription over the demesne and tenanted lands of a manor whereof he was seised *jure ecclesiæ*, accepted a grant from the Crown to himself and his successors of free warren over the demesne lands of all his manors in England: it was held that, even admitting the grant to have the effect of extinguishing the prescription as to the demesne lands (which the court considered to be at least doubtful), it could not affect it over the other lands of the manor (*Carnarvon v. Villebois*, 13 M. & W. 313).

Statutes in
relation to
prescription
and custom.

A man cannot prescribe, or allege a custom, against a statute of a public nature, because it is the highest matter of record in law, unless the custom or prescription be saved or preserved by another act (Co. Litt. 115; see *Noble v. Durell*, 2 T. R. 271; *Goodtitle v. Baldwin*, 11 East, 488; *Butterworth v. West Riding*, 1909, A. C. 57). Lord Coke makes a difference between statutes in the negative and in the affirmative; for a statute in the affirmative without any negative, express or implied, does not take away the common law; likewise between statutes that are in the negative, for if a statute in the negative be declarative of the ancient law, a man may prescribe or allege a custom against it, as he may against a common law (*Harg. Co. Litt.* 115 a, n. (15)). But the benefit of a statute of a private nature may be waived, and the waiver may be presumed (*Goldsmid v. G. E. R. Co.*, 25 Ch. D. 511; 9 App. Cas. 927; *A.-G. v. Grand Junction Co.*, 1909, 2 Ch. 516). An ancient custom may be destroyed by the express provisions of a statute or by positive language inconsistent with the existence of the custom (*Merchant Taylors' Co. v. Truscott*, 11 Exch. 855; *Salters' Co. v. Jay*, 3 Q. B. 109). But where a statute making an act illegal comes into force while a prescription is running, the prescription, after the proper period, may be an answer to one suing as an individual (*Millington v. Griffiths*, 30 L. T. 65). Where a statute has "embraced and confirmed" a right which had previously existed by custom or prescription, that right becomes thenceforward a statutory right. The lower title by custom or prescription is merged in and extinguished by the higher title derived from the statute (*New Windsor v. Taylor*, 1899, A. C. 49). A permanent right to take tolls based on prescription was held to have merged in and been extinguished by statutes temporary in their operation (*Ib.*). As to the effect of statutes in confirming customs, see *London v. Cox*, L. R. 2 H. L. 257; *Wake v. Hall*, 8 A. C. 198. Easements are sometimes extinguished by the express words of a statute, e.g. the Inclosure Acts, 1801 and 1845 (see *Turner v. Crush*, 4 App. Cas. 221), or by necessary implication from a statute (*Yarmouth v. Simmons*, 10 Ch. D. 518).

How prescrip-
tive rights
may be
destroyed.

By the common law a man might have prescribed for a right which had been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended for an indefinite series of

years. But by the Statute of Limitations (32 Hen. 8, c. 2) it is enacted **Prescription.** that no person shall make any prescription by the *seisin or possession* of his ancestor or predecessor, unless such *seisin or possession* had been within threescore years next before such prescription made (2 Bl. Comm. 263, 264). And the remedy for such rights, so far as it depended upon real actions, was further abridged by the abolition of real actions (R. P. Lim. Act, 1833, s. 36, *post*). It was said by Lord *Redesdale* that where a profit of any kind to be taken out of lands has not been taken for a vast number of years, and the lands have been enjoyed without yielding such profit to a third person, the consequence is, that the title to it, whatever its nature, shall be presumed to be discharged (*Norbury v. Meade*, 3 Bligh, 245). But in *Neill v. Devonshire* (8 App. Cas. 135), it was said that an incorporeal hereditament such as a several fishery, which can only pass by deed, cannot be abandoned.

A title gained by prescription or custom is not lost by mere interruption of *possession* for ten or twenty years, unless there be an interruption of the *right*, as by unity of possession of right of common and the land charged therewith in respect of an estate equally high and perdurable in both (Co. Litt. 114 b). An unity of possession merely suspends; there must be an unity of ownership to destroy a prescriptive right (*Canham v. Fisk*, 2 Cr. & Jerv. 126). Thus, if a person having a right of common by prescription takes a lease of the land for twenty years, whereby the common is suspended, he may, after the determination of the lease, claim the common again by prescription; for the suspension was only of the enjoyment, not of the right (Co. Litt. 113 b). Easements are extinguished by the union of *seisin* of the dominant and servient tenements in the same person (*James v. Plant*, 4 Ad. & El. 749). They also are extinguished when the purpose for which they were created no longer exists (*National Manure Co. v. Donald*, 4 H. & N. 8). A prescriptive right may be lost by the destruction of the subject-matter (4 Rep. 88); but not by an alteration of the quality of the thing to which a prescription is annexed (Hob. 39; 4 Rep. 86 a, 87 a). Alterations in the dominant tenement will sometimes extinguish an easement (*Allan v. Gomme*, 11 Ad. & El. 772). The release of an easement may be implied from abandonment or non-user (*Cook v. Bath*, 6 Eq. 177). It was said that a release of a right of way, or of a right of common, will not be presumed by mere non-user for a less period than twenty years, although it is otherwise as to lights (*Moore v. Rawson*, 3 B. & C. 339). But "it is not so much the duration of the cesser, as the nature of the act done by the grantee of the easement or of the adverse act acquiesced in by him, and the intention in him which either the one or the other indicates, which are material" (*R. v. Chorley*, 12 Q. B. 519; see *Crossley v. Lightowler*, 2 Ch. 482; *Ecc. Commrs. v. Kino*, 14 Ch. Div. 213; *James v. Stevenson*, 1893, A. C. 162). The right to hold courts for the determination of civil suits, granted by the king's charter to the steward and suitors of a court of ancient demesne, was held not to be lost by a non-user of fifty years (*R. v. Havering*, 5 B. & Ald. 691; *R. v. Hastings*, *Id.* 692, n.). An unlicensed change of days for holding fairs may forfeit the charter (*Newcastle v. Workop Council*, 1902, 2 Ch. 145; where see as to losing the right to fair tolls).

C. Custom.

Custom is also referred to in the above act as a ground on which the claims mentioned in sects. 1 and 2 can be made. Customs (as distinguished from usages, p. 34, *post*) may be copyhold or non-copyhold. This note deals mainly with the latter.

Non-copyhold Customs.

The nature of custom and its difference from prescription was thus expressed by Tindal, C.J.:—"A custom which has existed from time immemorial without interruption within a certain place, and which is certain and reasonable in itself, obtains the force of a law, and is in effect the common law within that place to which it extends, though contrary to the Nature of custom: it differs from prescription."

Custom.

general law of the realm. In the case of a custom, therefore, it is unnecessary to look out for its origin; but, in the case of prescription, which founds itself upon the presumption of a grant that has been lost by process of time, no prescription can have had a legal origin where no grant could have been made to support it. Thus a custom for all fishermen within a certain district to dry their nets upon the land of another might well be a good custom, as it was held in 5 Co. 84 [qu. 3 Lev. 160]; and yet a grant of such an easement to fishermen within the district *eo nomine* might well be held to be void" (*Lockwood v. Wood*, 6 Q. B. 64, 65; see *Goodman v. Saltash*, 7 App. Cas. 654; *Clarkson v. Woodhouse*, 5 T. R. 414).

The difference between custom and prescription, said Farwell, J., in *Mercer v. Denne*, 1904, 2 Ch. 556 (referring to claims to incorporeal hereditaments), "is only that the right to the former must be claimed by or in respect of a locality, and to the latter by a person or corporation. See Co. Litt. 113 b, where it is laid down that prescription is personal while custom is local, alleged in no person but laid within some place." The difference between custom and prescription lies in the mode of claim. Where the claimant has a weak and temporary estate, he cannot claim in his own right, but must have recourse either to the place, and allege a custom there. Or if he prescribes in the *que estate*, it must be under cover of the tenant in fee (*Bean v. Bloom*, 2 Bl. R. 928; *S. C.*, 3 Wils. 456; *Sharp v. Lowther*, Cas. temp. Hard. 293; *Linn Regis v. Taylor*, 3 Lev. 160). In other words, a prescriptive right must be claimed by a defined person. While a customary right can be claimed by undefined persons or a fluctuating class, such as "inhabitants"; the claim in the latter case being made in respect of some district, but not in respect of any defined dominant tenement within that district.

Nature of rights claimable by non-copyhold customs.

Rule that profits *à prendre* in another's soil cannot be claimed by custom.

The Prescription Act deals with profits *à prendre* and easements, and mentions custom in connection with each of these subject matters. As regards profits *à prendre* claimed on the ground of non-copyhold custom, the general rule is that a profit *à prendre* in another's soil cannot be claimed by custom (*Blewitt v. Tregonning*, 3 Ad. & E. 534; *Fitzhardinge v. Purcell*, 1908, 2 Ch. 163). For if it could, the claim by custom being for an indefinite number of people, the subject of the profit *à prendre* would be liable to be entirely destroyed (*Race v. Ward*, 4 E. & B. 705; *Bland v. Lipscombe*, *ib.* 713). And there could be no release of such a right (*Goodman v. Saltash*, 7 App. Cas. 655; *A.-G. v. Mathias*, 4 K. & J. 591). Thus the courts refused to admit a claim by custom to profits *à prendre* for "inhabitants" (*Chilton v. London*, 7 Ch. D. 735). In trespass for taking stones, &c., from the seashore, defendant pleaded a custom in the inhabitants of a township of which he was a member, and also a prescriptive right for the inhabitants and overseers of highways to take such stones. Such a custom was held bad, being a profit *à prendre in alieno solo*; and the overseers and inhabitants, not being a corporation, were not capable of taking by grant, and therefore could not claim by prescription (*Constable v. Nicholson*, 14 C. B. N. S. 230; *Pitts v. Kingsbridge Board*, 19 W. R. 884; *Hough v. Clark*, 23 T. L. R. 682). A claim, however, by "inhabitants" of tenements in a borough to the privilege of oyster dredging within a fishery which had been acquired by prescription by the borough corporation was supported by presuming a grant to the corporation subject to a trust (in the nature of a charitable trust) in favour of the inhabitants; *Goodman v. Saltash*, 7 App. Cas. 633; see the charitable trusts held to exist in *A.-G. v. Meyrick*, 1893, A. C. 1; *Wilson v. Barnes*, 38 Ch. Div. 507. Compare the right of fishing vested in a corporation in trust for its members (*Re Free Fishermen of Faversham*, 36 Ch. Div. 329); the case of a manor (including the right of sporting) vested in trustees for individual copyholders (*Hutchinson v. Morritt*, 3 Y. & C. 547); and the case where a vestry had during a long period let the grazing on a highway, and a lawful origin was found by presuming a grant to a trustee for the parish (*Haigh v. West*, 1893, 2 Q. B. 19; see *Eliot v. Bristol*, 71 L. T. 659). A Crown grant to the inhabitants of a parish to take profits *à prendre* out of a royal manor is valid, the effect being to incorporate the inhabitants for the

purpose (*Willingale v. Mailland*, 3 Eq. 103). Such a grant may be presumed from user: but not if the presumption is inconsistent with the past and existing state of things and there is no trace of such a corporation having existed (*Rivers v. Adams*, 3 Ex. D. 361). In the case of such a grant an action is maintainable only by the inhabitants as a corporation (*Chilton v. London*, 7 Ch. D. 735).

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Exceptions to the rule that a profit *à prendre* in another's soil cannot be claimed by custom occur in (1) certain mining customs as to tin mining in Cornwall (*Rogers v. Brenton*, 10 Q. B. 26; see *A.-G. v. Mathias*, 4 K. & J. 591) and lead mining in Derbyshire (*Wake v. Hall*, 8 App. Cas. 198; *Wake v. Redfearn*, 43 L. T. 123; *Ex p. Young*, *ib.* 725), and in (2) copyhold customs entitling copyholders to rights of common in the waste of a manor; as to which see *post*, p. 38.

Exceptions to rule.

Rights in the nature of easements may be claimed by a fluctuating class of persons (such as the "inhabitants" of a parish) on the ground of non-copyhold custom (*Brocklebank v. Thompson*, 1903, 2 Ch. 348). Thus a right of way may be so claimed (*Grimstead v. Marlow*, 4 T. R. 713). The "inhabitants" of a town cannot by that name and description prescribe for an easement *in alieno solo*; where such a claim has been allowed, it will be found to have been invariably rested on the ground of custom, and not of prescription (*Fox v. Venables*, Cro. Eliz. 180; *Day v. Savadge*, Hob. 85, 5th edit.; *Gateward's case*, 6 Rep. 59 b; *S. C.*, as *Smith v. Gateward*, Cro. Jac. 152; *Baker v. Brereman*, Cro. Car. 418; *Fitch v. Rawling*, 2 H. Bl. 393; see *A.-G. v. Acton*, 22 Ch. D. 228).

nature of easements.

The following are instances of non-copyhold customs under which rights in the nature of easements have been established: A custom for the inhabitants of a township to enter on land within the township and take water from a spring there (*Race v. Ward*, 4 E. & B. 702; 24 L. J. Q. B. 153; *Harrop v. Hirst*, L. R. 4 Ex. 43; *Smith v. Archibald*, 5 A. C. 512; *Goodday v. Mitchell*, Cro. Eliz. 441. See as to enforcing such a custom, *Stoke Council v. Price*, 1899, 2 Ch. 277). A custom for tin-borders inhabiting Cornwall to use for the purpose of mining the water in their district (*Gaved v. Martyn*, 19 C. B. N. S. 732; see *Ivinney v. Stocker*, 1 Ch. 409; *Bastard v. Smith*, 2 M. & Rob. 129); or for the same purpose to discharge rubbish into a stream (*Carlyon v. Lovering*, 1 H. & N. 781). A custom for the inhabitants of a parish to have a churchway over land within the parish forming the demesne of a manor (*Brocklebank v. Thompson*, 1903, 2 Ch. 344). A custom for parishioners to perambulate parish boundaries (*Taylor v. Devey*, 7 Ad. & Ell. 409; *Grant v. Kearney*, 12 Price, 773). A custom for the inhabitants of a town to use for recreation a promenade in the town (*Abercromby v. Fermoy*, 1900, 1 I. R. 302; see *Dyce v. Hay*, 1 Macq. 305). A custom for the inhabitants of a single parish to enter on land in the parish and dance there, or play any lawful game, or enjoy any lawful recreation at any time in the year, is good (*Hall v. Nottingham*, L. R. 1 Ex. D. 1; *Warrick v. Queen's College*, 10 Eq. 129). Such a custom cannot be claimed for the inhabitants of several parishes (*Edwards v. Jenkins*, 1896, 1 Ch. 313). A custom for the inhabitants of a parish to train horses at all seasonable times of the year on land within the parish might be good; but not where the training ground was outside the parish (*Sowerby v. Coleman*, L. R. 2 Ex. 99). A custom, however, for the freemen of a city to hold horse-races on a certain day in the year outside the city was held good (*Mounsey v. Ismay*, 1 H. & C. 729; 32 L. J. Ex. 94). A custom for any liege subject of the Queen, being a victualler, to enter, during a fair within a certain borough, on land within the borough, and for the convenient carrying on of his trade to erect there booths, paying reasonable compensation to the owner of the soil, was good (*Elwood v. Bullock*, 6 Q. B. 383; *Tyson v. Smith*, 9 Ad. & Ell. 406). A custom for the inhabitants of a seaside town to place chairs on the shore was held not proved (*Ramsgate v. Debbling*, 22 T. L. R. 369). A custom for the fishermen in a seaside parish to dry their nets on land within the parish, at all times seasonable for fishing, was good (*Mercer v. Denne*, 1905, 2 Ch. 538.) A custom for the fishermen of a particular locality to deposit oysters on the

Instances of non-copyhold customs.

- Custom.** foreshore might be good (*Truro v. Rowe*, 1901, 2 K. B. 870); but was not supported by evidence (1902, 2 K. B. 709). A custom for navigators frequenting a particular part of the coast to fix moorings there might be good (*A.-G. v. Wright*, 1897, 2 Q. B. 321).
- Non-copyhold custom can only apply to limited class, and limited district.** Non-copyhold customs conferring rights in the nature of easements can only be claimed for a limited class of persons, not the public generally (*Coventry v. Wills*, 12 W. R. 128; *Bourke v. Davis*, 44 Ch. D. 120; *Dungarvan v. Mansfield*, 1897, 1 I. R. 420; *De Morgan v. Metropolitan Board*, 5 Q. B. D. 155), and must be claimed for some definite district known to the law (Co. Litt. 110 b.; *Edwards v. Jenkins*, 1896, 1 Ch. 313; *Brocklebank v. Thompson*, 1903, 2 Ch. 353). It has been said that there cannot be a custom in one place to do something in another (*R. v. Ecclesfield*, 1 B. & Ald. 360; *Brocklebank v. Thompson*, 1903, 2 Ch. 354; but see *Mounsey v. Ismey*, 1 H. & C. 729). Land added by accretion to other land becomes subject to customs affecting the latter (*Mercer v. Denne*, 1904, 2 Ch. 560).
- Construed strictly.** Customs are not to be enlarged beyond the usage, but must be construed strictly (*Rogers v. Brenton*, 10 Q. B. 57; *Arthur v. Bokenham*, 11 Mod. 160; *Fitzgib.* 243).
- Relation of custom to the common law.** Custom, said *Jessel, M.R.*, referring to non-copyhold custom, is local common law. It is common law because it is not statute law. It is local law because it is the law of a particular place as distinguished from the general common law (*Hammerton v. Honey*, 24 W. R. 603). As to the relation of custom to statute, see *ante*, p. 28. As to its relation to the common law, it is of the very essence of a custom that it should vary from the common law (*Horton v. Beckman*, 6 T. R. 764; *Lockwood v. Wood*, 6 Q. B. 64; *Johnson v. Clark*, 1908, 1 Ch. 311). But to give validity to a custom, it must be certain, reasonable in itself, commencing from time immemorial and continued without interruption (*Tyson v. Smith*, 9 Ad. & Ell. 421; *Mercer v. Denne*, 1904, 2 Ch. 551); rules which relate to the evidence of a custom (*Hammerton v. Honey*, *sup.*).
- What customs are valid. Rules of evidence. A custom must be certain.** A custom accordingly must be certain (*Baylis v. Tyssen Amhurst*, 6 Ch. D. 509; *Champneys v. Buchan*, 4 Drew. 116). A custom is not uncertain because it is not invariable in every part. Thus, the number of persons entitled to enjoy it will vary (*Mercer v. Denne*, 1904, 2 Ch. 552). So a custom to play games is not uncertain if it be extended to new games (*ib.* 553); or a custom to dry nets, if it be extended to a new process of drying (*Mercer v. Denne*, 1905, 2 Ch. 581). For general customs may be extended to new things which are within the reason of those customs (*London v. Vanacre*, 12 Mod. 270). Nor is a custom uncertain because its area varies by accretions or recessions of the sea (*Mercer v. Denne*, 1905, 2 Ch. 584). Compare with the above rule as to certainty, the certainty required where profits *à prendre* were claimed by copyholders on the ground of custom (*Peppin v. Shakespear*, 6 T. R. 743; *Wilson v. Willes*, 7 East, 121); or by freeholders on the ground of prescription (*Clayton v. Corby*, 5 Q. B. 415; *A.-G. v. Matthias*, 4 K. & J. 592).
- Reasonable.** Again, a custom must be reasonable. Customs, especially where they derogate from the general rights of property, must be construed strictly, and above all things they must be reasonable (*Rogers v. Brenton*, 10 Q. B. 57). This rule has been explained as meaning in effect that to be valid a custom must be consistent with the general principles underlying the common law (*Johnson v. Clark*, 1908, 1 Ch. 311). A custom which is for the advantage of an industry or trade may be good, although it bears hardly on the individual. While, on the other hand, a custom which is for the advantage of the individual only, and is prejudicial to the public or a class of the public, is bad. For the common law in principle imposes obligations on the individual for the benefit of the public, and not on the public for the benefit of the individual (*ib.*).
- "It belongs to the judges of the land to determine whether a custom is reasonable or not. A custom is not unreasonable merely because it is contrary to a particular maxim or rule of the common law, for '*consuetudo ex*

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certa causa rationabili usitata privat communem legem (Co. Litt. 113 a), as the custom of gavelkind and borough-English, which are directly contrary to the law of descent; or, again, the custom of Kent, which is contrary to the law of escheats. Nor is a custom unreasonable because it is prejudicial to the interests of a private man, if it be for the benefit of the commonwealth, as the custom to turn the plough upon the headland of another, in favour of husbandry, or to dry nets on the land of another, in favour of fishing and for the benefit of navigation. But, on the other hand, a custom that is contrary to the public good, or injurious or prejudicial to the many, and beneficial only to some particular person, is repugnant to the law of reason; for it could not have had a reasonable commencement: as a custom set up in a manor, on the part of the lord, that the commoner cannot turn in his cattle until the lord has put in his own, is clearly bad; for it is injurious to the multitude, and beneficial only to the lord (Year B. Trin. 2 H. 4, fol. 24. B. pl. 20). So a custom that the lord of the manor shall have £3 for every pound breach of any stranger (21 H. 4 (a)); or that the lord of the manor may detain a distress taken upon his demesnes until fine be made for the damage, at the lord's will (Litt. s. 212)." (*Per Tindal, C. J., Tyson v. Smith*, 9 Ad. & Ell. 421.) The Judges accordingly as trained lawyers determine whether a custom is reasonable (*Johnson v. Clark*, 1908, 1 Ch. 311, 316; *Tyson v. Smith*, *supra*; compare *Bradburn v. Foley*, 3 C. P. D. 135; *Re Walkers & Co.*, 1904, 2 K. B. 159; cases of usage). The Judges will not admit mere usage to establish what they think unreasonable (*Hammerton v. Honey*, 24 W. R. 603). And if they think an alleged custom unreasonable they in effect hold that the usage though immemorial must have resulted from accident or negligence and not from any right conferred (*Salisbury v. Gladstone*, 9 H. L. C. 701). The time for ascertaining whether a custom is reasonable is its inception (*Mercer v. Denne*, 1904, 2 Ch. 557; *Mounsey v. Ismay*, 32 L. J. Ex. 96; *Johnson v. Clark*, 1908, 1 Ch. 306).

As instances of the rule as to reasonableness, a custom for the fishermen in a parish to dry their nets on land within the parish, was reasonable (*Mercer v. Denne*, 1904, 2 Ch. 552). But a custom for tin bounders in Cornwall to preserve their rights by mere annual renewals without working was unreasonable (*Rogers v. Brenton*, 10 Q. B. 57); as was a custom for any person to take rabbits on the waste of a manor (*Coote v. Ford*, 83 L. T. 482).

Again, the custom must have commenced from time immemorial, *i.e.* from the reign of Richard I. But this rule will not render a custom bad, unless rial; the impossibility of its having existed in that reign be demonstrated (*Mercer v. Denne*, 1904, 2 Ch. 555). A custom to erect stalls for hiring servants at statute sessions was held bad, statute sessions having been introduced by the Statutes of Labourers, the first of which was in the reign of Edward 3 (*Simpson v. Wells*, L. R. 7 Q. B. 214). A custom is usually proved by evidence extending over at least half a century (*Hammerton v. Honey*, 24 W. R. 604). But a regular usage for twenty years unexplained and uncontradicted may suffice to support an immemorial custom (*R. v. Jolliffe*, 2 B. & C. 54). And from such modern usage, unless the contrary appear, the immemorial existence of the right ought to be presumed (*Brocklebank v. Thompson*, 1903, 2 Ch. 350).

Lastly a custom must have been continued without interruption (*Hammerton v. Honey*, 24 W. R. 603). But mere discontinuance of user will not amount to interruption (*Scales v. Key*, 11 Ad. & Ell. 823). There must be an interruption of the right as well as the possession (Co. Litt. 114 b; *Mercer v. Denne*, 1904, 2 Ch. 556). And there may be an intermittent customary right (*Mercer v. Denne*, 1905, 2 Ch. 571).

As regards the nature of this continuous user. It was laid down by *Enjoyment Willes, J.*, that in the case of custom, long enjoyment in order to establish a right must have been as of right, and therefore neither by violence nor by right. stealth, nor by leave asked from time to time (*Mills v. Colchester*, L. R. 2 C. P. 486; see *Montgomery v. Wallace James*, 1904, A. C. 82). Compare the rule as to the user on which prescriptive rights must be founded, *ante*, pp. 8, 27.

- Custom.** The Prescription Act mentions custom as well as prescription as a mode of claiming incorporeal hereditaments, both in the case of profits *à prendre* (sect. 1) and in the case of easements (sect. 2). Sect. 5, however, refers to "the tenement in respect whereof the right is claimed," while it will be remembered that a claim by custom is made in respect of some district, but not in respect of any defined dominant tenement within that district. Notwithstanding the above words in sect. 5, it was at first suggested that rights not annexed to a defined dominant tenement might still be claimed under the statute, as being within the equity of it (*Welcome v. Upton*, 5 M. & W. 404; 6 M. & W. 542; *Wickham v. Hawker*, 7 M. & W. 81; see 2 Wms. Saund. 515). The words in sect. 5, however, led the courts to decide that such claims could not be made under the statute, either in the case of profits *à prendre* in gross (*Shuttleworth v. Le Fleming*, 19 C. B. N. S. 687; 34 L. J. C. P. 309; *Foster v. Warblington*, 1906, 1 K. B. 664), or in the case of rights in the nature of easements based on custom (*Mounsey v. Ismay*, 3 H. & C. 486; 34 L. J. Ex. 52). These decisions were followed where a customary right for the fishermen of a district to dry their nets on the shore was attempted to be claimed under the statute (*Mercer v. Denne*, 1904, 2 Ch. 540, 555; see *Ramsgate v. Debling*, 22 T. L. R. 369). In the Court of Appeal, a different view of the statute was raised, but the point not decided (1905, 2 Ch. 574, 586).
- Customary rights accordingly cannot be claimed under the statute. They are claimed by a method analogous to common law prescription, upon proof of immemorial enjoyment as of right (*Montgomery v. Wallace James*, 1904, A. C. 81).
- Extinguishment of customary rights.** Custom being local law cannot be got rid of except by statute (*Hammerton v. Honey*, 25 W. R. 604; see *Scales v. Key*, 11 Ad. & Ell. 822). Customary rights can be extinguished by the express words of a statute (*Salters Co. v. Truscott*, 11 Exch. 855); or through being embraced and confirmed by a statute, in which case they become statutory rights (*New Windsor v. Taylor*, 99 A. C. 49; see *Wake v. Hall*, 8 App. Cas. 195).
- Customs connected with tenure of land.** Besides the above customs which establish the right to certain incorporeal hereditaments, other customs should be mentioned which are connected with the tenure of land; e.g. the Customs of Gavelkind and borough-English; as to which see the notes to sect. 2 of the Inheritance Act, 1833, sect. 1 of the Dower Act, 1833, and sect. 3 of the Real Property Act, 1845, *post*; Elton on Copyholds, 7, 126. In the case of lands of burgage tenure, a custom for a married woman to dispose thereof with her husband's consent, but without separate examination, was held unreasonable and bad (*Johnson v. Clark*, 1908, 1 Ch. 303). Again, there are customs connected with copyhold tenure. Thus a custom binding the copyhold tenants of a manor to repair their tenements was good (*Blackmore v. White*, 1899, 1 Q. B. 293). Many other instances of copyhold customs will be found in the note on Rights of Common, *post*.
- Copyhold customs.**
- Miscellaneous customs.** Again, in a wide sense of the word custom there are a number of miscellaneous rights which are mentioned in the books as customary rights. As, for instance, a custom obliging landowners to maintain sea frontages (*L. & N. W. R. Co. v. Fobbing*, 66 L. J. Q. B. 27). A custom rendering a parish or township liable to repair highways within it (*R. v. Ecclesfield*, 1 B. & Ald. 360) or exempting it from contributing to repair highways without it (*R. v. Barnardswick*, 4 Q. B. 499; *R. v. Rollett*, L. R. 10 Q. B. 469). A custom as to marriage fees (*Bryant v. Foot*, L. R. 2 Q. B. 161, 171, 178), or the appointment of churchwardens (*Bremner v. Hall*, L. R. 1 C. P. 748; *R. v. Green*, 30 L. T. 255), or as to payment of church rates (*R. v. Dalby*, 3 Q. B. 602), or as to paying to a corporation duties on imported coal (*Jenkins v. Harvey*, 1 C. M. & R. 877). A custom binding the parson as owner of great tithes to keep a bull and boar for the use of parishioners is mentioned in *Lanchbury v. Bode*, 1898, 2 Ch. 120.
- Usages.** All the customs referred to above must be distinguished from usages which are imported into mercantile contracts or into contracts between landlord and tenant. Such usages need not be immemorial (*Crouch v. Credit Foncier*, L. R. 8 Q. B. 386). But they must be reasonable (*Gibbon v. Pease*,

1905, 1 K. B. 810) and certain (*Re Walkers & Co.*, 1904, 2 K. B. 159). Their reasonableness is a question of law for the court, not of fact for the jury (*Bradburn v. Foley*, 3 C. P. D. 135, compare *Re Walkers & Co.*, 1904, 2 K. B. 159). It seems that mercantile usage cannot prevail against positive law (*Goodwin v. Robartes*, L. R. 10 Ex. 357). Modern usages between landlord and tenant were discussed in *Bradburn v. Foley*, *sup.*; *Tucker v. Linger*, 8 A. C. 508. A modern usage as to cutting timber was considered in construing a will and as between persons claiming under the will rendered that not waste which would have been waste between others (*Dashwood v. Magniac*, 1891, 3 Ch. 350). As to the above modern usages, see further *Wigglesworth v. Dallison*, 1 Sm. L. C.

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D. Of Grants, Express and Implied, of Incorporeal Rights; and herein of Licences in Relation to Real Estate.

The title to incorporeal rights may arise by grant, whether express or implied.

As regards implied grants of easements, see the decisions in the case of ways, p. 67, *post*; water, p. 81, *post*; and light, p. 103, *post*.

As regards express grants, sect. 62 of the Conv. Act, 1881, provides that easements may be granted by way of use; and by sect. 49, *post*, the word "grant" is not necessary to convey incorporeal hereditaments. Any words which show the intention to give an easement which is by law grantable, is sufficient to effect that purpose (*North British Ry. v. Park Yard*, 1898, A. C. 646). Thus a covenant may operate as a grant of an easement (*Northam v. Hurly*, 1 Ell. & Bl. 665).

Creation by express grant.

With respect to the estate in the servient tenement which the grantor of the easement must possess at the date of the express grant, it has been held that an easement could not be granted by an executor who had no estate but only a power of sale (*Re Barrow-in-Furness & Rawlinson*, 1903, 1 Ch. 339), or by one who had only a right of entry under a building agreement (*Quicke v. Chapman*, 1903, 1 Ch. 659), or by an owner in fee who had previously contracted to sell the servient tenement (*Beddington v. Atlee*, 35 Ch. D. 317). And where at the time of the express grant of the easement, the grantor had only a term of years in the servient tenement, the grant did not bind the subsequently acquired fee (*Booth v. Alcock*, 8 Ch. 663).

Estate of grantor in the land;

With respect to the estate in the dominant tenement which the grantee of the easement must possess at the date of the express grant, it was said that no easement could be granted to one who at that date has no interest in the dominant tenement (*Rymer v. McIlroy*, 1897, 1 Ch. 532, 535; see *North British Ry. v. Park Yard*, 1898, A. C. 643). But where at that date A was yearly tenant of the dominant tenement, a grant of an easement "to A his heirs and assigns" enured for the benefit of the fee which A subsequently acquired (*Rymer v. McIlroy*, *sup.*).

of grantee.

A right of way, or a right of passage for water (where it does not create an interest in land) is an incorporeal right or hereditament (see *ante*, p. 5), and stands upon the same footing as rights of common, rents, advowsons, &c. It lies not in livery, but in grant (*Hewlins v. Shippam*, 5 B. & C. 229; see *Hastings v. N. E. R.*, 1898, 2 Ch. 674). According to the older cases at common law a deed was necessary to create either a freehold interest in an incorporeal right (*Hewlins v. Shippam*, *sup.*; *Blanchard v. Blanchard*, 1 Ad. & E. 536), or a leasehold interest (*Somerset v. Fogwell*, 5 B. & C. 875, a case of a several fishery; *Bird v. Higginson*, 6 Ad. & E. 824, a right of sporting; *Wood v. Leadbitter*, 13 M. & W. 843). In accordance with this doctrine, it was held at common law that an agreement, otherwise than by deed, for an incorporeal right, was merely a parol licence revocable at will, though valuable consideration had been given or expense incurred (*Fentiman v. Smith*, 8 East, 107; *Cocker v. Cowper*, 1 C. M. & R. 418; *Bryan v. Whistler*, 8 B. & C. 298; *Adams v. Andrews*, 15 Q. B. 284; see *R. v. Hornden-on-the-Hill*, 4 M. & S. 565; *Thomas v. Fredericks*, 10 Q. B. 775; *Smart v. Jones*, 33 L. J. C. P. 154).

Necessity of a deed to pass incorporeal rights. Effect of an agreement not under seal; older cases at common law;

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recent cases.

It has, however, been laid down more recently that an agreement for valuable consideration, though not under seal, is sufficient to create a right to an easement, and for the purpose of creating a lawful user is as good as a deed (*Dalton v. Angus*, 6 App. Cas. 765, 782; see *May v. Belleville*, 1905, 2 Ch. 605). And see the earlier cases in equity, where it was held that a parol licence for an easement was irrevocable where expense had been incurred, and there had been acquiescence (*Devonshire v. Eglin*, 14 Beav. 530; *Moreland v. Richardson*, 22 Beav. 596; *Mold v. Wheatcroft*, 27 Beav. 510; *Laird v. Birkenhead Co.*, Joh. 500; *Newby v. Harrison*, 1 J. & H. 393; *Bankart v. Tennant*, 10 Eq. 141; *Carr v. Benson*, 3 Ch. 524). The decision in *Walsh v. Lonsdale* (21 Ch. Div. 9) may have altered the earlier law in relation to agreements as to sporting rights (*Lowe v. Adams*, 1901, 2 Ch. 600). Such rights passed in Ireland under an agreement not sealed (*Radcliff v. Hayes*, 1907, 1 I. R. 101). A verbal agreement for an easement may be enforced where there has been part performance (*McManus v. Cooke*, 35 Ch. D. 681). In a case, however, where there was no writing and no part performance, sect. 4 of the Statute of Frauds prevented the recovery of damages for breach of a verbal agreement giving the right to shoot over land and take away game, such right being treated as real estate (*Webber v. Lee*, 9 Q. B. Div. 315).

Creation by statute.

Easements may be created by statute, e.g. support (*L. N. W. R. v. Evans*, 1893, 1 Ch. 16). As to light see *Boyce v. Paddington*, 1903, 1 Ch. 115. As to right of way, see *post*, p. 69. Under the L. C. C. Acts alone no Ry. Co. could purchase an easement (*Re Barrow-in-Furness and Rawlinson*, 1903, 1 Ch. 350); but in special cases rights in the nature of statutory easements can be acquired (*Hill v. Midland Co.*, 21 Ch. D. 143; *G. W. R. v. Swindon Co.*, 22 Ch. Div. 707; 9 A. C. 802).

Licences in relation to Real Estate.

Nature of a licence.

As regards licences generally in relation to real estate: "A dispensation or licence properly passeth no interest, nor alters or transfers property in anything, but only makes an action lawful which, without it, would have been unlawful" (*Thomas v. Sorrell*, Vaughan, 351). A licence authorizing the commission of an act illegal by statute was held void (*Edwick v. Hawkes*, 18 Ch. D. 199). A personal licence, as to enter a house to seize goods, is not assignable (*Re Davis, Ex parte Rawlins*, 22 Q. B. Div. 193; see *Ackroyd v. Smithson*, 10 C. B. 164). A personal licence of pleasure cannot be exercised with or by servants; *secus*, in the case of a licence of profit (*Norfolk v. Wiseman*, cited 7 M. & W. 77). As to the legal nature of the rights conferred by a railway passenger's ticket, see *Butler v. Manchester S. & L. R. Co.*, 21 Q. B. Div. 207.

Grant of licence: express;

A licence to be binding on a third party must be by deed, as in the case of a licence to use a common (*Hoskins v. Robins*, 2 Wms. Saund. 728, and n. 12; *Shep. Touch.* 330; *Monk v. Butler*, Cro. Jac. 574; see *Perry v. Fitzhove*, 8 Q. B. 757; *Ramsey v. Rawson*, 1 Vent. 18—25); or a licence to a former tenant to enter to remove chattels after a new tenant is in possession (*Roffey v. Henderson*, 17 Q. B. 574). But as against the licensor a parol licence is an excuse for a trespass until countermanded (*Hewlins v. Shippam*, 5 B. & C. 232; *Cornish v. Stubbs*, L. R. 5 C. P. 339). A parol agreement which is void under sect. 4 of the Statute of Frauds may operate as a licence (*Carrington v. Roots*, 2 M. & W. 257; *Crosby v. Wadsworth*, 6 East, 602; compare *Webber v. Lee*, 9 Q. B. Div. 315). As to parol licence by the Crown, see *Harper v. Charlesworth*, 4 B. & C. 590.

implied.

Where a party places goods of another upon his own close, he gives the owner an implied licence to enter for the purpose of recaption (*Patrick v. Colerick*, 3 M. & W. 483; *Wood v. Leadbitter*, 13 M. & W. 853); but no such licence will be implied to a purchaser of goods to enter the premises of the vendor to take them (*Williams v. Morris*, 8 M. & W. 488; see *Wood v. Manley*, 11 Ad. & Ell. 34).

Revocation of licences:

As regards the revocation of licences, a mere licence which is not coupled with a grant, and which has not been executed, is revocable whether under

seal or not (*Wood v. Leadbitter*, 13 M. & W. 845). Even where the licence had been executed and expense incurred by the licensee, according to the older cases at common law a parol licence to do an act on the land of the licensor was revocable (*R. v. Hornden-on-the-Hill*, 4 M. & S. 565; see *Plimmer v. Wellington*, 9 App. Cas. 699; *Islington v. Hornsey*, 1900, 1 Ch. 695; it should be observed, however, that under such circumstances there might be a contract for breach of which, if the licence were revoked, damages might be recovered, see *Kerrison v. Smith*, 1897, 2 Q. B. 445). In equity a licence to do acts on the land of the licensor might, where expense had been incurred by the licensee, be held irrevocable (*Devonshire v. Eglin*, 14 Beav. 530, and other cases quoted *ante*, p. 36; *Plimmer v. Wellington*, 9 App. Cas. 699; *Civil Service Association v. Whiteman*, 68 L. J. Ch. 484; compare *Ramsden v. Dyson*, L. R. 1 H. L. 129; *Edwards v. Summerton*, 1899, W. N. 120).

Licences.

executed
licences to do
acts on land
of licensor,

As regards acts on the land of the licensee, licences for these acts were, on land of in the older common law cases, distinguished from licences for acts on the licensee; land of the licensor (see notes to *Coryton v. Lithebye*, 2 Wms. Saund. 363). And where a parol licence for acts of the former nature had been given which involved expenditure by the licensee, and the work had been executed, it was held that the licensor could not revoke the licence, and require the *status quo ante* to be restored; at least, not without tendering the expenditure (*Winter v. Brockwell*, 8 East, 308; *Liggins v. Inge*, 7 Bing. 682; *Blood v. Kellar*, 11 Ir. C. L. R. 124; *Davies v. Marshall*, 31 L. J. C. P. 61; but see *Aldin v. Latimer*, 1894, 2 Ch. 437).

Again, where a parol licence was coupled with a grant of something licence capable of being granted by parol, it was irrevocable (*Wood v. Leadbitter*, coupled with 13 M. & W. 845). So a licence to dig for tin and to dispose of the tin was a grant; irrevocable as carrying an interest in the ore (*Doe v. Wood*, 2 B. & Ald. 738; see *Northam v. Bowden*, 11 Exch. 70; *Jones v. Tankerville*, 1909, W. N. 171). So, also, where there was an agreement in writing to let, for one year, a shooting, with the right to the game shot, and the letting was continued by parol for some years, the right was not a licence revocable at will, although it was validly determined by a month's notice terminating at the end of a year (*Lowe v. Adams*, 1901, 2 Ch. 598; *Radcliff v. Hayes*, 1907, 1 I. R. 101; compare *Wilson v. Tavener*, 1901, 1 Ch. 578; and see the cases as to profits *à prendre*, *ante*, p. 3). Where by the conditions of sale of goods the buyer was to be allowed to enter to take them, the licence could not, after sale, be revoked, but could be executed even by force (*Wood v. Manley*, 11 Ad. & Ell. 34; see *Wood v. Leadbitter*, 13 M. & W. 853).

The locking a gate is sufficient notice of revocation of a parol licence to mode of pass through it (*Hyde v. Graham*, 1 H. & C. 593; see *Russell v. Harford*, revocation. 2 Eq. 507). A parol licence for an easement over land is revoked by the transfer of the land to a third person (*Wallis v. Harrison*, 4 M. & W. 538; see *Roffey v. Henderson*, 17 Q. B. 574; *Coleman v. Foster*, 1 H. & N. 37).

The licensee under a revocable licence is entitled to reasonable notice of revocation (*Cornish v. Stubbs*, L. R. 5 C. P. 334; *Mellor v. Watkins*, L. R. 9 Q. B. 400; *Aldin v. Latimer*, 1894, 2 Ch. 448). As to what is a reasonable notice, see *Wilson v. Tavener*, 1901, 1 Ch. 578; compare *Lowe v. Adams*, 1901, 2 Ch. 598.

In some cases of revocation, even where a licence has been rightfully Remedies: revoked, damages may be recovered by the licensee on the ground of breach damages; of contract (*Kerrison v. Smith*, 1897, 2 Q. B. 445; see *Cornish v. Stubbs*, L. R. 5 C. P. 334; *Mellor v. Watkins*, L. R. 9 Q. B. 400). But the Statute of Frauds may prevent the recovery of damages (*Webber v. Lee*, 9 Q. B. Div. 315; compare *Carrington v. Roots*, 2 M. & W. 257).

Where previously to the execution of a lease and as part of the con-injunction. sideration therefor an agreement not under seal for the exercise by the tenant of sporting rights was entered into, the tenant obtained an injunction restraining interference by the landlord with the sporting rights until a grant thereof under seal had been executed (*Frogley v. Lovelace*, Johns. 333).

Rights of
Common.

III.—RIGHTS OF COMMON.

- (1) *Meaning of Common; Claims thereto by Custom and by Prescription; the...*38.
- (2) *Common of Pasture...*39.
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(1)
Several
species of
common.

Common is a right which one or more persons claim of taking some part of that which another man's lands, waters, woods, &c., naturally produce, without having an absolute property in such lands, waters, woods, &c. It is called an incorporeal right, which lies in grant, as originally commencing by some agreement between lords and tenants, for some valuable purposes, which continues good, although there be no instrument in writing that proves the original agreement (4 Rep. 37 a; 2 Inst. 65; Vent. 387; Bac. Abr. Common). The rights of common most frequently met with are the rights of tenants of a manor in the waste.

Claims to
common by
custom.

Rights of common in the waste may be claimed by copyhold tenants of a manor by custom (*Gateward's case*, 6 Rep. 59; *Bean v. Bloom*, 2 Bl. R. 926; *S. C.*, 3 Wils. 456). They cannot prescribe in their own names by reason of the want of permanence. Nor can they in their lord's name, for he cannot claim common in his own land. They are therefore allowed to claim it by custom (*per Lord Denman, Rogers v. Brenton*, 10 Q. B. 61; see *Warrick v. Queen's College*, 10 Eq. 122). In the case of freehold tenants of a manor, rights of common in the waste may be claimed by prescription (*Warrick v. Queen's College*, 6 Ch. 716). Where rights of common have been exercised for many years by the freehold tenants of a manor, and also by the inhabitants, the court will presume that the inhabitants claimed through the freehold tenants, and will try to find a legal origin for those rights (*Warrick v. Queen's College*, 6 Ch. 716). In the case of persons who are not themselves either copyhold or freehold tenants of the manor, common cannot be claimed on the ground of either custom or prescription by "dwellers" in a manor (*Allgood v. Gibson*, 25 W. R. 60; 34 L. T. 883); or by "occupiers" of copyhold lands (*Austin v. Amhurst*, 7 Ch. D. 689; *Knight v. King*, 20 L. T. 494). See further, as to claims to common when based on prescription, the cases quoted *ante*, pp. 2, 23; and when based on custom, the cases, p. 30. For cases where trusts of commonable rights for the benefit of occupiers were held to have been created, see *A.-G. v. Meyrick*, 1893, A. C. 1; *Simcoe v. Pethick*, 1898, 2 Q. B. 555.

Claims to
common by
prescription.

Rights of common have been frequently dealt with by statute (see note on Inclosure Acts, *post*, p. 49), and have been created by Crown grant (see *Chilton v. London*, 7 Ch. D. 735). Where the Crown dedicated land as permanent common but named no commoner, common of pasturage was not created (*Sydney v. A.-G. for N. S. Wales*, 1894, A. C. 444).

Different
kinds of
common.

Common has been divided into five sorts (Co. Litt. 122 a), viz.: 1st, *Common of pasture*, which is a right that one man has in common with others to feed his beasts in another man's land. 2ndly, *Common of turbary*, or the liberty of cutting turves in another's soil, to be burnt in a house (see *Valentine v. Penny*, Noy, 145; *Wilson v. Willes*, 7 East, 121; 3 Lev. 165).

3rdly, *Common of estovers*, which is a right of taking trees, loppings, shrubs, or underwood, in another's woods, coppices, &c. (see *Arundel v. Steere*, Cro. Jac. 25; 5 Rep. 25 a; 4 Rep. 87 a; Cro. Eliz. 820; Plowd. 381). 4thly, *Common of piscary*, or a right of taking fish in pond, pool, or river, the soil whereof belongs to another. And 5thly, a liberty which in some manors the tenants have, of taking sand, gravel, stone, &c. in the lord's soil (Bac. Abr. Common, (A.)). All claims of this kind, in order to be valid, must be made with some limitation and restriction (*Clayton v. Corby*, 5 Q. B. 419).

Rights of Common.

Common of pasture is, where one person has, in common with other persons, the right of taking by the mouths of his cattle the herbage growing on the land of which some other person is the owner. This species of common is either appendant, appurtenant, or in gross (Selw. N. P. Common, s. 2).

(2)

Common of pasture.

Common of pasture appendant is a right belonging to freehold tenants holding arable lands parcel of a manor. It is a right to put commonable beasts upon the lord's waste, and upon the lands of other persons within the same manor. Commonable beasts are horses and oxen to plough the land, and cows and sheep to manure it (Co. Litt. 122 a; 2 Bl. Com. 33; *Tyrringham's case*, 4 Rep. 36 a; 2 Inst. 85). As to this right *Parke, B.*, in the Exch. Chamb., laid down that, although there are some books which state that common appendant is of common right, and that common appendant is the common law right of every free tenant in the lord's wastes (see *Mellor v. Spateman*, 1 Wms. Saund. 346 d, 6th ed.; *Bennett v. Reeve*, Willes, 227; Com. Dig. Comm. B.), it is not to be understood that every tenant of a manor has by common law such a right, but only that certain tenants have such a right, not by prescription, but as a right at common law, incident to the grant. The right therefore is not a common right of all tenants, but belongs only to each grantee, before the stat. *Quia emptores*, of arable land by virtue of his individual grant and as incident thereto; and it is as much a peculiar right of the grantee as one derived by express grant, or by prescription, though it differs in its extent, being limited to such cattle as are kept for ploughing and manuring the arable land granted, and as are of a description fit for that purpose; whereas the right by grant or prescription has no such limits and depends on the will of the grantor (*Dunraven v. Llewellyn*, 15 Q. B. 810, 811). As to this decision see *Williams' Real Prop.*, App. F., 628, 17th ed., and *Warrick v. Queen's College*, 10 Eq. 123. Common of pasture appendant cannot, it seems, be claimed by copyholders.

Common appendant can only be claimed in the lord's wastes (2 Inst. 85; 1 Roll. 396; 4 Rep. 37), for the claimant's own commonable cattle levant and couchant upon the land (*Ib.*; Burr. 320). A right of common for cattle "levant and couchant," upon inclosed land, extends to such cattle as the winter eatage of the land, together with the produce of it during the summer, is capable of maintaining (*Whitelock v. Hutchinson*, 2 M. & Rob. 205; 5 T. R. 46; *Bennett v. Reeve*, Willes, 227; *Benson v. Chester*, 8 T. R. 396; *Willis v. Ward*, 2 Chit. 297). In other words the right is governed by the number of cattle which the commoner has the means of housing and providing for in the winter (*Dyce v. Hay*, 1 Macq. H. L. C. 313). Levant and couchant expresses a measure of the number of cattle that may be put in, and does not necessarily refer to cattle actually fed upon the particular land (*Johnson v. Barnes*, L. R. 7 C. P. 592). It is rather the measure of capacity of the land than a condition to be actually complied with (*Robertson v. Harropp*, 43 Ch. Div. 517; see *Carr v. Lambert*, L. R. 1 Exch. 168).

Meaning of levant and couchant.

This species of common must have existed from time immemorial (1 Roll. Abr. 396), and only arises in the case of grants of arable land (*Warrick v. Queen's College*, 6 Ch. 730). It might formerly be claimed as appendant to a cottage, because by 31 Eliz. c. 7 (repealed by 15 Geo. 3, c. 32), it was requisite for a cottage to have four acres of land attached to it (*Emerson v. Selby*, 1 Salk. 169; 2 Lord Raym. 1015). Common appendant is so necessarily incident to the land, that it cannot be severed from it, and, therefore, however often the land may be divided, every parcel of it is entitled to

Rights of
Common.

common appendant (*Bennett v. Reeve*, Willes, 240). Common of pasture appendant is extinguished by the erection of permanent buildings on the land in respect of which it is claimed, but not by the conversion of arable land into pasture (*Warrick v. Queen's College*, 6 Ch. 730; *Robertson v. Harropt*, 43 Ch. D. 517).

Common ap-
purtenant.

Common of pasture appurtenant, though frequently confounded with common appendant, differs from it in many circumstances. It may be created by grant or prescription. It may be claimed as annexed to any kind of land, whereas common appendant can only be claimed on account of ancient arable land (4 Rep. 37 a). And it may be not only for beasts usually commonable, such as horses, oxen and sheep, but likewise for goats, swine, &c. (1 Roll. Abr. 399); but not for geese, where they had no connection with the land (*Morley v. Clifford*, 20 Ch. D. 753). A fold course is a right of common appurtenant of pasture for sheep (*Robinson v. Duleep Singh*, 11 Ch. D. 798). Common appurtenant for a fractional part of a cow was claimed in *Nicholls v. Chapman* (5 H. & N. 643). In the case of common appurtenant there must be some connection between the occupation of the lands in respect of which the right is enjoyed, and the right itself, which connection must limit the right (*Baylis v. Tyssen-Amhurst*, 6 Ch. D. 500). A copyholder cannot lawfully claim common appurtenant without stint in respect of his copyhold tenement; but such common must be limited to the cattle levant and couchant on the tenement to which it is annexed, or the number must be ascertained by the court rolls, or in some other manner (*Morley v. Clifford*, 20 Ch. D. 753; see *Benson v. Chester*, 8 T. R. 396; *Scholes v. Hargraves*, 5 T. R. 46). A person may claim common appurtenant for a certain number of cattle, in which case the cattle of a stranger may be put upon the common, as no injury can arise to the owner of the soil as the number is ascertained (Bac. Abr. 96; *Richard v. Squibb*, 1 Ld. Raym. 726; see *Stevens v. Austin*, 2 Mod. 185; *Thornel v. Lassels*, Cro. Jac. 27). The principle furnished by *Potter v. North* (1 Wms. Saund. 635; *Hoskins v. Robins*, 2 Wms. Saund. 726), as to claims to common by custom or prescription, seems to be to ascertain the extent of the rights conferred, and the rights reserved, by the grant, and to see whether the act be in derogation of the latter (*Jones v. Richard*, 6 Ad. & Ell. 530; see 5 *Ib.* 413). If the common appurtenant be for an uncertain number of cattle, it is limited to the claimant's own commonable cattle levant and couchant upon his lands (see *Manchester v. Vale*, 1 Wms. Saund. 28, ed. 1871; and see further, as to common appurtenant for cattle levant and couchant, *Bowen v. Jenkins*, 6 Ad. & Ell. 911). A right of common appurtenant for cattle levant and couchant is not extinguished or suspended by reason of a change in the condition of the tenement, if the tenement might still easily be turned to the purpose of feeding cattle (*Carr v. Lambert*, L. R. 1 Exch. 168). After the extinction of a prescriptive right of common by a unity of possession of the waste with the land in respect of which the right is claimed, proof that the successive tenants of such lands for above fifty years under different lords had actually enjoyed the right of common is evidence for presuming a new grant from the lord (*Cowlam v. Slack*, 15 East, 108). As to the evidence in support of a claim to common appurtenant, see *Commrs. of Sewers v. Glasse*, 19 Eq. 150; and as to the proper mode of pleading a prescriptive right to common appurtenant, see *Baylis v. Tyssen-Amhurst*, 6 Ch. D. 500.

Apportion-
ment of
common.

If a man purchase part of the land wherein common appendant is to be had, the common shall be apportioned, because it is of common right, but it is otherwise as to common appurtenant and other kinds of common, as common of estovers or piscary. But both common appendant and common appurtenant will be apportioned on alienation of part of the land to which the common is appendant or appurtenant (Co. Litt. 122 a, 164 a; *Tyringham's case*, 4 Rep. 36; *Wild's case*, 8 Rep. 78; *O'Hare v. Fahy*, 10 Ir. C. L. R. 318).

The rent-charges under the acts for the commutation of tithes in England and Wales, in respect of the tithes of common appendant or appurtenant, are

to be charged on the allotments thereafter to be made in respect of the lands to which the right of common is attached (Tithe Act, 1839, s. 14).¹

**Rights of
Common.**

Common in gross is such a right of common as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. It is a separate inheritance, entirely distinct from landed property, and may be vested in one who has no land in the manor (Co. Litt. 122 a; 2 Bl. Comm. 34). Common appurtenant for a certain number of cattle may be converted into common in gross (*Drury v. Kent*, Cro. Jac. 14; *Bunn v. Channen*, 5 Taunt. 244). So a common appurtenant to a manor may be granted in gross (1 Roll. Abr. 402, pl. 3; *Day v. Spooner*, Cro. Car. 432; Sir W. Jones, 375; 2 Wms. Saund. 727, n.). A right of common in gross *sans nombre*, in the latitude in which it was formerly understood, cannot exist (*Mellor v. Spateman*, 1 Wms. Saund. 622; 1 Ld. Raym. 407; *Bennett v. Reeve*, Willes, 232; *Benson v. Chester*, 8 T. R. 396), and it can have no rational meaning but in contradistinction to stinted common, where a man has a right only to put on a particular number of cattle (*Bennett v. Reeve*, Willes, 232). A right of common in gross does not confer a vote for the coroner of a county (*R. v. Day*, 3 Ell. & Bl. 859).

Common in
gross.

A corporation may prescribe for common in gross for cattle levant and couchant within the town, but not for common in gross *sans nombre* (*Mellor v. Spateman*, 1 Wms. Saund. 629; *Clarkson v. Woodhouse*, 5 T. R. 412, n.; *Johnson v. Barnes*, L. R. 8 C. P. 527). Where all freemen inhabiting an ancient borough claimed right of common, and 5 & 6 Will. 4, c. 76, extended the limits of the borough, the right of common was reserved to those who resided within the old limits (*Beadsworth v. Torkington*, 1 Q. B. 782; *Hulls v. Estcourt*, 2 New Rep. 131). See a plea of common by a burgess under a grant to a corporation, *Parry v. Thomas*, 5 Exch. 37.

The Tithe Act, 1839, s. 13, provides the mode in which Lammas lands and a right of common in gross are to be charged with rent-charges, in lieu of tithes, under the acts for the commutation of tithes.

Common because of vicinage or neighbourhood, is not strictly a right of common. It happens where the inhabitants of two townships which lie contiguous to each other have usually intercommoned with each other, the beasts of the one straying mutually into the other's fields without any molestation from either. It is confined to two townships (*Commrs. of Sewers v. Glasse*, 19 Eq. 160), and if you have three vills, each of which has a common, A., B. and C., and vill B. lies between A. and C., B. may intercommon with A. or C., but A. cannot intercommon with C. (*Ib.*). It is only a permissive right, intended to excuse what, in strictness, is a trespass in both, and to prevent a multiplicity of suits (*Musgrove v. Cave*, Willes, 322; *Wells v. Percy*, 1 Bing. N. C. 556; *Gullett v. Lopes*, 13 East, 348). And therefore either township may inclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally into the other's common; but if they escape and stray thither of themselves, the law winks at the trespass (Co. Litt. 121, 122; 4 Rep. 38; 2 Bl. Comm. 33). Where an individual claimed a right to participate in this kind of common it was said that although it may be claimed by prescription, it is rather matter of immemorial custom. The substance of the custom is, that cattle lawfully on one common have been used to stray upon the other. All that it is necessary therefore for the pleadings to show is, that the cattle were lawfully on their own common before they strayed, and that is done by showing thirty years' user under the Prescription Act, 1832 (*Prichard v. Powell*, 10 Q. B. 603; see *Hetherington v. Vane*, 4 B. & Ald. 428; and as to pleading, see *Morewood v. Wood*, 14 East, 327). Reputation may be given in evidence in support of the immemorial right of such common so pleaded (*Prichard v. Powell*, *sup.*). Common *pur cause de vicinage* cannot be set up as an excuse for cattle rambling from downs subject to common of pasture into downs of which the owner has exclusive possession, notwithstanding there be no fence separating the downs (*Heath v. Elliot*, 4 Bing. N. C. 388). This common cannot be claimed by

Common
because of
vicinage.

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usage between the close of an individual and a common (*Clarke v. Tinker*, 10 Q. B. 604). Nor can it be claimed by custom in respect of a private estate over which no other right of common is shown (*Jones v. Robin*, 10 Q. B. 620).

To establish a right of common *pur cause de vicinage* an intercommoning between the two districts must be alleged and proved. It is not enough to show that there was no fence between the two districts, and that cattle strayed from one to the other, but were constantly either driven back by their own respective owners, or turned off by the owners of the land into which they had strayed (*Clarke v. Tinker*, 10 Q. B. 604).

Where the commons of two towns adjoin, and a right of common by reason of vicinage exists, and in one town there are fifty acres of common and in the other town one hundred acres of common, the commoners in the first town cannot put more cattle upon the entire common than the common of fifty acres will feed (*Corbet's case*, 7 Rep. 5 a; *Commrs. of Sewers v. Glasse*, 19 Eq. 161). Where common *pur cause de vicinage* exists one commoner cannot take the law into his own hands and distrain another commoner's cattle for a surcharge (*Cape v. Scott*, L. R. 9 Q. B. 269).

An end may be put to this species of common by inclosure (*Tyringham's case*, 4 Rep. 36 b, 38 b, 39 a; *Corbet's case*, 7 Rep. 5 a). Where one common is inclosed leaving open a passage for a highway, so that cattle could stray from one to the other by means of the highway, the common by vicinage still continues (*Gullett v. Lopes*, 13 East, 348). In case of open field lands, the owner of any particular spot may, by custom, exclude the other from right of pasture there, by inclosing his own land (2 Wils. 269). When there is a common *pur cause de vicinage* between two wastes, and one of them is under a private act conveyed to allottees, for the purpose of being inclosed, and the commissioners extinguish all rights of common on such one waste, these proceedings do not of themselves put an end to the common *pur cause de vicinage* (*Clarke v. Tinker*, 10 Q. B. 604; *Wells v. Pearcey*, 1 Bing. N. R. 556).

What rights of pasture may be prescribed for.

Apart from common of pasture there should be mentioned certain rights of pasture which may be prescribed for. Thus a party may prescribe to take the sole and several herbage (Co. Litt. 122; *Hoskins v. Robins*, 2 Wms. Saund. 726; *Potter v. North*, 1 Vent. 385; *Welcome v. Upton*, 6 M. & W. 543; see *North v. Cox*, 1 Lev. 253; *Johnson v. Barnes*, L. R. 8 C. P. 527). Instances of sole pasturage are to be found in the South Downs, in Sussex, and they are frequently transferred in gross; it is the same with the cattle-gates in the North of England, although some have thought the owners of them are tenants in common of the soil (*Welcome v. Upton*, 6 M. & W. 541, 542; *R. v. Whitley*, 1 T. R. 137). The grant of *vesturam terræ* or *herbagium terræ* does not pass the land or soil itself (Co. Litt. 4 b). A cattle-gate is not a more extensive right than the above, and does not include the right to the soil (*Rigg v. Lonsdale*, 1 H. & N. 923, 936; see *Robinson v. Wray*, L. R. 1 C. P. 490). A person may prescribe to have the sole and several pasture, vesture or herbage, in exclusion of the owner of the soil, for a limited time in every year (Fitz. Prescription, 51; Co. Litt. 122 a; 2 Roll. Abr. 267 (L.) pl. 6; Winch's Rep. 5; Hutt. 45; *Johnson v. Barnes*, L. R. 8 C. P. 527); or for the whole year (*Hoskins v. Robins*, 2 Wms. Saund. 726; *S. C.*, 2 Lev. 2; Pollexf. 13; 1 Mod. 74). But a man cannot prescribe to have common *eo nomine* for the whole year, in exclusion of the lord, for this is held to be repugnant to the nature of the thing (Co. Litt. 122 a; 1 Roll. Abr. 396 (A.), pl. 1, 2; 2 Roll. Abr. 267, pl. 3; 2 Lev. 268; 1 Ventr. 395). However, it is said that the lord may by custom be restrained to a qualified right of common during a part of the year (Yelv. 129; 1 Brownl. 187; Cro. Jac. 208, 257). So it is said the lord may be restrained, together with the commoners, from using a common at all during a part of the year (1 Roll. Abr. 405, 406); and that the commoners may have common in exclusion of the lord for part of a year (2 Roll. Abr. 267 (L.), pl. 1; 1 Wms. Saund. 353, n. (2)), or in part of the common (*De la Warr v. Miles*, 17 Ch. Div. 587). The claim in right of a freehold estate and the lands which formerly belonged

to the manor farm, of a separate right of feeding and folding an unlimited number of sheep, is not a claim of a right of common, but of something in the nature of a separate right of feeding and folding (*Keilway*, 198 a; *Punsany and Leader's case*, 1 Leon. 11), which may have arisen out of an exception made by the lord upon granting the lands, or it may have been created by an act of parliament (*Ivatt v. Mann*, 3 M. & G. 699).

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Common.

(3)

Common of turbary is a right to dig turf upon another's land, or upon the lord's waste. This kind of common can only be appurtenant to a house, not to land; for turves are to be burnt in a house; nor can it extend to a right to dig turf for sale (*Valentine v. Penny*, Noy, 145; see *Hayward v. Cannington*, 1 Lev. 231; 1 Sid. 354). An ancient right of turbary can only exist as being a right in respect of an ancient dwelling-house or building, or at the most, for the house which supplies the place of that house (*Warrick v. Queen's College*, 6 Ch. 730). In an action of trespass the user of this right of common was held to extend to all parts of a common fit for the production of fuel, but not to a rock (*Peardon v. Underhill*, 16 Q. B. 120). A custom for all the customary tenants of a manor, having gardens, to dig turf for making grass plots, at all times of the year, and as often and in such quantity as occasion required, is bad, as being indefinite and destructive of the common (*Wilson v. Willes*, 7 East, 121, recognized in *Salisbury v. Gladstone*, 9 H. L. C. 692; see *Peppin v. Shakespear*, 6 T. R. 748). Common of turbary, appurtenant to a house, will pass by a grant or demise of such house with the appurtenances (*Solme v. Bullock*, 3 Lev. 165; *Dobbyn v. Somers*, 13 Ir. C. L. R. 293). There is nothing in law to prevent a party dealing with his own land and demising it, from annexing to the land or granting to the lessee a right to take turbary upon other lands of the landlord, to be consumed upon houses to be subsequently built upon the premises (*Hill v. Barry*, Hay & J. 688; *Duggan v. Carey*, 8 Ir. C. L. R. 210). The right of turbary is apportionable (*Hargrove v. Congleton*, 12 Ir. C. L. R. 368). As to trusts of turbary right for benefit of occupiers, see *A.-G. v. Meyrick*, 1893, A. C. 1; *Simcoe v. Pethick*, 1898, 2 Q. B. 555.

(4)

Common of estovers, or *estouviers*, that is, necessities (from *estover*, to furnish), is a liberty of taking necessary wood for the use or furniture of a house or farm from off another's estate. The Saxon word *bote* is used by us as synonymous to the French *estovers*; and therefore house-bote is a sufficient allowance of wood to repair or to burn in the house; which latter is sometimes called fire-bote; plough-bote, and cart bote, are wood to be employed in making and repairing all instruments of husbandry; and hay-bote, or hedge-bote, is wood for repairing hedges or fences, as pales, stiles, and gates, to secure inclosures. These botes or estovers must be reasonable ones: and such any tenant or lessee, except a strict tenant at will, may take off the land let or demised to him without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary (Co. Litt. 41; 2 Bl. Com. 35). Every tenant for life or years has a liberty of this kind of common right in the lands which he holds unless restrained, which is usual by particular covenants or exceptions (2 Bl. Com. 282). The rule is founded on the obligation upon tenants of making necessary repairs (*De Salis v. Crossan*, 1 Ball & B. 188). Where no wood exists, and where parts of the premises demised are bog, from which no other beneficial use can arise, a tenant is in Ireland entitled to use such bog for the purposes of fuel (*Howley v. Jebb*, 8 Ir. C. L. R. 435). A person having common of estovers in a certain wood of another, by view and delivery of the owner's bailliff, by taking estovers without such view and delivery is a trespasser, though he takes less than he was entitled to (5 Rep. 25 a).

Common of estovers can only be claimed by prescription for an ancient house (F. N. B. 180; 4 Co. 86; see, however, *Arundel v. Steer*, Cro. Jac. 25); but if it be pulled down and another built, either in the same or another place, the prescription will not be lost (*Costard and Wingfield's case*, Godb. 97; *Cowper v. Andrews*, Hob. 39). Rooms may be altered or new

Common of
estovers.

Rights of
Common.

chimneys built, or additions made to the house, without the right being lost. But the estovers cannot be used in the parts newly added (*Luttrell's case*, 4 Rep. 87 a). A person having common of estovers is not entitled to estovers out of timber which the owner of the soil has cut down in part of the wood, but he must take his estovers out of the residue (*Basset v. Maynard*, Cro. Eliz. 820; *Dowglass v. Kendal*, Cro. Jac. 256). A person having common of estovers appurtenant to a house cannot grant the estovers to another, reserving the house to himself, nor grant the house to another, reserving the estovers to himself (Plowd. 381). The estovers taken must be reasonable, and limited to the wants of the tenement in respect of which a man claims them, upon which therefore they must be expended (7 E. 4, 27; 12 E. 4, 8; 8 Rep. 54); and cannot be sold to be used elsewhere (11 H. 6, 11 b; *Pembroke's case*, Clayt. 47). Where a tenant abuses his right of estovers, an injunction will be granted (*Courtoun v. Ward*, 1 Sch. & Lef. 8; see *Wilson v. Bragg*, 8 Bac. Abr. 428, Waste (O)).

Apart from common of estovers the right to estovers may be appurtenant to a messuage by prescription or grant, to be exercised in lands not occupied by the tenant of the house; as if a man grants estovers to another for the repair of a certain house, they become appurtenant to that house; so that whoever afterwards acquires it, shall have such common of estovers. This right may be claimed either by prescription or grant, but (except in the case of copyholders) it cannot be claimed by custom; for, according to a well-known rule, a custom to take profits *in alieno solo* is bad (*Gateward's case*, 6 Rep. 59; *Bean v. Bloom*, 3 Wils. 456; 2 Sir W. Black. 926; *Grimstead v. Marlowe*, 4 T. R. 717; *Selby v. Robinson*, 2 T. R. 758; *Hoskins v. Robins*, 1 Vent. 123—163; 2 Saund. 320). And special rights in respect of wood may be acquired by prescription. Thus the owner of a house established by prescription the right to take for use in the house all thorns growing upon another's land (*Dowglass v. Kendal*, Cro. Jac. 256). But, if claimed as appurtenant to land, such a right must have connection with the enjoyment of the land. And where a right to cut all the wood on another's land and to dispose of it as the claimant pleased was claimed as appurtenant, the claim was bad (*Bailey v. Stevens*, 12 C. B. N. S. 91; 31 L. J. C. P. 226).

As analogous to estovers there should be mentioned the rights of commoners to cut furze, etc. (*Smith v. Brownlow*, 9 Eq. 241; *Warrick v. Queen's College*, 6 Ch. 716); also the right of the inhabitants of a parish to lop for fuel the branches of trees growing on the waste, which right may exist by virtue of a Crown grant (*Willingale v. Maitland*, 3 Eq. 103; *Rivers v. Adams*, 3 Ex. D. 361; *Chilton v. London*, 7 Ch. D. 735).

(5)
Common of
piscary.

A *common of fishery* is a right of fishing in common with other persons in a stream or river, the soil whereof belongs to a third person. This does not differ in any respect from any other right of common (Salk. 637); and trespass will not lie for an injury to it. Common of fishery may be claimed by copyhold tenants by custom (*Tilbury v. Silva*, 45 Ch. Div. 115). The right cannot be claimed by "inhabitants" (*Bland v. Lipscombe*, 24 L. J. Q. B. 155 n.; *Lloyd v. Jones*, 6 C. B. 81); nor by "dwellers" in a manor (*Allgood v. Gibson*, 34 L. T. 883); the ground being that, independently of manorial rights, a fishery *in alieno solo*, which is a profit *à prendre*, must be claimed not by custom but by prescription (*Bland v. Lipscombe*, *sup.*); and a large and indefinite class cannot prescribe (*Tilbury v. Silva*, *sup.*).

Different
kinds of
fishery.

As to the various kinds of fisheries, the only substantial distinction is between an exclusive right of fishery usually called "several," sometimes "free," used as in "free warren"; and a right in common with others usually called common of fishery, sometimes "free," used as in "free port" (*Per Willes, J., Malcolmson v. O'Dea*, 10 H. L. C. 593). A grant of a "free fishery" is *prima facie* a grant of non-exclusive fishery (*Bloomfield v. Johnston*, 1 R. 8 C. L. 68). A "common fishery," as distinguished from a "common of fishery," means a fishery extending to all mankind, as in the sea (*Benett v. Costar*, 8 Taunt. 186).

Several
fishery.

A several fishery is when a person has an exclusive right of fishery either

in his own soil or in the soil of another (1 Selw. N. P. 751, 13th ed.) within particular limits (3 Salk. 360; 2 Salk. 637; see Co. Litt. 122 a, n. 7; *R. v. Ellis*, 1 M. & S. 652). Such a right is, strictly speaking, the proper subject of a grant, but not of an exception or reservation (*Doe v. Loch*, 2 Ad. & El. 743; *Wickham v. Hawker*, 7 M. & W. 76; *Corker v. Payne*, 18 W. R. 436; see *Hamilton v. Musgrave*, 19 W. R. 443; *Grove v. Portal*, 1902, 1 Ch. 727). The word "several" is not necessary to create such a right (*Hanbury v. Jenkins*, 1901, 2 Ch. 401). A grant of the exclusive right of fishing includes the right to take away fish (*Fitzgerald v. Firbank*, 1897, 2 Ch. 96).

A several fishery cannot be appurtenant to a several pasture (*Edgar v. Fishery Commissioners*, 23 L. T. 732). But a several fishery may be appurtenant to a manor (*Rogers v. Allen*, 1 Camp. 309). And in such a case will remain in gross if the lands of the manor are conveyed away (*Neill v. Devonshire*, 8 App. Cas. 153, 169; *Devonshire v. Pattinson*, 20 Q. B. Div. 263), unless the intention to transfer the fishery appear in the conveyance (*Tilbury v. Silva*, 45 Ch. Div. 98). A perfect paper title to a several fishery may not be absolutely conclusive if there be evidence of user by others inconsistent therewith (*Blount v. Layard*, 1891, 2 Ch. 681, n.; *Neill v. Devonshire*, *sup.*; *Smith v. Andrews*, 1891, 2 Ch. 678). A several fishery may have annexed to it a right of way (*Hanbury v. Jenkins*, 1901, 2 Ch. 401), and such a fishery, whether in tidal or non-tidal waters, may exist independently of riparian ownership, and that whether the owner of the fishery be the owner of the soil of the river (*Neill v. Devonshire*, 8 App. Cas. 153; *Devonshire v. Pattinson*, *sup.*; *Smith v. Andrews*, 1891, 2 Ch. 697; *Hanbury v. Jenkins*, 1901, 2 Ch. 401), or not (*A.-G. v. Emerson*, 1891, A. C. 654; *Miller v. Little*, 4 L. R. Ir. 302; *Foster v. Wright*, 4 C. P. D. 449). The owner of a several fishery is entitled (as an incident to the right) to do all things necessary for exercising the right (*Caldwell v. Kilkelly*, 1905, 1 I. R. 434), and may take away fish (*Fitzgerald v. Firbank*, 1897, 2 Ch. 96). A several fishery may be followed where the water gradually shifts its course (*Foster v. Wright*, 4 C. P. D. 438; see *Miller v. Little*, 4 L. R. Ir. 302; *Hindson v. Ashby*, 1896, 2 Ch. 1); but not where it leaves the old course and commences to follow a new course which was always distinguishable from the old (*Carlisle v. Graham*, L. R. 4 Ex. 361). As to whether the right to a several fishery can be lost by abandonment, see *Neill v. Devonshire*, 8 App. Cas. 154, 170.

A claim to a fishery in gross is not within the Prescription Act (*Shuttleworth v. Le Fleming*, 19 C. B. N. S. 687; 34 L. J. C. P. 309).

In addition to the above distinction between common of fishery and a several fishery, it is important to bear in mind the distinction between (1) non-tidal waters (which include that part of a river in which the water is not salt, and in ordinary tides is unaffected by tidal influence, *Reece v. Miller*, 8 Q. B. D. 626); and (2) tidal waters.

Distinction
between
fisheries in
non-tidal, and
tidal, waters :
non-tidal
waters ;

In the case of a non-tidal river the presumption is that each riparian owner is entitled to a several fishery in the river in front of his land *ad medium filum* (*Blount v. Layard*, 1891, 2 Ch. 689, n. *Zetland v. Glover*, L. R. 2 H. L. Sc. 70; see *Beauman v. Kinsella*, 8 Ir. Ch. 291). This is so even in the case of a navigable non-tidal river or "king's stream" (*Ib.*); or of a river flowing through a manor (*Lamb v. Newbiggin*, 1 C. & K. 549). But the several fishery of a riparian owner may extend over the whole stream (*Blount v. Layard*, 1891, 2 Ch. 688). As to fishery in a lake, see *Bristow v. Cormican*, 3 App. Cas. 641; *Marshall v. Ulleswater Co.*, 3 B. & S. 732; *Johnson v. Bloomfield*, L. R. 8 C. L. 68; *Blackett v. Clayton*, quoted 1897, 2 Ch. 564. In non-tidal waters, an individual may acquire a title by prescription to a several fishery (Co. Litt. 122 a; Ventr. 391; see 2 Saund. 326; *Peers v. Lacy*, 4 Mod. 362); which when prescribed for as annexed to land cannot be without stint (*Chesterfield v. Harris*, 1908, 2 Ch. 397). An individual can also acquire a prescriptive title to a fishing weir (*Rolle v. Whyte*, L. R. 3 Q. B. 286; *Leconfield v. Lonsdale*, L. R. 5 C. P. 657; see *Barker v. Faulkner*, 1898, W. N. 69; *Hanbury v. Jenkins*, 1901, 2 Ch. 401).

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Common.

The owner of a several fishery in non-tidal waters can obtain an injunction restraining pollution (*Fitzgerald v. Firbank*, 1897, 2 Ch. 96), or the abstraction of water (*Pirie v. Kintore*, 1906, A. C. 478). It is doubtful whether the Crown can grant an exclusive right of fishing in a non-tidal river flowing over the soil of a subject (*Devonshire v. Pattinson*, 20 Q. B. Div. 263). The public cannot have a right to fish in non-tidal waters founded on custom, prescription, or lost grant (*Smith v. Andrews*, 1891, 2 Ch. 699, and cases there quoted; *Blount v. Layard*, *ib.* 689, n.).

tidal waters.

In tidal waters (whether sea or river), the right of fishing is *prima facie* in the public (*Neill v. Devonshire*, 8 App. Cas. 177; *Malcolmson v. O'Dea*, 10 H. L. C. 618). This public right includes the right to fish for shell fish (as oysters), as well as floating fish (*Bagot v. Orr*, 2 Bos. & P. 472; *Saltash v. Goodman*, 7 Q. B. Div. 116); but not the right to appropriate foreshore for storing oysters (*Truro v. Rowe*, 1902, 2 K. B. 709). The right to create a several fishery in tidal waters existed in the Crown before Magna Charta, and a several fishery so created could lawfully afterwards be made the subject of a grant by the Crown to an individual (*Malcolmson v. O'Dea*, *sup.*; see *Neill v. Devonshire*, 8 App. Cas. 135). And when the Crown acquired the right to such a fishery by merger since Magna Charta it could re-grant it (*Northumberland v. Houghton*, L. R. 5 Ex. 127). Long exclusive enjoyment alone may be ground for presuming the grant of such a fishery (*Edgar v. Fishery Commissioners*, 23 L. T. 732; *Mannall v. Fisher*, 5 C. B. N. S. 856; *Little v. Wingfield*, 8 Ir. C. L. R. 279; *Beaman v. Kinsella*, *ib.* 291). So a several fishery in tidal waters has been presumed to have been granted to a corporation subject to a trust (in the nature of a charitable trust) in favour of inhabitants, authorizing them to dredge for oysters within a certain period annually (*Goodman v. Saltash*, 7 App. Cas. 633). A several fishery was held to have been granted to a corporation in trust for the members thereof (*Re Free Fishermen of Faversham*, 36 Ch. Div. 329). An individual may claim a several fishery in an arm of the sea by prescription (*Oxford v. Richardson*, 4 T. R. 437; see *Ward v. Cresswell*, Willes, 265; *Crichton v. Coltery*, 19 W. R. 107; *R. v. Downing*, 11 Cox C. C. 584). A several fishery in the sea was held to be vested in the lord of the manor who also had the soil of the foreshore vested in him (*Foster v. Warblington*, 1906, 1 K. B. 659). A grant of foreshore would not of itself convey the right to a several fishery over it (*A.-G. v. Emerson*, 1891, A. C. 654). There may be a several fishery for oysters, the right to take floating fish remaining in the public (*Rogers v. Allen*, 1 Camp. 23); and, independently of a several fishery, there may be a right to have on the foreshore oyster beds or oyster layings (*Foster v. Warblington*, 1906, 1 K. B. 680). The owner of a several fishery over the foreshore, whether owner of the soil or not, can restrain the reclamation of part of the foreshore (*Bridges v. Hinton*, 11 L. T. 653).

Ownership of
soil in rela-
tion to
fishing.

As to the relation of the ownership of a fishery to the ownership of the soil of the bed, it is settled that the owner of a several fishery must be presumed to be the owner of the soil, whether the fishery is in tidal waters (*A.-G. v. Emerson*, 1891, A. C. 649); or in a non-tidal river (*Holford v. Bailey*, 13 Q. B. 426; *Hanbury v. Jenkins*, 1901, 2 Ch. 401; *Palmer v. Thames Conservators*, 1902, 1 Ch. 163); or in a lake (*Marshall v. Ulleswater Co.*, 3 B. & S. 732). The ownership is a limited one, in support and for the purposes of the fishery (*Hindson v. Ashby*, 1896, 2 Ch. 19). The terms of the grant of the fishery may rebut this presumption (*Somerset v. Fogwell*, 5 B. & C. 886; see *Bloomfield v. Johnson*, 1 R. 8 C. L. 95, 106; *A.-G. v. Emerson*, 1891, A. C. 655). In the case of a grant of a "free fishery," *i.e.* a non-exclusive right, the presumption is that the soil does not pass (*Bloomfield v. Johnson*, *sup.*). Where the waste of a manor is bounded by a river, and there is evidence of the exercise of rights of common (*e.g.*, fishing) over the bed, the bed *ad medium filum* forms part of the waste (*Tilbury v. Silva*, 45 Ch. D. 110). But it is not part of the waste, where the commoners' rights do not extend beyond the water's edge, and the bed is enjoyed as a separate tenement (*Ecroyd v. Coulthard*, 1898, 2 Ch. 368). For the ordinary rules as to the ownership of the soil below water, see *post*,

p. 91. And as to when the rights of lords of manors depend upon the ownership of the soil, see *Grand Union Canal Co. v. Ashby*, 6 H. & N. 394; *Clarke v. Mercer*, 1 F. & F. 492.

As to weirs, see *Weld v. Hornby*, 7 East, 195; *Hanbury v. Jenkins*, 1901, 2 Ch. 401; *Barker v. Faulkner*, 1898, W. N. 69.

As to the relief in equity in the case of common of fishery, see *post*, p. 52.

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Customs have been established entitling copyholders for the use of their tenements to take from the waste of the manor sand, gravel (*Peppin v. Shakespear*, 6 T. R. 748; *Duberley v. Page*, 2 T. R. 391), coal (*Portland v. Hill*, 2 Eq. 765), loam (*Robertson v. Hartopp*, 43 Ch. Div. 514), and stone (*Heath v. Dane*, 1905, 2 Ch. 86). Compare the customs established for copyholders to take clay, &c., without limit from their copyhold tenements (*Salisbury v. Gladstone*, 9 H. L. C. 692; *Hanmer v. Chance*, 4 D. J. & S. 626).

(6)
Customs to
take sand,
gravel, &c.

In connection with the above customs giving copyholders mineral rights in the lord's waste there should be mentioned the customs as to the lord's own rights. Thus a custom for the lord of a manor to enter on the waste and to dig through the same for the purpose of working the quarries below was held good (*Rogers v. Taylor*, 1 H. & N. 706; 26 L. J. Ex. 203). So, also, the custom for the lord to enter on copyhold tenements for purpose of mining proved to exist in the Isle of Man (*Ballacorkish Co. v. Harrison*, L. R. 5 P. C. 49). An alleged custom for the lord of a manor to work mines under any parcel of the manor so as to let down the surface, without making compensation, was held bad (*Hilton v. Granville*, 5 Q. B. 701; Cr. & Ph. 283; a decision criticised unfavourably in *Blackett v. Bradley*, 1 B. & S. 140; and in *Buccleuch v. Wakefield*, L. R. 4 H. L. 410; but approved in *Bell v. Love*, 10 Q. B. Div. 561; 9 App. Cas. 286; see *Hayles v. Pease*, 1899, 1 Ch. 567; *Bishop Auckland v. Butterknowle*, 1904, 2 Ch. 419; 1906, A. C. 305). A similar custom where the lord was required to pay compensation would be good (*Aspden v. Seddon*, 1 Ex. Div. 510). And possibly a similar custom where it was confined to the waste (*Gill v. Dickinson*, 5 Q. B. Div. 159).

As to taking materials for repairing highways from wastes or commons, see Highway Act, 1835, s. 51; Commons Act, 1876, s. 20; *Rylatt v. Marfleet*, 14 M. & W. 233; *Hayes Conservators v. Bromley Council*, 1897, 1 Q. B. 321.

The interest which a commoner has in the common is, in the legal phrase, Interest of to eat the grass with the mouths of his cattle. He must not meddle at all the with the soil, nor with its fruit and produce, even though it may eventually improve and meliorate the common (1 Roll. Abr. 406, pl. 10; 12 H. 8, 2 a; *Harcourt's case*). Therefore he cannot cut the grass, wood, bushes, fern, or other thing, growing on the common; nor can he cut the molehills, or make fishponds there (12 H. 8, 2 a; *per Brooke, J.*, 2 Leon. 202; Gobd. 182, pl. 258; *Anon.*, Bridg. 10; *Samborn v. Harilo*, 2 Bul. 116; *Carrill v. Pack*, 1 Sid. 251). But in special cases there may be special rights. Thus there may be a custom for commoners to take rabbits on the waste (*Coote v. Ford*, 83 L. T. 482). Again in the case of forests, there may exist either by custom or Prescriptive prescription a right of common of pannage; in other words, a right exercisable rights over in common with others by an owner of land who keeps pigs to take his pigs the waste. into the forest to eat acorns fallen on the ground (*Chilton v. London*, 7 Ch. D. 562). So, again, a prescriptive right of cutting in a forest litter for the use of a copyhold tenement in an adjoining manor was established by the owner of that tenement as being exercisable by him in common with others (*De La Warr v. Miles*, 17 Ch. D. 535). And see the special prescriptive rights of pasture referred to, *ante*, p. 42, and the special prescriptive rights of cutting wood referred to at p. 44.

(8)

Primâ facie the lord of the manor is entitled to all waste lands within Presumption the manor; and it is not essential that the lord should show acts of that waste

Rights of Common.

land belongs to lord of manor.

ownership of such lands; evidence that the public have been used to throw rubbish on waste land is rather evidence that it belongs to the lord (*Doe v. Williams*, 7 C. & P. 332). A right to the waste may, however, be established against the lord by repeated acts of ownership, as by cutting trees, digging turf, and the like (*Tyrwhitt v. Wynne*, 2 B. & Ald. 554; *Barnes v. Mawson*, 1 M. & S. 77; *Richards v. Peake*, 2 B. & C. 918). The lord may take gravel and loam from the waste, provided he does not infringe the commoners' rights (*Hall v. Byron*, 4 Ch. D. 667; see *Bateson v. Green*, 5 T. R. 411; *Folkard v. Hemmitt*, 5 T. R. 417; *Hilton v. Granville*, 5 Q. B. 730). The onus of showing that such rights are interfered with lies on the commoner (*Hall v. Byron*, 4 Ch. D. 680; *Robertson v. Hartopp*, 43 Ch. D. 501). The tenants of demesne lands may have quasi rights of pasture over the waste (*Musgrave v. Inclosure Comm.*, L. R. 9 Q. B. 175).

Grants by the lord.

The lord may, with the consent of the homage, grant part of the soil for building, if he has immemorially exercised such right (*Folkard v. Hemmitt*, 5 T. R. 417). In like manner there may be a valid custom for the lord with the assent of the homage to grant parcels of the waste to be holden by copy of court roll, and for the grantees to inclose the same, and to hold them in severalty against the commoners (*Boulcott v. Winmill*, 2 Camp. 261; see *Northwich v. Stanway*, 3 Bos. & P. 346; *Lascelles v. Onslow*, 2 Q. B. D. 433), even where a sufficiency of common is not left (*Ramsey v. Cruddas*, 1893, 1 Q. B. 228). The consent of the majority of the homage is sufficient (*Id.*). But without a custom for the purpose, the lord cannot make a new grant of copyhold (*R. v. Horncchurch*, 2 B. & Ald. 189; *R. v. Wilby*, 2 M. & S. 504). The consent of the Board of Agriculture and Fisheries is necessary for a new grant of copyhold (Copyhold Act, 1894, s. 81), and also the consent of the homage when such is the custom (sect. 83). A custom for the lord to grant leases of the waste of the manor without restriction is bad in point of law (*Badger v. Ford*, 3 B. & Ald. 153). A custom to inclose (even as against a common right of turbary), leaving sufficiency of common, is good; but the onus of proving that a sufficiency is left lies on the lord (*Arlett v. Ellis*, 7 B. & C. 346; see *Rogers v. Wynne*, 7 D. & R. 521; *Betts v. Thompson*, 6 Ch. 732; *Robertson v. Hartopp*, 43 Ch. D. 501). It seems that the lord may license training of horses on the waste so long as it does not injure the right of pasture (*Coote v. Ford*, 83 L. T. 483).

Presumption as to encroachments on the waste.

Where a copyholder encroaches on the waste, *Fry, J.*, laid down that the encroachment becomes (at any rate where the lord may by custom grant the waste as copyhold) a copyhold accretion to the previous holding (*A.-G. v. Tomline*, 5 Ch. D. 750; see *Doe v. Tidbury*, 14 C. B. 324, and the judgment of *Campbell, C.J.*, *Andrews v. Hailes*, 2 E. & B. 353; 22 L. J. Q. B. 409; compare *Whitmore v. Humphries*, 7 C. P. 1, where the encroachment on the waste was made by a lessee holding adjoining waste under a lease from the lord; and see the presumption as to a tenant's encroachment stated in the note to sect. 2 of the R. P. Lim. Act, 1833, *post*). In the C. A. it was doubted whether under any circumstances an encroachment could become copyhold (*A.-G. v. Tomline*, 15 Ch. D. 160).

Right to approve.

By the Statute of Merton (20 Hen. 3, c. 4), and by subsequent statutes (29 Geo. 2, c. 36, and 31 Geo. 2, c. 41), the lord of a manor may inclose so much of the common as he pleases, for tillage, or wood ground, provided he leaves common sufficient for those entitled to rights of common. But the consent of the Board of Agriculture and Fisheries is now necessary (56 & 57 Vict. c. 57). This inclosure, when justifiable, is called in law "approving," an ancient expression signifying the same as "improving" (2 Bl. Com. 34). The statutory right to approve applies as against common appurtenant of pasture (*Robinson v. Duleep Singh*, 11 Ch. D. 798); but there can be no improvement against tenants of a manor who have a right to dig gravel on the waste, and to take estovers (*Duberley v. Page*, 2 T. R. 391; *Grant v. Gunner*, 1 Taunt. 435; *Shakespeare v. Peppin*, 6 T. R. 741). The statute does not authorize the lord to approve as against common of turbary or

estovers; but such a right may exist by custom (*Lascelles v. Onslow*, 2 Q. B. D. 451; *Clarkson v. Woodhouse*, 5 T. R. 412, n.; *Bateson v. Green*, 5 T. R. 411; *Place v. Jackson*, 4 D. & R. 318; 2 Atk. 189). There can be no inclosure under 29 Geo. 2, c. 36, as against persons entitled to the under-wood on the waste (*Nicholls v. Mitford*, 20 Ch. D. 380). A custom for tenants to approve by the lord's consent, and by presentment of the homage of the court baron, does not restrain the lord's right to approve (*Duberley v. Page*, 2 T. R. 392, n.).

An owner *pur autre vie* of a common may approve under the statute (*Patrick v. Stubbs*, 9 M. & W. 830). A person seized in fee of part of the waste, although not lord, may approve without consent of the homage, provided he leaves a sufficiency of common for the tenants (*Glover v. Lane*, 3 T. R. 445).

Where a lord approves, there lies upon him (apart from a custom to a different effect, *Ramsey v. Cruddas*, 1893, 1 Q. B. 228) the *onus* of showing that sufficient waste is left for the commoners (*Betts v. Thompson*, 6 Ch. 732). The question of sufficiency depends, not on the average number of sheep commoners have in fact turned out, but on the number they are entitled to turn out (*Robertson v. Hartopp*, 43 Ch. Div. 484, see p. 518, where the C. A. treat as doubtful the decisions in *Lake v. Plaxton*, 10 Exch. 196; and *Lascelles v. Onslow*, 2 Q. B. D. 433).

A lord cannot under 51 Geo. 3, c. 115, grant waste for a burial ground, discharged from a customary right of recreation (*Forbes v. Eccl. Commrs.*, 15 Eq. 5).

(9)

The greater part of the commons in England have been inclosed under local acts of parliament. The Inclosure (Consolidation) Act, 1801, con-

solidated provisions which had usually been inserted in acts of inclosure, and facilitated the proofs usually required on the passing of such acts. The 1 & 2 Geo. 4, c. 23, amended the law of inclosure. The 3 & 4 Will. 4, c. 87, remedied defects in titles to real property allotted under inclosure acts. Further facilities for inclosure were given by stat. 6 & 7 Will. 4, c. 115; 3 & 4 Vict. c. 31. By the Inclosure Act, 1845, the superintendence of applications for inclosure and the carrying the same into operation was entrusted to commissioners, whose powers and duties are now vested in the Board of Agriculture and Fisheries (52 & 53 Vict. c. 30; 3 Ed. 7, c. 31). The act of 1845 has been amended by recent acts, and these acts are now collectively known as the Inclosure Acts, 1845 to 1882 (Short Titles Act, 1896). The rules for construing inclosure acts as regards the right to support when the ownership of minerals and surface is severed are given in *Bishop Auckland v. Butterknowle*, 1904, 2 Ch. 419; 1906, A. C. 305.

Inclosure
commis-
sioners.

Where, under an inclosure act, the waste of a manor is directed to be allotted, the freehold of the unallotted land remains in the lord (*Packe v. Mee*, 9 W. R. 335). The legal estate in land allotted under an inclosure act passed to the allottee (*Simcoe v. Pethick*, 1898, 2 Q. B. 555; see *A.-G. v. Meyrick*, 1893, A. C. 1). Where by agreement between lord and copyholders, waste lands are allotted, the allotments taken by copyholders are freehold (*Paine v. Ryder*, 24 Beav. 151; *Doe v. Davidson*, 4 M. & S. 175). Under the Inclosure Act, 1845, gavelkind lands in Kent may be exchanged for lands in Middlesex held in common socage (*Minet v. Leman*, 7 D. M. & G. 340). See further, as to inclosure, Cooke on Inclosures, 4th ed.

29 & 30 Vict. c. 122, amended and extended by 32 & 33 Vict. c. 107, provides for the improvement, protection and management of commons near the metropolis.

(10)

By the conveyance of the lands to which common either appendant or appurtenant is annexed, the right of common will pass (*Solme v. Bullock*, 3 Lev. 165; *Sacheverell v. Porter*, Cro. Car. 482; *Drury v. Kent*, Cro. Jac. 14). Where common has been extinguished by union of ownership, and a grant is made of the land, to which, before the extinguishment, the right of common was attached, and the words "appertaining" and "belonging"

By what
words a right
of common
and a will pass.

Rights of
Common.

only are used, the right will not pass. But if the words "or therewith used or enjoyed" are inserted, they would be sufficient to revive the right (*Clements v. Lambert*, 1 Taunt. 205; *Morris v. Eggington*, 3 Taunt. 24; *Barlow v. Rhodes*, 1 C. & M. 448; *Wardle v. Brocklehurst*, Ell. & Ell. 1058; *Baring v. Abingdon*, 1892, 2 Ch. 374). Now, by Conv. Act, 1881, s. 6 (*post*), a conveyance of land includes all commons appertaining or reputed to appertain to the land or any part thereof, or at the time of the conveyance demised, occupied, or enjoyed with, or reputed or known as, part or parcel of or appurtenant to the land.

The effect of an enfranchisement being to extinguish all rights annexed to the copyholder's estate as such, the right of common will not pass by the word "appurtenances" in the deed of enfranchisement (*Moore*, 667; *Cro. Jac.* 253; 2 *Ld. Raym.* 1225; *Salk.* 170, 364); but must be created by express grant (*Moore*, 667; *Cro. Eliz.* 570; see *Doidge v. Carpenter*, 6 M. & S. 49). General words in a conveyance by the lord were held not to re-create rights of common (*Hall v. Byron*, 4 Ch. D. 667). And where a lord granted demesne lands together with all commons, &c., the words did not create a right of common (*Baring v. Abingdon*, 1892, 2 Ch. 374). On the other hand, where a copyhold tenement (to which common was appurtenant), having vested in the lord by forfeiture, was granted by him as copyhold, with the appurtenances; it was entitled to common (*Badger v. Ford*, 3 B. & Ald. 153). And a copyholder, who has common in a waste *without* the manor of which his copyhold is parcel, does not lose it by enfranchisement (*Barwick v. Matthews*, 5 Taunt. 365).

Where upon an inclosure an allotment was awarded in lieu of commonable rights annexed to land (which were thereupon extinguished), a subsequent lease of the land with general words did not carry the allotment (*Williams v. Phillips*, 8 Q. B. Div. 437).

(11)
Extinguish-
ment of
common.

A right of common may be extinguished by a release, by unity of possession of the land, by severance, or by the enfranchisement of a copyhold. If the commoner releases part of the common, it will operate as an extinguishment of the whole, because the right is entire throughout the whole land, therefore a release of part is a release of the whole (*Rotherham v. Green*, *Cro. Eliz.* 593; 1 *Show.* 350; *Johnson v. Barnes*, L. R. 8 C. P. 527). Common appendant and appurtenant become extinguished by unity of possession of the land to which the right of common was annexed with the land in which the common was. But it is necessary that the party should have an estate equal in duration, quality, and other circumstances of right, in the two tenements (*R. v. Hermitage*, *Carth.* 239; *Bradshaw v. Eyr*, *Cro. Eliz.* 570; 4 *Rep.* 38 a; see *Lloyd v. Powis*, 4 El. & Bl. 485; compare the quasi rights of pasturage in *Musgrave v. Inclosure Comm.* L. R. 9 Q. B. 175). Common appendant or appurtenant for cattle levant and couchant may also be extinguished by severance. As where a person, having common of this kind annexed to a messuage or tenement, conveys the messuage or tenement, excepting the common, the common is extinguished (1 *Roll. Abr.* 401). Where a right of common is annexed to a copyhold, and the lord grants the land to the copyholder and his heirs, with the appurtenances, the common is extinguished, because it was annexed to the customary estate, which being converted into a freehold, the right of common is gone (*Marshall v. Hunter*, *Cro. Jac.* 253; *Gilb. Ten.* 224). But there may be words amounting to a re-grant of common (*Doidge v. Carpenter*, 6 M. & S. 49; see *Baring v. Abingdon*, 1892, 2 Ch. 374). Common is not extinguished on the release of seigniorial rights in the freeholds of a manor (*Baring v. Abingdon*, *sup.*; *Broome v. Wenham*, 68 L. T. 651). Equity will, under certain circumstances, decree the continuance of common, where it would be extinct at law (*Styant v. Staker*, 2 *Vern.* 250; *Comb.* 127). Commonable rights are not extinguished by enfranchisement under the Copyhold Acts (Copyhold Acts, 1841, s. 81, 1852, s. 45, and 1894, s. 22). Nor are the lord's mineral rights or sporting rights affected (Copyhold Act, 1894, s. 23). A right of common appurtenant for cattle levant and couchant

may be extinguished by alteration in the dominant tenement (*Carr v. Lambert*, L. R. 1 Ex. 168), or by cesser of the product of the waste (*Scrutton v. Stone*, 9 Times L. R. 478).

Rights of
Common.

(12)

One remedy for an injury to the right of common is abatement. It is, however, the policy of the law not to allow commoners to abate except in a few cases. The abator is a judge in his own cause, which ought seldom to be permitted, whereas an action will best ascertain the just measure of the damages. The cases where the law allows an abatement by a commoner are where the acts of the lord are contrary to the nature of the common. For by the grant of it, the grantor gives everything which is incident to the enjoyment of the grant, such as free ingress, egress, &c. Therefore, if the lord erect a fence on land surrounding the common, to exclude from the common the commoner's cattle, the commoner may abate, because it is inconsistent with the grant (2 Roll. Abr. 145, (W.) pl. 2; *Cooper v. Marshall*, 1 Burr. 259; *Sadgrove v. Kirby*, 6 T. R. 485); but only so much of the erection as to make a way for his cattle (15 Hen. 7, 10 b, pl. 18; 29 Edw. 3, 6; 2 Inst. 88; *Mason v. Caesar*, 2 Mod. 65; see 1 Wms. Saund. 651). So where a wall is erected upon the common itself, he may abate the whole erection, for it deprives him of his common, and forms no part of the soil, and by such abatement the commoner does not meddle with the soil (*Mason v. Caesar*, 2 Mod. 65; 2 Inst. 88; Litt. Rep. 38). And yet, as the lord may approve, leaving a sufficiency of common, the commoner acts at the peril of an action of trespass, provided the lord has left a sufficiency of common (*Arlett v. Ellis*, 7 B. & C. 346; 9 B. & C. 671; see *Robertson v. Hartopp*, 43 Ch. D. 496).

Remedies for
disturbance
of rights of
common:
by abate-
ment;

A commoner may pull down a house wrongfully erected upon the common, if necessary for the exercise of his right, unless persons are in it at the time (*Perry v. Fitzhove*, 8 Q. B. 757; *Jones v. Jones*, 1 H. & C. 1; see *Harvey v. Bridges*, 1 Exch. 261). And may do so even where persons are in the house at the time, after notice and request to the occupier to remove it (*Davies v. Williams*, 16 Q. B. 543; see *Lane v. Cupsey*, 1891, 3 Ch. 411). If a stranger erect a building upon land belonging to another, the owner is justified in pulling down the building, although the intruder is at the time in the building (*Barking v. Read*, 19 L. J. Q. B. 291).

If the lord plant trees on the common, and the commoner thereby cannot have his common so beneficially as he ought, he cannot cut them down, for they are part of the soil itself, being the fruit and produce of the soil, but he must bring an action (*Sadgrove v. Kirby*, 6 T. R. 483; 1 Bos. & P. 13). So if the lord's rabbits on a common increase so much that there is not a sufficiency of common left, a commoner cannot fill up the coney-burrows (*Cooper v. Marshall*, 1 Burr. 259; *S. C.*, 2 Wils. 51; 1 Roll. Abr. 405, pl. 3). Much less can a commoner kill the rabbits to prevent their increase to the prejudice of the common (*Hodson v. Grissell*, 1 Roll. Abr. 405, pl. 1, 2; Cro. Jac. 195; Yel. 104; 1 Lutw. 108; 2 Leon. 203; see 1 Wms. Saund. 651; *Robertson v. Hartopp*, 43 Ch. D. 501). As to a custom to take rabbits, see *Coote v. Ford*, 83 L. T. 482.

A commoner can distrain the cattle of a stranger (*Hall v. Harding*, by distress; 4 Burr. 2428); but he cannot distrain the cattle of another commoner, because they come on the commonable land by colour of right (*Hall v. Harding*, 4 Burr. 2426). This principle applies to common *pur cause de vicinage*, as well as to common appurtenant (*Cape v. Scott*, L. R. 9 Q. B. 269). As to the right of distress for a surcharge, see further 1 Wms. Saund. 630.

According to the practice before the Jud. Acts of the Courts of common by action; law the usual remedy for an injury to the right of common was an action for disturbance of the right, which might be maintained either against the lord or owner of the soil (*Hassard v. Cantrell*, Lutw. 101), or a stranger, or a commoner (1 Selw. N. P. 381, 13th ed.), or a company which had taken a common without first making compensation to the commoners (*Stoneham v. L. B. & S. C. R.*, L. R. 7 Q. B. 1). The plaintiff had to prove an injury;

Rights of Common.

but the smallest injury was sufficient, as that of taking away manure dropped on the common (*Pindar v. Wadsworth*, 2 East, 154; see cases cited in *Marzetti v. Williams*, 1 B. & Ad. 426; *Blofield v. Payne*, 4 B. & Ad. 410; and *Beadsworth v. Torkington*, 1 Q. B. 782). Again, if one commoner surcharged the common (that is, put more cattle into the common than he was entitled), an injured commoner might sue for a surcharge, notwithstanding himself guilty of one (*Hobson v. Todd*, 4 T. R. 71; see *Bowen v. Jenkins*, 6 Ad. & Ell. 911; *Atkinson v. Teesdale*, 2 W. Bl. 817; *Cheesman v. Hardham*, 1 B. & Ald. 706). Such a plaintiff was not obliged to show that he was exercising his right of common at the time, but only that he could not enjoy his common so beneficially as he ought (*Wells v. Watling*, 2 W. Bl. 1233).

A commoner (being as such entitled to a profit *à prendre*) has such possessory right that he can maintain an action of trespass for infringement (*Fitzgerald v. Firbank*, 1897, 2 Ch. 101). Thus an action of trespass will lie by one commoner against another for making holes in the common, and for digging and taking turves in excess of the defendant's commonable rights (*Wilkinson v. Haygarth*, 16 L. J. Q. B. 103). Where burgesses were during part of the year entitled to the exclusive possession of the surface of Blackacre (which belonged in fee to A.) and to depasture cattle thereon, A. could during that time maintain trespass against B. for digging in the subsoil, but not for riding on the surface (*Cox v. Glue*, 5 C. B. 533). As to pleading in an action of trespass against several claiming a right of common, see *Church v. Wright*, 15 C. B. N. S. 750; *Davies v. Williams*, 16 Q. B. 543.

actions in
Chancery
Division.

As to proceedings in equity in relation to rights of common before the Jud. Acts, see *York v. Pilkington*, 1 Atk. 282; *Tenham v. Herbert*, 2 Atk. 483; *Whitchurch v. Hyde*, *Id.* 391; *Welby v. Rutland*, 6 Br. P. C. 575; 1 Br. C. C. 40, 572.

An action may be brought in the Chancery Division against the lord by one copyholder (if he sues on behalf of himself and the other copyholders, not otherwise) to have their rights of common ascertained (*Phillips v. Hudson*, 2 Ch. 243). An action for the purpose of establishing a right of common over the wastes of a manor may be maintained by a copyhold and freehold tenant of the manor on behalf of himself and all other copyhold and freehold tenants (*Smith v. Brownlow*, 9 Eq. 241; *Robertson v. Hartopp*, 43 Ch. D. 484); and by one freehold tenant of a manor on behalf of himself and all other freehold tenants (*Warrick v. Queen's College*, 6 Ch. 716; *Betts v. Thompson*, 6 Ch. 732). An action for the purpose of establishing a right of common over the wastes of a forest may be maintained by an owner and occupier of land within the forest on behalf of all the owners and occupiers (*Commrs. of Sewers v. Glasse*, 7 Ch. 456). The decree in such an action is given (19 Eq. 164). The defendants were the lord and two grantees of the waste, who were sued as representing other grantees. The decree was held binding on another grantee against whom a supplemental statement of claim was subsequently filed (*Commrs. of Sewers v. Gellatly*, 3 Ch. D. 610; see *Howard v. Maitland*, 11 Q. B. Div. 695). Where it was alleged that the Crown had granted a profit *à prendre* to "inhabitants" of a parish, thereby constituting them a corporation, an individual cannot sue to establish the right; only the corporation (*Chilton v. London*, 7 Ch. D. 735).

Before the R. P. Lim. Act, 1833, the commoner was barred of his right of entry and ejectment, by having acquiesced in the inclosure of part of a common for more than twenty years, and his remedy was by writ of assize of common. The lord was not conclusively barred of his remedy to recover common lands which had been inclosed until the lapse of sixty years, within which time he might recover the lands by a real action (*Edwards v. M'Leay*, Cooper, C. C. 318; *Hawke v. Bacon*, 2 Taunt. 155; *Creach v. Wilmot*, *Id.* 159). Writs of assize have been abolished by R. P. Lim. Act, 1833, s. 36, *post*.

As to production of documents in a suit instituted to establish a right of common, see *Minet v. Morgan*, 11 Eq. 284; *Warrick v. Queen's College*, 3 Eq. 683. On an issue whether land was common land or subject to any commonable rights of the commoners of certain parishes, evidence of

reputation was admitted (*Evans v. Merthyr Tydfil Council*, 1899, 1 Ch. 241). Rights of Way.

As to the law of common in general, see *Bac. Abr. Common*; *Com. Dig. Common*; *Cruise's Dig. tit. XXIII.*; *Elton on Commons*; *Williams on Commons*.

IV.—OF RIGHTS OF WAY, (A) PUBLIC AND (B) PRIVATE.

A. *Public Rights of Way and Highways, and herein of Balks and Ditches.*

- (1) *What ways are highways*...53.
- (2) *Creation of highways*...53.
- (3) *Nature of rights of public over highways*...56.
- (4) *Repair of highways*...57.
- (5) *Extinction of highways*...57.
- (6) *Remedies for disturbance of highways*...58.
- (7) *Public bodies and highways*...59.
- (8) *Ownership of soil of highways and roadside wastes*...61.
- (9) *Balks and ditches*...63.

A right of way may be either public or private. Ways common to all the king's subjects are called highways (1 Vent. 189; 1 T. R. 570). Whether a way be a public or private way is a matter of fact, and depends much on common reputation (1 Vent. 189; Hawk. P. C. b. 1, c. 76, s. 1). A public road is *primâ facie* a road which leads from one public place to another (*A.-G. v. Antrobus*, 1905, 2 Ch. 206). A road may be a highway, although it is circuitous (*R. v. Lloyd*, 1 Camp. 261). It may be a highway though it terminates in a common (*R. v. Wandsworth*, 1 B. & Ald. 63), and there may be a highway over a *cul de sac* (*Rugby Charity v. Merryweather*, 11 East, 375; *Bateman v. Bluck*, 18 Q. B. 870; *Campbell v. Lang*, 1 Macq. H. L. C. 451; *Souch v. East London R. Co.*, 16 Eq. 108; *Vernon v. S. James*, 16 Ch. D. 449). But in such a place it is very difficult to make out dedication by user (*Whitehouse v. Hugh*, 1906, 2 Ch. 285). And it seems that such a dedication will not be presumed without evidence of the expenditure on the *cul de sac* of public money (*A.-G. v. Antrobus*, 1905, 2 Ch. 207; *Bourke v. Davis*, 44 Ch. D. 122; *A.-G. v. Richmond*, 89 L. T. 700). See *Woodyer v. Hadden* (5 Taunt. 125), where a court, which was no thoroughfare, was held not a highway. A footpath across a churchyard may be a "churchway," to which the right is in the parishioners, or else a common highway (*Batten v. Gedye*, 41 Ch. D. 515; compare *Farquhar v. Newbury*, 1908, 2 Ch. 589). There may be a faculty for such a path, see *Re St. John's, Cardiff*, 1898, P. 155. As to the distinction between a right for the public to use a footway on the ground of dedication, and a right for the inhabitants of a district to use a promenade on the ground of custom, see *Abercromby v. Fermoy*, 1900, 1 I. R. 302.

On an issue, whether land is a highway, evidence of reputation is admissible, e.g. that at a meeting held to consider the repairing of a way, several, since dead, signed a paper, stating that the land was not a highway, there being at the time no litigation (*Barraclough v. Johnson*, 8 Ad. & Ell. 99; see *Nicholls v. Parker*, 14 East. 331, n. to *Outram v. Moorewood*). On such an issue a tithe map and award may be evidence (*A.-G. v. Antrobus*, 1905, 2 Ch. 193), but not ordnance maps (*Ib.* 203, *Mercer v. Denne*, 1905, 2 Ch. 538). Evidence of reputation is not admissible to prove particular facts as to the boundaries of a highway (*R. v. Bliss*, 7 Ad. & El. 550; *R. v. Berger*, 1894, 1 Q. B. 823).

Highways may be created—(1) by statute, (2) by dedication (*Cubitt v. Maxse*, L. R. 8 Q. B. 714). The creation of a highway over a cemetery or highways.

- Rights of Way.** churchyard may be authorized by faculty (*Re Bideford Parish*, 1900, P. 314). In the Channel Islands a highway must be made out by grant or prescription (*Godfray v. Sark*, 1902, A. C. 534).
- By statute.** A highway may be created by statute (*R. v. French*, 4 Q. B. Div. 507), e.g. the Public Health Act, 1875, s. 154; the Inclosure Acts, the Settled Estates Act, 1877, s. 20; or the Settled Land Act, 1882, s. 16. When such a public right was created by a statute which also reserved private rights to the lord of the manor, the private reservation was subject to the public right (*Benfieldside Board v. Consett Co.*, L. R. 3 Exch. D. 54; see *L. & N. W. R. v. Evans*, 1893, 1 Ch. 28).
- By dedication.** Where a highway is created by dedication, there must be both dedication by the owner and user by the public (*Cubitt v. Maxse*, L. R. 8 C. P. 715; *A.-G. v. Biphosphated Guano Co.*, 11 Ch. Div. 327). Public user for a sufficient time (e.g. six years) is *prima facie* evidence on which dedication may be presumed (*R. v. Petrie*, 4 El. & B. 737). But the user must be open and as of right (*A.-G. v. Antrobus*, 1905, 2 Ch. 202). User inferred to have been permissive was not sufficient ground for the presumption (*Ib.* 208). The effect of user may depend on the nature of the land; and on the owner being resident or not (*Chinnock v. Hartley Council*, 63 J. P. 327). A single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment (*Poole v. Huskinson*, 11 M. & W. 830, adopted *Healey v. Batley*, 19 Eq. 388; *Vernon v. S. James*, 16 Ch. D. 456; *Mann v. Brodie*, 10 App. Cas. 386; see *Coats v. Herefordshire*, 1909, 2 Ch. 579). The common course to show that a licence only is intended, is to shut up the way one day in every year (*British Museum v. Finnis*, 5 C. & P. 460; *R. v. Broke*, 1 F. & F. 514). The presumption of dedication may be rebutted by proof of a bar having been placed across the street (*Roberts v. Karr*, 1 Camp. 262, n.; see *Lethbridge v. Winter*, *Id.* 263, n.). But a gate being kept across a way is not conclusive, as the way may have been granted to the public with the reservation of a gate to prevent cattle from straying (*Davies v. Stephens*, 7 C. & P. 570; *R. v. Bliss*, 2 Nev. & P. 464; see *Barry v. Lowry*, I. R. 11 C. L. 483). As to the effect of dealing with the land as private property, see *Friern Council v. Richardson*, 62 J. P. 547.
- Dedication a question of intention.** Dedication is a question of intention. The mere acting so as to lead persons into the supposition that a way is dedicated to the public does not of itself amount to dedication (*Simpson v. A.-G.*, 1904, A. C. 493; *Barracrough v. Johnson*, 8 Ad. & El. 99). The mere setting out of an intended road, even where the public have traversed it, is not an irrevocable dedication (*Hall v. Bootle*, 44 L. T. 873). But a dedication may be presumed from an uninterrupted user by the public during six years (*Rugby Charity v. Merryweather*, 11 East, 376; *R. v. Petrie*, 4 El. & B. 737; 24 L. J. Q. B. 167). Where an owner lays out a private carriage-way alongside a public footway, he is presumed to have dedicated the whole surface as a public footway (*A.-G. v. Esher Co.*, 1901, 2 Ch. 647). A public footway, however, which originated in an award was not converted by user into a public cartroad (*Sheringham v. Holsey*, 1904, W. N. 83).
- Where highway can be dedicated.** Dedication may be proved of a space which includes a ditch, even though the ditch cannot be used for passage (*Charley v. Nightingale*, 1906, 2 K. B. 618; 1907, 2 K. B. 637; see *Simcox v. Yardley*, 69 J. P. 66). As to the dedication as a highway of a non-tidal river, see *Simpson v. A.-G.*, 1904, A. C. 476; 1901, 2 Ch. 671. From user the court may presume the dedication to the public of a way over a disused tramway site (*Coats v. Herefordshire*, 1909, 2 Ch. 579); or over a bridge (*R. v. Southampton*, 17 Q. B. D. 424; 19 Q. B. D. 590; see *Surrey Canal Co. v. Hall*, 1 Man. & Gr. 382; *R. v. Wright*, 3 B. & Ad. 681; *Tyne Commrs. v. Imrie*, 81 L. T. 174). Or over a sea wall or embankment (*Greenwich v. Maudslay*, L. R. 5 Q. B. 397); or over a path along the sea coast (*Behrens v. Richards*, 1905, 2 Ch. 614; *Maddock v. Wallasey Board*, 55 L. J. Q. B. 267). From user of some paths of this nature, however, which is often permitted by the landowner's good nature, it is difficult to infer an intention to dedicate (1905, 2 Ch. 619). See the words of *Bowen*, L.J., in *Blount v. Layard*, 1891, 2 Ch. 691 n.

"Nothing worse can happen in a free country, than to force people to be churlish about their rights, for fear that their indulgence may be abused," adopted in *Simpson v. A.-G.*, 1904, A. C. 492; *Brinckman v. Matley*, 1903, 2 Ch. 340; *A.-G. v. Antrobus*, 1905, 2 Ch. 200.

Rights of
Way.

The right for the public to walk round and inspect a public monument is not one which can be the subject matter of grant or prescription (*A.-G. v. Antrobus*, 1905, 2 Ch. 198, 199); nor would a network of tracks be held to be public roads (*Ib.* 204). The use by the public of an open space by passing over it in every direction without any defined path was not evidence of the dedication of the whole space to the public (*Robinson v. Cowpen Board*, 63 L. J. Q. B. 235). Nor will dedication to the public be presumed in the case of a wood with tracks through it leading in different directions where people have wandered at pleasure (*Chapman v. Cripps*, 2 F. & F. 864; *Schwinge v. Dowell*, *Ib.* 845; *Eyre v. New Forest Board*, 8 T. L. R. 648). As to a footpath over a mountain, see *Macpherson v. Scottish Society*, 13 App. Cas. 744.

Jus spatiandi.

As regards the title of the person alleged to have dedicated. Continued user of a way by the public raises a presumption of dedication, and it is not incumbent on the public to show by what particular owner the dedication has been made. But it is open to the owner of the soil to establish that owing to the condition of the title dedication was not possible (*Farguhar v. Newbury*, 1908, 2 Ch. 596; see *R. v. Petrie*, 4 El. & B. 737; 24 L. J. Q. B. 167; *R. v. Eastmark*, 11 Q. B. 877). It is settled that if there is dedication at all, it must be in perpetuity (*Daves v. Hawkins*, 8 C. B. N. S. 858), *i.e.* it must be by an owner in fee. A fee farm grantee can dedicate (*Smith v. Wilson*, 1903, 2 I. R. 45). Where since 1810 the servient tenement had been held by successive tenants for life the court refused in 1902 to presume dedication (*Roberts v. James*, 89 L. T. 282; *A.-G. v. Antrobus*, 1905, 2 Ch. 201; *Eyre v. New Forest*, 56 J. P. 517). But where in 1842 there was a tenant for life and remainderman in fee; and the remainderman, being in possession, laid out a new road, and such road had been used by the public ever since, the court in 1908 presumed that the acts of the remainderman had been done with the approval of the tenant for life, and decided in favour of dedication (*Farguhar v. Newbury*, 1909, 1 Ch. 12). Under special statutory provisions (S. L. Act, 1882, s. 16) the tenant for life of settled land can dedicate.

Who can
dedicate;

tenant for
life;

As regards a tenant for years, he cannot dedicate for his term (*Corsellis v. London*, 1907, 1 Ch. 704). A tenant for ninety-nine years cannot dedicate without the consent of the owner of the fee; and permission by such tenant will not bind the landlord after the expiration of the term (*R. v. Bliss*, 7 Ad. & Ell. 555; *Barracrough v. Johnson*, 8 Ad. & Ell. 104; *Pryor v. Pryor*, 26 L. T. 760). However, after a long lapse of time, and a frequent change of tenants, and from the notorious and uninterrupted use of a way by the public, it may be presumed that the landlord had notice of the way being used, and that it was so used with his concurrence (*R. v. Barr*, 4 Camp. 16; *Davies v. Stephens*, 7 C. & P. 570; *Simpson v. A.-G.*, 1904, A. C. 507; see *Deeble v. Lineham*, 12 Ir. C. L. Rep. N. S. 1; *R. v. Hudson*, Str. 909). Notice to the steward is notice to the landlord (*R. v. Barr*, *sup.*; *Doe v. Wilson*, 11 East, 56). Where evidence was given of user over nearly seventy years, but during the whole period the land had been on lease, the jury might presume from these acts a dedication at a time anterior to the lease (*Winterbottom v. Derby*, L. R. 2 Ex. 316; see *Wood v. Veal*, 5 B. & Ald. 454; *Barracrough v. Johnson*, 8 Ad. & Ell. 104; *R. v. Lloyd*, 1 Camp. 260; *Baxter v. Taylor*, 4 B. & Ad. 72; *Bermondsey v. Brown*, 1 Eq. 204).

Long user of a way across copyholds is evidence of dedication by both lord and copyholder (*Powers v. Bathurst*, 42 L. T. 123). The Crown may dedicate *R. v. East Mark*, 11 Q. B. 877; *Turner v. Walsh*, 6 App. Cas. 636. Land acquired by a company for statutory objects may be dedicated by the company; but only if the public user be not inconsistent with those objects (*Grand Junction Co. v. Petty*, 21 Q. B. Div. 273; *G. W. R. Co. v. Solihull Council*, 86 L. T. 852; *A.-G. v. L. S. W. R.*, 21 T. L. R. 220;

Others.

Rights of
Way.Limited
dedication.

Taff Vale v. Pontypridd, 93 L. T. 126; *Coats v. Herefordshire*, 1909, 2 Ch. 579; see *Re Gonty and Manchester Co.*, 1896, 2 Q. B. 439, the case of a private way).

There may be a partial dedication of a highway to the public (*Stafford v. Coyne*, 7 B. & C. 257; see *Roberts v. Karr*, 1 Camp. 262; *R. v. Northamptonshire*, 2 M. & S. 262). Although the dedication of a way to the public may be *partial* or limited as to the sort of way (as to a horseway, &c.), yet there cannot be a *qualified* dedication to the public, subject to a power of resumption to the grantor (*Fitzpatrick v. Robinson*, 1 Hudson & Brook, 585; see *Blundell v. Catterall*, 5 B. & Ald. 315; *Lade v. Shepherd*, 2 Str. 1004; *Barruclough v. Johnson*, 8 Ad. & Ell. 104). There can be no dedication of a way to the public for a limited time; if dedicated at all, it must be dedicated in perpetuity (*Daves v. Hawkins*, 8 C. B. N. S. 848). Nor can there be a dedication to a *limited part* of the public, as to a parish (*Farquhar v. Newbury*, 1909, 1 Ch. 12; *Poole v. Huskinson*, 11 M. & W. 827; *Bermondsey v. Brown*, 1 Eq. 204). But parishioners may by custom have a churchway (*Brocklebank v. Thompson*, 1903, 2 Ch. 348). A subject cannot without a grant from the Crown or a statute dedicate a way to the public subject to a toll (*Austerberry v. Oldham*, 29 Ch. Div. 750; *A.-G. v. Simpson*, 1901, 2 Ch. 693). But a highway may be dedicated, subject to a pre-existing right of user by adjoining occupiers for depositing goods thereon (*Morant v. Chamberlin*, 6 H. & N. 541), or subject to a market (*Gingell v. Stepney*, 1908, 1 K. B. 115). Where an erection or an excavation exists upon land, and the land is dedicated as a highway, the dedication must be taken to be made to the public and accepted by them, subject to the inconvenience or risk (*Fisher v. Prowse*, 2 B. & S. 770; see *Robbins v. Jones*, 15 C. B. N. S. 221). There may in law be a dedication to the public of a footpath across a field, subject to the right of the owner of the soil to plough it up (*Mercer v. Woodgate*, L. R. 5 Q. B. 26; *Arnold v. Blaker*, L. R. 6 Q. B. 433; see *R. v. Lecke*, 5 B. & Ad. 469). In such a case the public have no right to deviate (*Arnold v. Holbrook*, L. R. 8 Q. B. 96). Where part of a highway is dedicated as a carriage way and part as a footway the urban authority cannot, under sect. 150 of the Public Health Act, 1875, alter the relative proportions (*Robertson v. Bristol*, 1900, 2 Q. B. 198).

(3)

Nature of
public rights
over highway.

The *primâ facie* right of the public is one of passage; but the reasonable and usual mode of using a highway as such includes other things (*Harrison v. Rutland*, 1893, 1 Q. B. 146). The public, however, have no right to remain on a highway for sporting (*R. v. Pratt*, 4 El. & Bl. 860; see *Fitzhardinge v. Purcell*, 1908, 2 Ch. 168; *Fielden v. Cox*, 22 T. L. R. 411), or for interfering with sport (*Harrison v. Rutland*, 1893, 1 Q. B. 142), or for watching trials of racehorses on adjoining land (*Hickman v. Maisey*, 1900, 1 Q. B. 752). Nor can they depasture cattle on the highway (*Dovaston v. Payne*, 2 H. Bl. 527; *Stevens v. Whistler*, 11 East, 51; see *Luscombe v. G. W. R. Co.*, 1899, 2 Q. B. 313). The owner of the soil may exercise all rights of ownership not inconsistent with the dedication to the public (*St. Mary, Newington v. Jacobs*, L. R. 7 Q. B. 47). As to deviation by the public, see *Arnold v. Holbrook*, L. R. 8 Q. B. 96; *Daves v. Hawkins*, 8 C. B. N. S. 848. And as to the rights of using a highway possessed by occupiers of premises abutting thereon, see cases quoted, p. 64, *post*.

Fences by the side of a highway are *primâ facie* the boundaries of the highway so as to raise a presumption that the public right of way extends over the whole space between the fences (*Offin v. Rochfort*, 1906, 1 Ch. 342); so far as that space can be used for passage (*Chorley v. Nightingale*, 1906, 2 K. B. 618; *Harvey v. Truro*, 1903, 2 Ch. 638). But the mere existence of a fence is not conclusive. The presumption will not arise where there is reason for supposing that the fence was not put up as a boundary of the highway (*Offin v. Rochfort, sup.*), e.g. where the road crosses uninclosed waste the fence may have been put up to separate adjoining closes from the waste (*Neeld v. Hendon Council*, 81 L. T. 410). See as to footpaths, *Ford v. Harrow*, 88 L. T. 394, and see generally, *R. v. U. K. Electric Telegraph Co.*, 2 B. & S. 647, 31 L. J. M. C. 166; *Turner v.*

Ringwood Board, 9 Eq. 418; *Nicol v. Beaumont*, 50 L. T. 112; *Locke King v. Woking Council*, 77 L. T. 790). Evidence rebutting the above presumption was given in *Neeld v. Hendon Council*, 81 L. T. 405. The nature of the district, the width and level of the margins, and the regularity of the lines of fence must be considered (*Belmore v. Kent Council*, 1901, 1 Ch. 873). Where, by an inclosure award, a way was set out fifteen feet wide as a public bridlepath and footway and also as a private driftway, the public were held entitled to use the whole width for those purposes (*Pullin v. Deffel*, 64 L. T. 134). As to the application of the fifteen feet rule, see *Easton v. Richmond Board*, L. R. 7 Q. B. 69.

Rights of Way.

At common law, highways are repairable by the inhabitants of the parish (Glen on Highways, cap. 4). In the case of dedications before the Highway Act, 1835, the assent of the parish was not requisite (*R. v. Leeke*, 5 B. & Ad. 469; *Rishton v. Haslingden*, 1898, 1 Q. B. 301). In the case of dedications since the act, parishes are not liable to repair the highway unless it is made to the satisfaction of the surveyor of the highways, and of two justices of the peace, who are to give a certificate to this effect, which certificate is to be enrolled (Highway Act, 1835, s. 23). After a lapse of time these formalities were presumed (*Leigh Council v. King*, 1901, 1 Q. B. 747).

(4)
Repair of public ways.

Under recent statutory provisions, main roads are now repairable by the county council (Local Government Act, 1888, s. 11). And other highways (unless repairable by some person *ratione tenuræ*) by the district council (Local Government Act, 1894, s. 25; see *R. v. Shipley Council*, 61 J. P. 488). As to roads within urban districts, see Public Health Act, 1875, s. 144; *R. v. Poole*, 19 Q. B. D. 602; *R. v. Wakefield*, 20 Q. B. D. 810. A parish council may undertake the repair of a public footpath (Local Government Act, 1894, s. 13 (2)). Where there is no obligation to repair there can be (in the absence of special power) no right to repair (*Campbell Davys v. Lloyd*, 1901, 2 Ch. 518).

See further as to the repair of highways, *Dovaston v. Payne*, 2 Smith's L. C.; *R. v. Stoughton*, 2 Wms. Saund. 462, edit. 1871, and Glen on Highways.

(5)

Extinction of public ways.

Mere disuse of a highway for any length of time cannot deprive the public of their rights in respect of it (*Harvey v. Truro*, 1903, 2 Ch. 638; *Vooght v. Winch*, 2 B. & Ald. 662; *R. v. Montague*, 4 B. & C. 598). The public cannot release their right to a public highway by non-user (*Daves v. Hawkins*, 8 C. B. N. S. 848; *Freeman v. Tottenham R. Co.*, 13 W. R. 335; *Hillary v. Waller*, 12 Ves. 265), or by acquiescence in an obstruction (*Pullin v. Deffel*, 64 L. T. 134). Consent by a highway authority to an obstruction is ineffectual (*Harvey v. Truro*, 1903, 2 Ch. 638). A highway may be destroyed by the sea (*R. v. Hornsea*, 23 L. J. M. C. 59), or by a landslip (*R. v. Greenhow*, 1 Q. B. D. 703); and a way ceases to be a public highway when the access to it at both ends has become impossible (*Bailey v. Jamieson*, 1 C. P. D. 329). A public right of way may be extinguished by statute, either by express words (*Wells v. London and Tilbury R. Co.*, 5 Ch. D. 126), or by implication (*Yarmouth v. Simmons*, 10 Ch. D. 518). The repeal of a statute which had extinguished a public right of way did not revive the right (*Gwynne v. Drewitt*, 1894, 2 Ch. 616). A public right of way to a towing-path on the banks of a navigable tide river, is not destroyed by the river having been converted by statute into a floating harbour, although the user of the towing-path has been thereby increased (*R. v. Tippet*, 3 B. & Ald. 193). Where an inclosure act directs that all ways not set out shall be deemed part of the lands to be allotted, an ancient towing-path upon the banks of the river, though not set out by the commissioners, still subsists, for it is not within their jurisdiction (*Simpson v. Scales*, 2 Bos. & P. 496; see *Thackrah v. Seymour*, 1 C. & M. 18). The 10th and 11th sections of the Inclosure Act, 1801, did not extinguish a right to take water from a well which the inhabitants of a parish had immemorially exercised upon common land which had been inclosed, although the ancient

Rights of Way.

way to the well was extinguished under the inclosure (*Race v. Ward*, 7 El. & Bl. 384). The Rys. Clauses Act, 1845, sect. 16, does not empower a railway company to divert a public footpath so as to place it upon land of which the company has not acquired the ownership (*Rangeley v. Midland R. Co.*, 3 Ch. 306). The mere construction of a railway across a public footpath will not extinguish it (*Cole v. Miles*, 60 L. T. 145). But the company are not bound to make a bridge or tunnel (*Dartford Council v. Bexley Heath R. Co.*, 1898, A. C. 210).

(6)

Remedy for nuisances to public ways: by indictment, etc.,

In the case of public nuisance to a highway arising from nonfeasance in failing to repair it, no action will lie against an urban authority (*Cowley v. Newmarket*, 1892, A. C. 345; see *Sydney v. Bourke*, 1895, A. C. 433; *Thompson v. Brighton*, 1894, 1 Q. B. 332; *Lambert v. Lowestoft*, 1901, 1 Q. B. 590); and as against a person liable to repair *ratione tenure*, it was doubted whether an action for special damage for non-repair would lie (*Rundle v. Hearle*, 1898, 2 Q. B. 83). The remedy in the case of non-repair is by proceedings before justices (Highway Act, 1835, s. 94), or by indictment, which apparently lies against the inhabitants of a parish (Glen on Highways, Bk. 1, ch. 5), but not against a parish council (*R. v. Shipley Council*, 61 J. P. 488). In the case of a public nuisance arising from misfeasance the remedy is by indictment, or by information at the suit of the Att.-Gen. In the case of a private nuisance by misfeasance the remedy is by action. But where that which is a public nuisance is also a private nuisance to an individual by inflicting on him some special damage, the individual may have his private remedy by action (*Soltan v. De Held*, 2 Sim. N. S. 143, 145; see *Wallasey Board v. Gracey*, 36 Ch. Div. 593; *Boyce v. Paddington*, 1903, 1 Ch. 114). An indictment does not lie for obstruction of a local right, such as a parish church way (*Brocklebank v. Thompson*, 1903, 2 Ch. 355); but does lie for obstruction of a highway (*R. v. Train*, 2 B. & S. 640; *R. v. U. K. Telegraph Co.*, 2 B. & S. 647, n.; *R. v. Longton Gas Co.*, 29 L. J. M. C. 118). Such an indictment cannot be compromised (*Windhill Board v. Vint*, 45 Ch. Div. 351). Statutory penalties are imposed on persons committing specified nuisances on a highway by Highway Act, 1835, s. 72.

by action for damages,

A private person cannot sue for damage arising from the disturbance of a highway, unless he has sustained some special damage (Co. Litt. 56 a; 5 Rep. 73 a; *Rose v. Groves*, 5 M. & G. 613; *Dobson v. Blackmore*, 9 Q. B. 1002; *Blagrove v. Bristol*, 1 H. & N. 369). Where the plaintiff proved no damage peculiar to himself, beyond delay in passing along the road, he could not maintain the action (*Winterbottom v. Derby*, L. R. 2 Ex. 316). So, an individual cannot maintain an action where the obstruction is temporary and the injury sustained by the plaintiff is only in common with others (*Ricket v. Metropolitan R. Co.*, L. R. 2 H. L. 175; overruling *Wilks v. Hungerford Co.*, 2 Bing. N. C. 281; *Metropolitan Board of Works v. M'Carthy*, L. R. 7 H. L. 243; *Biggs v. London*, 15 Eq. 376). But if the plaintiff can prove a particular damage to himself beyond the general damage to the public, and that such damage is direct and substantial, an action can be maintained (*Benjamin v. Storr*, L. R. 9 C. P. 400). In *Iveson v. Moore* (1 Lord Raym. 186), the preventing of colliers from coming to a colliery by obstructing a public highway, by which the benefit of the colliery was lost, enabled a man to maintain an action (see *Rose v. Miles*, 4 M. & S. 101; *Rose v. Groves*, 5 M. & G. 620; *Greasley v. Codling*, 2 Bing. 266). The occupier of premises abutting on a highway may recover damages on the ground of an unreasonable use of a highway by others which has either occasioned loss of custom to the plaintiff (*Fritz v. Hobson*, 14 Ch. D. 542), or rendered his dwelling uncomfortable (*Benjamin v. Storr*, L. R. 9 C. P. 400; see *Sadler v. G. W. R.*, 1896, A. C. 450). In a case of doubt the right of such an occupier himself to use the highway for loading and unloading goods at his premises must yield to the public right of passage (*A.-G. v. Brighton Association*, 1900, 1 Ch. 276). Such right is not the occupier's private right, but an individual interest in a public right (*Chaplin*

v. Westminster, 1901, 2 Ch. 329). As to the reasonable user of a highway by the occupiers of premises abutting thereon, see *Original Hartlepool Co. v. Gibb*, 5 Ch. D. 721; *Barber v. Penley*, 1893, 2 Ch. 447. Where a public right of way is raised as a defence to an action of trespass, see as to pleadings and evidence, *Webber v. Sparkes*, 10 M. & W. 485; *Wood v. Wedgewood*, 1 C. B. 273; *Bracegirdle v. Peacock*, 8 Q. B. 174; *Offin v. Rockford Council*, 1906, 1 Ch. 342; and as to particulars, see *Spedding v. Fitzpatrick*, 38 Ch. Div. 410. In a case where this defence failed the court granted nominal damages, but refused an injunction on the ground that the plaintiff was not injured (*Behrens v. Richards*, 1905, 2 Ch. 614).

The Att.-Gen. can obtain an injunction to restrain interference with a by injunction, highway without showing actual injury (*A.-G. v. Shrewsbury*, 21 Ch. D. 752; see *A.-G. v. L. & N. W. R.*, 1900, 1 Q. B. 78). But without proof of special damage an individual alone cannot sue (see *London, &c., Association v. London & India Docks Committee*, 1892, 3 Ch. 270). Where, however, an individual can prove special damage, he can sue for an injunction without making the Att.-Gen. a party (*Cook v. Bath*, 6 Eq. 177; *Barber v. Penley*, 1893, 2 Ch. 447; *Boyce v. Paddington*, 1903, 1 Ch. 114). The remedy of a parishioner in respect of interference with a "churchway" is in the ecclesiastical court (*Batten v. Gedye*, 41 Ch. D. 507).

The breaking up of the pavements of a town by an individual for the purpose of laying gas pipes, may be the subject of an indictment (*R. v. Longton Gas Co.*, 29 L. J. M. C. 118); but it will not be restrained by injunction as a public nuisance, the injury not being either irreparable or continuous (*A.-G. v. Cambridge Co.*, 4 Ch. 71). Damages in a proper case may be awarded in substitution for an injunction (*Wedmore v. Bristol*, 11 W. R. 13), the jurisdiction of the court under Lord Cairns' Act not being affected by its repeal (*Sayers v. Collyer*, 28 Ch. Div. 103).

A private individual has no right to remove an obstruction to a highway, by abatement, unless it is necessary in order that he may exercise his right of passage (*Bateman v. Bluck*, 18 Q. B. 870); or unless it causes a special injury to him (*Bagshaw v. Buxton Board*, 1 Ch. D. 224). As to removal by a highway authority, see *post*, p. 60. It is doubtful whether the right to abate exists in the case of nonfeasance (*Campbell Davys v. Lloyd*, 1901, 2 Ch. 518). In any case it would not justify a member of the public in re-erecting a bridge which had been allowed to decay (*Ib.*).

With respect to public bodies, some statutory provisions require to be mentioned. By Loc. Gov. Act, 1888, s. 11, sub-s. 6, main roads, except where an urban district council maintains them, are vested in the county council. As regards ordinary roads, which are not main roads, it is provided by P. H. Act, 1875, s. 149, that streets within an urban district shall vest in and be under the control of the local authority (now known as the urban district council); and to this authority are given the management powers of surveyors of highways (P. H. Act, 1875, ss. 144-148; Loc. Gov. Act, 1894, s. 21). Ordinary roads in a rural district are not vested in the local authority (now known as the rural district council); but to this authority have been given the management powers mentioned in ss. 144-148 of the P. H. Act, 1875 (Loc. Gov. Act, 1894, s. 25). As regards the metropolis, s. 96 of the Metrop. Management Act, 1855, contains vesting provisions similar to s. 149 of the P. H. Act, 1875 (see *Battersea v. County of London Co.*, 1899, 1 Ch. 474).

The effect of these various vesting provisions (which seem to be substantially similar) has been much discussed. It has been held that s. 149 of the P. H. Act, 1875, vests in the local authority property as distinguished from an easement (*Tunbridge Wells v. Baird*, 1896, A. C. 437; *A.-G. v. Conduit Co.*, 1895, 1 Q. B. 311; *Westminster v. Johnson*, 1904, 2 K. B. 745). This means such property and such property only as is necessary for the control, protection, and maintenance of the street as a highway for public use (*Tunbridge Wells v. Baird*, 1896, A. C. 442; see *Sydney Council v. Young*, 1898, A. C. 459). That which is vested is what is called the "area

(7)
Public bodies
and high-
ways.
Statutory
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to vesting and
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Effect of
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of user"; all the stratum of air above the surface and all the stratum of soil below the surface which in any reasonable sense can be required for the purposes of the street as street vest in and belong to the local authority (*Finchley Electric Co. v. Finchley Council*, 1903, 1 Ch. 441; compare *Midland R. Co. v. Wright*, 1901, 1 Ch. 738; *A.-G. v. Barker*, 83 L. T. 245). The local authority accordingly has no power to erect lavatories below the surface of a street (*Tunbridge Wells v. Baird, sup.*); or to compel an electric company to remove wires two feet below the surface (*Battersea v. County of London Co.*, 1899, 1 Ch. 474); or to prevent the placing of electric wires over the street at a height not interfering with the proper user of the street as a street (*Finchley Electric Co. v. Finchley Council, sup.*). *Secus* where the wire interferes with such user (*Wandsworth v. United Telephone Co.*, 13 Q. B. D. 904; compare *National Telephone Co. v. St. Peter Port*, 1900, A. C. 317). The property of the local authority was not enlarged by the fact that the street had been originally conveyed to turnpike trustees in fee (*Finchley Electric Co. v. Finchley Council, sup.*), and the property ceased when the highway was stopped up or diverted (*Rolls v. St. George's Vestry*, 14 Ch. Div. 785). It is a statutory determinable fee simple (*Foley v. Dudley*, 1909, W. N. 250). In respect of their property in the area of user the local authority can sue for a trespass or a nuisance damaging their property (*Wednesbury v. Lodge Co.*, 1907, 1 K. B. 90; 1908, A. C. 326; *Foley v. Dudley, sup.*; *A.-G. v. Conduit Co.*, 1895, 1 Q. B. 311; *Sheringham Council v. Holsey*, 1904, W. N. 83; 20 T. L. R. 402).

Powers of district councils;

Further, by section 26 of Loc. Gov. Act, 1894, it is the duty of every district council to protect public rights of way and to prevent obstruction, and also to prevent encroachment on roadside wastes. For the purposes of the section the council may institute or defend legal proceedings and take other steps. (See as to county councils, Loc. Gov. Act, 1888, s. 11, sub-s. 1).

as to removing obstructions;

Under the above section, a district council is in the position of a private individual protecting his own property (*Murray v. Epsom Board*, 1897, 1 Ch. 40). It can remove obstructions (*Reynolds v. Presteign Council*, 1896, 1 Q. B. 609; see *Louth Council v. West*, 65 L. J. Q. B. 535; *Harris v. Northamptonshire Council*, 61 J. P. 599); and may contribute to the costs of an individual who has done so, and been sued (*R. v. Norfolk Council*, 1901, 2 K. B. 268).

as to legal proceedings.

The district council can defend actions in which a public right of way is brought in question (*Harvey v. Truro Council*, 1903, 2 Ch. 635; *Offin v. Rochford Council*, 1906, 1 Ch. 302), and in such proceedings has under the Public Authorities Protection Act, 1893, recovered costs as between solicitor and client (*Ib.*; see *Greenwell v. Howell*, 1900, 1 Q. B. 535). The council can in certain cases maintain in its own name an action of trespass (see *Sheringham Council v. Holsey*, 1904, W. N. 83; 20 T. L. R. 402). But in general the council cannot without proof of special damage sue alone in its own name in respect of a public nuisance (*Wallasey Board v. Gracey*, 36 Ch. D. 593; *Tottenham v. Williamson*, 1896, 2 Q. B. 353); or sue alone in its own name to enforce bye-laws as to new streets (*A.-G. v. Ashborne*, 1903, 1 Ch. 101; *Devonport v. Tozer*, 1903, 1 Ch. 759; *A.-G. v. Gibb*, 1909, 2 Ch. 265). The council may, however, in a proper case act as relator. In an action by the Att.-Gen. at the relation of a district council, an injunction was granted to restrain acts rendered illegal by a public general statute, even where such statute provided a special remedy by way of penalty which had been recovered (*A.-G. v. Wimbledon Co.*, 1904, 2 Ch. 34; *A.-G. v. Pontypridd*, 1908, 1 Ch. 388).

Parish authorities.

As regards parish authorities. Before the formation of parish councils under the Loc. Gov. Act, 1894, it was held that the vestry of a parish could not, except as relators, sue to restrain the obstruction of a public right of way (*Bermondsey v. Brown*, 1 Eq. 204). Since the Loc. Gov. Act, 1894, it has been held that a parish council which had property in the herbage growing on a private road could sue for trespass to the herbage (*A.-G. v. Garner*, 1907, 2 K. B. 487). As to rights of way acquired by a parish council and actions in respect thereof, see Loc. Gov. Act, 1894, s. 8, sub-s. 1 (g), and *Stoke Council v. Price*, 1899, 2 Ch. 277.

The effect of statutory powers given to public bodies of interfering with a highway and the subsoil thereof was considered, as regards tramway poles, in *Escott v. Newport*, 1904, 2 K. B. 369; *Goldberg v. Liverpool*, 82 L. T. 362; as regards lamp-posts, in *Chaplin v. Westminster*, 1901, 2 Ch. 329; and as regards sanitary conveniences, in *Vernon v. St. James'*, 16 Ch. Div. 449; *Westminster v. L. & N. W. Ry. Co.*, 1905, A. C. 427. As regards sanitary conveniences in London, see as to the effect of the vesting provisions in s. 44 of the P. H. (London) Act, 1891, *Westminster v. Johnson*, 1904, 2 K. B. 737; *L. & N. W. Ry. Co. v. Westminster*, 1904, 1 Ch. 765.

Rights of Way.

Statutory powers of interfering with highways.

Subject to the above statutory provisions the rule is that the freehold of the highway is in the owner of the freehold of the soil, although the public may pass and repass at their pleasure (2 Inst. 705; *Lade v. Shepherd*, 2 Str. 1044). The owner of the soil is entitled to all profits, trees and mines upon or under the highway (1 Roll. Abr. 392; *Goodtitle v. Alker*, 1 Burr. 143). In the 82nd section of the Highway Act, 1835, there is a saving of mines to the owner of lands taken for widening narrow roads. The soil in turnpike roads does not vest in the trustees thereof, who have only the control of the highway, without a special clause for that purpose (*Davison v. Gill*, 1 East, 69; see also *R. v. Mersey Navigation*, 9 B. & C. 95; *R. v. Thomas*, Id. 114; *Salisbury v. G. N. R. Co.*, 5 C. B. N. S. 174). The owner of land adjoining only one side of the highway may maintain an action of trespass against one who suffers his cattle to depasture along the highway (*Dovaston v. Payne*, 2 H. Bl. 527; *Stevens v. Whistler*, 11 East, 51; see *Luscombe v. G. W. R.*, 1899, 2 Q. B. 313); or an action of ejectment for land over which there is a public right of way (*Goodtitle v. Alker*, 1 Burr. 133; *Doe v. Wilkinson*, 3 B. & C. 413; and see *Scales v. Pickering*, 4 Bing. 448; *Bevan v. London Cement Co.*, 67 L. T. 615). And the owner of the soil can obtain an injunction to restrain a stranger from laying down pipes under the highway (*Goodson v. Richardson*, 9 Ch. 221). The principle is carried so far that a man may be a trespasser on the highway when he is there not for passing but for different purposes, e.g. sporting (*R. v. Pratt*, 4 El. & Bl. 860); or for interfering with sport (*Harrison v. Rutland*, 1893, 1 Q. B. 142); or for watching trials of racehorses on adjoining land (*Hickman v. Maisey*, 1900, 1 Q. B. 752). The owner who dedicates his land as a highway parts with no other right than a right of passage, and may exercise all other rights not inconsistent with such dedication (*St. Mary, Newington v. Jacobs*, L. R. 7 Q. B. 47). Title to the soil of a highway (subject to the public right of passage) was acquired by letting the grazing for a long period (*Haigh v. West*, 1893, 2 Q. B. 19).

Where an inclosure act provided for the allotment of land to the lord in compensation for all right of soil, the soil of a private road set out under the act vested *ad medium filum* in the allottees of the adjacent land (*Neaverson v. Peterborough Council*, 1901, 1 Ch. 22). But there is no general presumption that the soil in roads set out under an inclosure act belongs to the adjoining owners (*R. v. Edmonton*, 1 M. & Rob. 24; *R. v. Wright*, 3 B. & Ad. 681; see *Haigh v. West*, *sup.*). Where the herbage of a road becomes vested by the Inclosure (Consolidation) Act, 1801, s. 11, in the proprietors of allotments on each side, no presumption arises that the soil itself belongs to such proprietors (*R. v. Hatfield*, 4 Ad. & Ell. 156; see *Hooper v. Bourne*, 3 Q. B. Div. 258). The soil in a road was held to remain in the lord of the manor, that portion of the soil only being taken from him for which he received compensation and which is allotted to others (*Poole v. Huskinson*, 11 M. & W. 827; see *R. v. East Mark*, 12 Jur. 332; *Neaverson v. Peterborough Council*, *sup.*).

Where closes abutting on opposite sides of the highway belong to different owners, each owner is, according to presumption of law, entitled to the soil under the highway *usque ad medium filum vice* (*Beckett v. Leeds*, 7 Ch. 424; *Leigh v. Jack*, 5 Ex. Div. 270; *L. & N. W. R. v. Westminster*, 1902, 1 Ch. 279). Accordingly, such closes may be "adjoining or contiguous" within the meaning of a lease (*Haynes v. King*, 1893, 3 Ch. 439). As to the meaning

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Ownership of highway

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of "adjoining" in covenants, see further *White v. Harrow*, 86 L. T. 4; *Ind, Coope & Co. v. Hamblin*, 84 L. T. 168; *Vale v. Moorgate*, 80 L. T. 487; and in a statute *Re Bateman and Parker*, 1899, 1 Ch. 599). The above-mentioned presumption exists only in the absence of evidence of ownership (*Beckett v. Leeds*, 7 Ch. 421). The presumption applies equally to a private as to a public road (*Holmes v. Bellingham*, 7 C. B. N. S. 329; *Smith v. Howden*, 14 C. B. N. S. 398).

When soil of highway passes by conveyance.

In the case of the conveyance of land adjoining a highway, the soil of the highway, *ad medium filum viæ*, passes by the conveyance. The rule applies even where the land is set forth by admeasurement and referred to in a plan, which includes no portion of the highway (*Berridge v. Ward*, 10 C. B. N. S. 400; *R. v. Strand Board*, 4 B. & S. 526, where the boundary of a parish was defined by statute; *Micklethwait v. Newlay Co.*, 33 Ch. Div. 145, a case of land bounded by a river). The rule applies to streets in a town as well as to highways in the country (*Haynes v. King*, 1893, 3 Ch. 439; *Re White's Charities*, 1898, 1 Ch. 659; *L. & N. W. R. v. Westminster*, 1902, 1 Ch. 279); and to leases as well as conveyances (*Haynes v. King*, *sup.*; see *Landrock v. Metropolitan R. Co.*, 1886, W. N. 195; *Mappin v. Liberty*, 1903, 1 Ch. 118). The rule does not apply to a grant of land adjoining a railway (*Thompson v. Hickman*, 1907, 1 Ch. 550). As to whether it applies to grants by the Crown, see *Mappin v. Liberty*, *sup.*; *A.-G. v. British Museum*, 1903, 2 Ch. 598. But the soil of the highway will not pass if it appears that such soil was not intended to pass, either from a map annexed to the conveyance, or from the form of the conveyance (*Salisbury v. G. N. R. Co.*, 5 C. B. N. S. 174; 28 L. J. C. P. 40; *Plumstead v. British Land Co.*, L. R. 10 Q. B. 16). The circumstances under which the conveyance was executed (e.g. trees on the highway having been omitted from a valuation) may assist to rebut the presumption (*Pryor v. Petre*, 1894, 2 Ch. 11). And where a conveyance described land as bounded by a street, which at that time was intended to be used as a highway, but had not been dedicated, the soil of the street did not pass (*Leigh v. Jack*, L. R. 5 Ex. Div. 264; see *Mappin v. Liberty*, *sup.*). *Cotton*, L.J., doubted whether the rule would ever apply to cases where land is sold in plots for building purposes, even although the roads had been actually laid out (*Leigh v. Jack*, *sup.*). As to the effect of subsequent circumstances not contemplated at the time of the grant, see *Micklethwait v. Newlay Co.*, 33 Ch. Div. 133. Where the grantor is the owner of the soil beyond the *medium filum*, the presumption is that the conveyance passes the soil so far as vested in him (*Re White's Charities*, 1898, 1 Ch. 659). Strips of land along a highway, even though indirectly connected with waste, may pass under a conveyance of the adjacent inclosure (*Dendy v. Simpson*, 7 Jur. N. S. 1058; 9 W. R. 743; *Simpson v. Dendy*, 8 C. B. N. S. 433).

Ownership of waste adjoining highways.

At common law (independently of statute) the presumption is, that waste land adjoining a road belongs to the owner of the adjoining inclosure, and not to the lord of the manor (*Steel v. Prickett*, 2 Stark, 463; *Scoones v. Morrell*, 1 Beav. 251); whether such owner be a freeholder, copyholder, or leaseholder (*Doe v. Pearsey*, 7 B. & C. 304). The right extends to the centre of the road (*Cooke v. Green*, 11 Price, 736). This presumption may be rebutted by evidence of acts of ownership by the lord of the manor (*Anon.*, Loft, 358). And if the strip communicate with larger portions of land, the presumption is considerably narrowed; for the evidence of ownership, which applies to the larger portions, applies also to the strip (*Grose v. West*, 3 Taunt. 39; *Headlam v. Hedley*, Holt, N. P. C. 463). Upon this question the lord may give evidence of grants by him of the waste between the road and other inclosures at a distance from the spot, provided such evidence is confined to the road which passes by the spot (*Doe v. Kemp*, 7 Bing. 332; 2 Bing. N. C. 102; see *Stanley v. White*, 14 East, 332; *Dendy v. Simpson*, 18 C. B. 831). The presumption may also be rebutted by the owner of the adjoining land accepting an allotment of the strip from commissioners appointed to inclose the wastes of the manor (*Gery v. Redman*, 1 Q. B. D. 161). Where the lord has conveyed land to A. and other land to B., and a

strip passed by one of these conveyances, but it is doubtful by which; no presumption arises in favour of A. from the fact that the strip lies between a highway and land indisputably comprised in the conveyance to A. (*White v. Hill*, 6 Q. B. 787). The presumption may also be rebutted by showing that the strip adjoins other land occupied adversely to such owner (*Doe v. Hampson*, 4 C. B. 267; 17 L. J. C. P. 225).

As regards recent statutes, sect. 149 of the P. H. Act, 1875, *ante*, p. 59, enables the local authority to demise the right of pasturage on the side of a highway (*Coverdale v. Charlton*, 4 Q. B. Div. 104. On the other hand, sect. 11 (6) of the Loc. Gov. Act, 1888, does not vest in the county council strips of grass bordering the metalled part of a main road or the herbage thereon (*Curtis v. Kesteven Council*, 45 Ch. D. 504). As to the rights of the public over roadside wastes, see *ante*, p. 60.

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Balks are strips of land lying between lands which are private property. In presumption of law, balks belong to the owners of the adjacent land, unless the contrary is proved (*Godmanchester v. Phillips*, 4 Ad. & Ell. 560). (9) Balks and ditches.

The rule about ditching is this: no man making a ditch can cut into his neighbour's soil, but usually he cuts to the very extremity of his own land; he is of course bound to throw the soil which he digs out upon his own land, and after, if he likes it, he plants a hedge upon the top of it; therefore, if he afterwards cuts beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser; no rule about four feet or eight feet has anything to do with it (*Vowles v. Miller*, 3 Taunt. 138). Where two adjacent fields are separated by a hedge and ditch there is a *prima facie* presumption that the owner of the close on the side of the hedge opposite to the ditch owns the hedge (*Guy v. West*, Selw. N. P. 1218), and also the land constituting the ditch (*Doe v. Pearsey*, 7 B. & C. 308). The presumption is not rebutted by acts of ownership done by another without the knowledge of such owner (*Craven v. Pridmore*, 18 T. L. R. 282; *Henniker v. Howard*, 90 L. T. 157). Whether the presumption applies to a natural watercourse, *qu.* (*Marshall v. Taylor*, 1895, 1 Ch. 641). If there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership (*Guy v. West*, Selw. N. P. 1218; see as to acts of ownership of a ditch, *Searby v. Tottenham R. Co.*, 5 Eq. 409; *Norton v. L. & N. W. R. Co.*, 13 Ch. Div. 268; *Marshall v. Taylor*, *sup.*). If a tree grows near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of the land in which the tree was first sown or planted (*Holder v. Coates*, M. & M. 112; see *Waterman v. Soper*, 1 Lord Raym. 737; *Masters v. Pollie*, 2 Roll. R. 141; *Anon.*, 2 Roll. R. 255). But the other owner can cut branches which overhang his land even where they have overhung for twenty years (*Lemmon v. Webb*, 1895, A. C. 1), or recover damage caused by overhanging branches (*Smith v. Giddy*, 1904, 2 K. B. 448).

B. Private Rights of Way.

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(1)
Different
kinds of ways.

There are four kinds of ways (Co. Litt. 56 a):—1, a foot-way—2, a horse-way, which includes a foot-way—3, a carriage-way, which includes both horse-way and foot-way—4, a drift-way (see *Cannon v. Villars*, 8 Ch. D. 420, 421). Although a carriage-way comprehends a horse-way and a foot-way (*Davies v. Stevens*, 7 C. & P. 570), yet it does not necessarily include a drift-way (*Ballard v. Dyson*, 1 Taunt. 279); but evidence of a carriage-way is strong presumptive evidence of the grant of a drift-way (*Ibid.*). As to the meaning of a right of way to "lead manure," see *Brunton v. Hall*, 1 Q. B. 792. A way may be granted for agricultural purposes only (*Reynolds v. Edwards*, Willes, 282); or for the carriage of coals only (*Iveson v. Moore*, 3 Ld. Raym. 291; 1 Salk. 15); or for the carriage of all other articles except coals (*Stafford v. Coyne*, 7 B. & C. 257; *Jackson v. Stacey*, Holt, N. P. C. 455). There may be a private right of way over a *cul de sac* (*Roe v. Siddons*, 22 Q. B. Div. 234). Parishioners may by custom be entitled to a church-way within the churchyard (*Batten v. Gedyne*, 41 Ch. D. 507); or across the demesne of a manor within the parish (*Brocklebank v. Thompson*, 1903, 2 Ch. 341).

Public and
private ways
co-existing.

There may be both an occupation way and a public highway over the same road (*Brownlow v. Tomlinson*, 1 M. & G. 484; *Wells v. London & Tilbury Co.*, 5 Ch. D. 126; *A.-G. v. Esher Co.*, 1901, 2 Ch. 647). The acquiring a right of way by the public does not destroy a previously existing right of way over the same line (*Duncan v. Louch*, 6 Q. B. 904; *R. v. Chorley*, 12 Q. B. 515). The court acted on an enclosure award which set out the same way as a bridle and footpath for the public, and as a carriage-way for particular persons (*Pullin v. Deffel*, 64 L. T. 134).

Private access
to highway.

The right of a person who has land abutting on a highway to pass from one to the other is incontrovertible (*Burgess v. Northwich*, 6 Q. B. D. 275; *Marshall v. Ulleswater*, 7 Q. B. 172; *Ramuz v. Southend Board*, 67 L. T. 169). It is a private right (*Chaplin v. Westminster*, 1901, 2 Ch. 329), quite different from such a person's individual interest in the public right of using the highway (*Ib.*; *Lyon v. Fishmongers' Co.*, 1 App. Cas. 676; *Fritz v. Hobson*, 14 Ch. D. 554). He could sue in respect of this private right without joining the Attorney-General (*Boyce v. Paddington*, 1903, 1 Ch. 114).

Private rights
of way, in
gross, and
appurtenant.

A private right of way in gross (that is, not annexed or appurtenant to other property) can be created by express grant; but if so it is personal only and cannot be assigned (*Ackroyd v. Smith*, 10 C. B. 188). An easement of a right of way strictly so called implies the existence of a dominant tenement to which the easement is appurtenant (*Hawkins v. Rutter*, 1892, 1 Q. B. 671). To be so appurtenant the easement must be an incident of a known and usual kind (*Ackroyd v. Smith*, *sup.*), and it must be beneficial to and connected with the enjoyment of the property to which it is appurtenant; *e.g.* there cannot be a right of way over land in Kent appurtenant to an estate in Northumberland (*Bailey v. Stevens*, 12 C. B. N. S. 91; see *Thorpe v. Brumfitt*, 8 Ch. 650). A right of way may be appurtenant either to land or to a right of fishing (*Hambury v. Jenkins*, 1901, 2 Ch. 423).

(2)
Acquisition of
private rights
of way:

A private way is a right which one or more persons have of going over the land of another. This may be claimed by express reservation, or by grant, or as necessarily incident to a grant of land: or it may be claimed by prescription, custom, or by virtue of an inclosure act (Selw. N. P. 1266, 13th ed.).

(a)
by express
reservation:

A right of way may be claimed by express reservation; as where A. grants land to another, reserving to himself a way over such land (1 Roll. Abr. 109, pl. 45; Com. Dig. Chimin (D. 2); and see *Cardigan v. Armitage*, 2 B. & C. 197). *Tindal*, C. J., in *Durham R. Co. v. Walker* (2 Q. B. 967),

observed, "A right of way cannot in strictness be made the subject either of exception or reservation. A right of way reserved to a lessor is, in strictness of law, an easement newly created by way of grant from the grantee or lessee, in the same way as the right of sporting or fishing" (see *Doe v. Lock*, 2 Ad. & Ell. 705; *Wickham v. Hawker*, 7 M. & W. 63). The effect of such a reservation, operating as a re-grant, was considered (*Dynevor v. Tennant*, 33 Ch. Div. 420; 13 App. Cas. 279). In order to establish an easement claimed by lessors, as in the nature of a grant from the lessee, it would in general be essential to show the execution of the lease by the lessees (*Durham R. Co. v. Walker*, 2 Q. B. 967; *Corcor v. Payne*, I. R. 4 C. L. 380; see, however, *May v. Belleville*, 1905, 2 Ch. 605, where an agreement for sale reserving a right of way followed by a conveyance not executed by the purchaser bound the purchaser). A right of access stipulated for by a contract was extinguished by the deed of conveyance which did not reserve it (*Teebay v. Manchester R. Co.*, 24 Ch. D. 572; see *Leggott v. Barrett*, 15 Ch. Div. 309; *Greswolde Williams v. Barneby*, 17 T. L. R. 110). In such a case the court must see that the deed covers the whole ground of the contract (*Palmer v. Johnson*, 13 Q. B. Div. 357); and if it does not there is no extinguishment (*Brazier v. Glasspool*, 1902, W. N. 162; see *De Lassalle v. Guildford*, 1901, 2 K. B. 215).

A way may be claimed by grant, as where an owner of land grants to by express another person a way through or over a particular close (Com. Dig. Chimin, grant; D. 3). But the word "way" in a grant is not an apt word to create a new right of way. It is a word descriptive of an existing right—a right of way over the land of another person (*Roe v. Siddons*, 22 Q. B. Div. 236). The description of a right of way in a grant was rectified, as not in accordance with the intention (*Cowen v. Truefitt*, 1899, 2 Ch. 309). A covenant by an owner of land that another person shall have and use a way amounts to an express grant (*Holme v. Seller*, 3 Lev. 305). A grant was implied from an express covenant (*Oakley v. Adamson*, 8 Bing. 356). A contract to grant a right of way was held equivalent to a contract for sale of real estate, so that no damages were given for breach (*Rowe v. London School Board*, 36 Ch. D. 619; see *Jones v. Watts*, 43 Ch. Div. 574). If a right of way is appurtenant to a piece of land which is demised, the right of way passes also without any special mention of such right (*Skull v. Glenister*, 7 L. T. 827; see *Evans v. Angell*, 26 Beav. 205). The conveyance of an inland farm with the "appurtenances" did not pass the right to take sea-weed from the neighbouring sea-shore (*Baird v. Fortune*, 7 Jur. N. S. 926; 10 W. R. 2). As to when a right of way will pass where there has been unity of seisin of the dominant and servient tenements, see the cases quoted below.

A railway company cannot grant a private right of way over land required for the purposes of its undertaking (*Mulliner v. Midland R. Co.*, 11 Ch. D. 611; *G. W. R. v. Talbot*, 1902, 2 Ch. 765), except where the way is not inconsistent with such purposes (*Re Gonty and Manchester Co.*, 1896, 2 Q. B. 439; see *Foster v. L. C. & D. R.*, 1895, 1 Q. B. 711).

On the construction of the devise of a right of way, it was held limited to the lifetime of the devisee (*Pym v. Harrison*, 33 L. T. 796). General words reserving a wayleave to a bishop for coal got out of any land were restricted by the context to land belonging to the See (*Midgley v. Richardson*, 14 M. & W. 495; see *Hedley v. Fenwick*, 3 H. & C. 349).

A grant of a right of way to Blackacre made to A., "his heirs and assigns," who at the time was tenant from year to year, and subsequently acquired the freehold, enured for the benefit of such freehold (*Rymer v. McIlroy*, 1897, 1 Ch. 528).

The grant should define the way (*Metropolitan R. Co. v. G. W. R. Co.*, 84 L. T. 333). And a grantor having once defined a way cannot alter it (*Deacon v. S. E. R. Co.*, 1889, W. N. 79). Compare the rule as to a way of necessity (*Pearson v. Spencer*, 1 B. & Sm. 584).

In an action for obstructing a way, granted by a lease from the defendant evidence as to the plaintiff, the judge will receive evidence of the state of the premises at grants; the time of the lease, and will then put a construction on the lease as to the

Rights of Way.

line along which the way is granted: but he will not receive evidence of the declarations or acts of the parties, either before or after the lease, as showing where the way is or was intended to be; but if it be uncertain on the words of the grant which of two ways is intended, the judge will receive parol evidence to show which the grantor meant to grant (*Osborn v. Wise*, 7 C. & P. 761; see *R. v. Chorley*, 10 W. R. 2).

way passing
by estoppel;

Where in a conveyance land was described as bounded by a street or roadway (*International Tea Stores v. Hobbs*, 1903, 2 Ch. 173; *Espley v. Wilkes*, L. R. 7 Ex. 304; *Roberts v. Karr*, 1 Taunt. 495; *Gogarty v. Hoskins*, 1906, 1 I. R. 173), or by the seashore (*Mellor v. Walmesley*, 1905, 2 Ch. 104), and the bounding land in fact belonged to the vendor, he was estopped from denying that the purchaser was entitled to a right of way over such bounding land. The inference of a right of way was assisted by a plan on the deed (*Espley v. Wilkes*, *sup.*; *Furness Co. v. Cumberland Society*, 52 L. T. 144). A plan on the agreement cannot, it seems, be referred to to construe the deed (*Barlow v. Rhodes*, 1 C. & M. 439). Sometimes the agreement reserves power to vary the plan appearing thereon (*Whitehouse v. Hugh*, 1906, 2 Ch. 283). As to the effect of a plan, see further *Bayley v. G. W. R. Co.*, 26 Ch. Div. 441, 457; *Randall v. Hall*, 4 D. G. & Sm. 343; *Roe v. Siddons*, 22 Q. B. D. 228; *Re Lindsay and Forder*, 72 L. T. 832.

effect
of plan.

In the case of deeds executed after 1881, a conveyance of land operates, where there is no contrary intention, to convey all ways appertaining or reputed to appertain to the land, or at the time of the conveyance demised occupied or enjoyed with or reputed or known as part or parcel of, or appurtenant to the land (Conv. Act, 1881, s. 6, *post*). As regards the operation of conveyances independently of this act, there have been a number of decisions on the question what words will pass rights of way where there has been unity of seisin of the quasi-dominant and quasi-servient tenements. The effect of these decisions is stated in the next paragraphs.

Where there
is unity of
seisin, what
words will
pass ways
which existed
before the
unity of
seisin.

Where there is an unity of seisin of the land, and of the way over the land, in one and the same person, the right of way is either extinguished or suspended, according to the duration of the respective estates in the land and the way; and after such extinguishment, or during such suspension, the way cannot pass as an *appurtenant* under the ordinary legal sense of that word. In such a case the grantor must either employ words of express grant, or must describe the way in question as one "used and enjoyed with the land" (*James v. Plant*, 4 Ad. & Ell. 761; *Kooystra v. Lucas*, 5 B. & Ald. 830; *Staple v. Haydon*, 6 Mod. 3; *Harding v. Wilson*, 2 B. & C. 96). The words "belonging or appertaining" are insufficient (*Barlow v. Rhodes*, 1 C. & M. 439; *Baring v. Abingdon*, 1892, 2 Ch. 390). Nothing is more clear than that under the word "appurtenances," according to its legal sense, an easement which has become extinct, or which does not exist in point of law, by reason of unity of ownership, does not pass (*Grimes v. Peacock*, 1 Bulst. 17; *Saundey v. Oliff*, Sir T. Moore, 467; *Whalley v. Thompson*, 1 Bos. & P. 371; *Phesey v. Vicary*, 16 M. & W. 484; *Clements v. Lambert*, 1 Taunt. 295; see *Worthington v. Gimson*, 2 E. & E. 618; and *Tatton v. Hammersley*, 3 Ex. 279; *Wardle v. Brocklehurst*, 1 Ell. & Ell. 1058; *Bolton v. Bolton*, 11 Ch. D. 968; *Brett v. Clowser*, 5 C. P. D. 376). In some cases, however, "appurtenances" may have a secondary meaning (*Thomas v. Owen*, 20 Q. B. Div. 232).

Again, it has been laid down that where there are two adjoining closes belonging to one owner, and there exists over one of them a formed road, which is in fact used for the purposes of the other, and that other is granted with the general words "together with all ways now used or enjoyed therewith," a right of way over the formed road will pass, even though that road had been first constructed during the unity of possession of the two closes (*Barkshire v. Grubb*, 18 Ch. D. 622; *Baring v. Abingdon*, 1892, 2 Ch. 390). *Thompson v. Waterlow* (6 Eq. 36) and *Langley v. Hammond* (L. R. 2 Ex. 161), so far as contrary to this view, have been overruled by *Watts v. Kelson* (6 Ch. 166) and *Kay v. Oxley* (L. R. 10 Q. B. 360) (see *Barkshire v. Grubb*, *sup.*; see further *Bayley v. G. W. R. Co.*, 26 Ch. Div. 457; *Roe*

v. *Siddons*, 22 Q. B. Div. 226; and *Geoghegan v. Fegan*, I. R. 6 Ch. 139). The court will in these cases put such a construction upon general words, which *primâ facie* might apply to rights and not to ways enjoyed *de facto* only, as is to be gathered from the true intention of the parties (*Bayley v. G. W. R. Co.*, 26 Ch. Div. 455). As to the construction in such cases of the words "now or heretofore enjoyed," see *Roe v. Siddons*, 22 Q. B. Div. 224.

The rule about rights of way which arise from implication is simply this, that on a severance of two properties anything like a right of way which is used and which is reasonably necessary for the reasonable and comfortable use of the part granted is intended to be granted too. The principle is that the grantor is assumed to have intended that his grant shall be effectual (*Bayley v. G. W. R. Co.*, 26 Div. 452). Compare the grant of easements implied upon the conveyance of one moiety of an outside wall (*Jones v. Pritchard*, 1908, 1 Ch. 635). Compare also the obligation of a lessor not to derogate from his grant implied in *Grosvenor Hotel Co. v. Hamilton*, 1894, 2 Q. B. 896; *Aldin v. Latimer*, 1894, 2 Ch. 437; also the agreement by the grantor implied upon the grant of property for a particular purpose (*Robinson v. Kilvert*, 41 Ch. Div. 88; *Corbett v. Jonas*, 1892, 3 Ch. 137). In applying, however, the doctrine of implied grant of easements, a distinction has been drawn between easements which are only used from time to time on the one hand, and on the other hand easements which are of necessity, or are apparent and continuous. And it has been laid down as clear law that upon a severance of tenements easements used from time to time only do not pass without appropriate language (*Polden v. Bastard*, L. R. 1 Q. B. 161; *Watts v. Kelson*, 6 Ch. 173).

In accordance with this rule a right of way, as being an easement which was not apparent and continuous, did not pass under a lease (*Glave v. Harding*, 27 L. J. Ex. 292). So a right to go to a well and take water, as being an easement which was not continuous, did not pass under a devise (*Polden v. Bastard*, *sup.*; *Taws v. Knowles*, 1891, 2 Q. B. 570).

On the other hand, where a formed road has been made over a quasi servient tenement to and for the apparent use of the quasi dominant tenement, the formed road is considered to be an apparent and continuous easement, and it may pass by implied grant without any general words at all (*Brown v. Alabaster*, 37 Ch. D. 507; *Thomas v. Owen*, 20 Q. B. Div. 231; *Nicholls v. Nicholls*, 81 L. T. 811). Similarly where at the date of the grant of a gravel pit a tramway was in fact enjoyed with the pit in such a manner as to lead to a reasonable expectation that the enjoyment would be permitted to be continued, a grant was implied (*Brazier v. Glasspool*, 1901, W. N. 237; 1902, W. N. 162). Again, where a quasi dominant tenement is so constructed as that part of it, in order to its enjoyment in the state it is in when dealt with, involves a necessary dependence upon the adjoining quasi servient tenement, it has been laid down that a grant of a right of way will be implied. So held in the case of a lease (*Ford v. Metropolitan Ry. Co.*, 17 Q. B. Div. 28): and again where the same testator devised to different devisees the quasi dominant tenement and the quasi servient tenement adjoining (*Pearson v. Spencer*, 3 B. & S. 761; *Milner's Safe Co. v. G. N. & City Ry. Co.*, 1907, 1 Ch. 208, 220).

Where a formed road existed, a right of way over it was reserved by implication (*Thomas v. Owen*, 20 Q. B. Div. 225).

Where property devised or granted is landlocked, and there is no other way of getting at it without some way over the land of the testator or grantor, a way of necessity is created *de novo* (*Pearson v. Spencer*, 1 B. & S. 583; *Pinnington v. Galland*, 9 Exch. 1; *Pyer v. Carter*, 1 H. & N. 916; see *Beaudely v. Brook*, Cro. Jac. 189; *Howton v. Frearson*, 8 T. R. 50). An easement of necessity means an easement without which the property cannot be used at all, not one merely necessary to the reasonable enjoyment of that property (*Union Co. v. London Dock Co.*, 1902, 2 Ch. 572). A way of necessity is in fact only a right of way by implied grant (1 Wms. Saund. 323, n.; see *Bullard v. Harrison*, 4 M. & S. 387; *Hinchliffe v. Kinnoul*, 5 Bing. N. C. 1; *Kavanagh v. Coal Mining Co.*, 14 Ir. C. L. R. 82; see

Rights of
Way.

(b)
Acquisition
by implied
grant upon
severance of
tenements.

Implied
reservation.
Ways of
necessity;

Rights of Way.

Donnelly v. Adams, 1905, 1 I. R. 154). A grant of the right to use the staircase of a building was implied in a lease of an upper flat (*Miller v. Hancock*, 1893, 2 Q. B. 180). No grant will be implied where at the time the necessity did not exist (*Midland R. Co. v. Miles*, 33 Ch. D. 632). And a claim to a way of necessity was refused where one side of the land granted abutted on a highway twenty feet below it (*Titchmarsh v. Royston Co.*, 1899, W. N. 256). The right may arise by implied reservation. Thus if the owner of four closes, having no way to one of them but over the others, grant the latter without reserving a right of way, it will be reserved to him by operation of law (*Clarke v. Cogg*, Cro. Jac. 170; *Jordan v. Attwood*, Owen, 121; *London v. Rigg*, 13 Ch. D. 798). On the sale of land to a purchaser who has notice that the adjoining land is to be laid out in building in a manner which will make a way over the purchased land necessary to the vendor, such a right of way is reserved to the vendor by implication (*Davies v. Sear*, 7 Eq. 427). As to the implied reservation of an easement of necessity, see *Sherbrook v. Tufnell*, 46 L. T. 886; *Union Co. v. London Dock Co.*, 1902, 2 Ch. 557; cases of support.

A way of necessity cannot be pleaded generally, without showing the manner in which the land over which the way is claimed is charged with it (*Bullard v. Harrison*, 4 M. & S. 387; see 1 Wms. Saund. 323, n. 6).

Where there is a private road through a farm, the parson may use it for carrying away his tithe, though there is another public way equally convenient (*Cobb v. Selby*, 6 Esp. 103; see *James v. Dodds*, 2 C. & M. 266). Where a man leases lands, reserving the timber, he may enter to show it to a purchaser (2 Rol. Abr. 74, 1, 41; 1 Rol. Abr. 109, 1, 5). So if a man grants to another certain trees in his wood, the grantee may go with carts over the grantor's lands to carry away the trees (*Liford's case*, 11 Rep. 52 a; Vin. Abr. Incident). A man having a right to wreck thrown on another man's land, has necessarily a right of way over such land to take the wreck (*Anon.*, 6 Mod. 149). Where at the time of the grant in respect of which a right of way was claimed, there was a way which continued to exist, another way could not be claimed as a way of necessity, on the ground of its being more convenient than the former way (*Dodd v. Burchall*, 1 H. & C. 113). As to a right of way by necessity to land which had escheated to the lord of the manor, see *Proctor v. Hodgson*, 10 Exch. 824.

Where a grantee is entitled to a way of necessity over another tenement belonging to the grantor, and there exist to the tenement granted more ways than one, the grantee is entitled to one way only, which the grantor may select (*Bolton v. Bolton*, 11 Ch. D. 968). The grantee cannot in general claim a right of way over one particular defined road as a way of necessity (*Brown v. Alabaster*, 37 Ch. D. 500; *Titchmarsh v. Royston Co.*, 1899, W. N. 256). A way of necessity once created must remain the same way as long as it continues at all (*Pearson v. Spencer*, 1 B. & S. 584; compare *Deacon v. S. E. R. Co.*, 1889, W. N. 79; and *Allport v. General Security Co.*, 11 T. L. R. 310, a staircase to a flat). The lessee of an inner close has by necessity a right of way suitable to the business for which the lease was made, over an outer close which belongs to the same landlord (*Gayford v. Moffatt*, 4 Ch. 133). So where land was taken compulsorily for sewage works, the local board acquired a way of necessity for all purposes connected with these works (*Serff v. Acton*, 31 Ch. D. 679). In general, however, a way of necessity is only such a right as will enable the owner of the close to enjoy it in the condition it was in at the time of the creation of the way (*London v. Rigg*, 13 Ch. D. 798).

A way of necessity is limited by the necessity which created it; and when such necessity ceases, the right of way also ceases; therefore if, at any subsequent period, the party formerly entitled to such way can approach the place to which it led by passing over his own land, by as direct a course as he would have done by using the old way, the latter will cease to exist (*Holmes v. Goring*, 2 Bing. 76; *Reynolds v. Edwards*, Willes, 282; but see *Buckley v. Coles*, 5 Taunt. 311, and the remarks of Parke, B., *Proctor v. Hodgson*, 10 Ex. 828; see also *Pheysey v. Vicary*, 16 M. & W. 491).

instances of
ways of
necessity ;

nature of a
way of
necessity ;

duration of
a way of
necessity.

A private right of way may be claimed by lost grant. As to this mode of claim, see *ante*, p. 22. Such a grant may be presumed from long enjoyment, where its commencement cannot be accounted for, unless a grant has been made (*Doe v. Reed*, 5 B. & Ald. 237). The uninterrupted enjoyment of a right of way for twenty years, in the absence of evidence that it had been used by leave, or under a mistake, was held sufficient foundation for the presumption of a lost grant, although such grant must have been made within twenty-six years, as all former ways were at that time extinguished by an inclosure act (*Campbell v. Wilson*, 3 East, 294). So where there had been an absolute extinguishment of a right of way for many years by unity of possession, but the way had been used for thirty years preceding an action for its obstruction, the jury were directed to presume a grant (*Keymer v. Summers*, 3 T. R. 157; *Livett v. Wilson*, 3 Bing. 115). Though an uninterrupted user for twenty years and upwards be a bar to an action, yet the rule must be taken with this qualification, that the user was with the acquiescence of the person seised of an estate of inheritance (*Roberts v. James*, 89 L. T. 287). The mere knowledge of a tenant for years is not sufficient (*Daniel v. North*, 11 East, 372); but if the user has been for a great length of time, it may be presumed that the landlord was aware of it (*Davies v. Stephens*, 7 C. & P. 570; *Jamieson v. Coulter*, 21 W. R. 852; *Gray v. Bond*, 2 Brod. & Bing. 667; see *Dawson v. Norfolk*, 1 Price, 247). It has been held in Ireland that a grant may be presumed from one tenant to another (*Timmons v. Hewitt*, 22 L. R. Ir. 627).

Rights of Way.

(c)
Acquisition
(based on
user) by lost
grant;

A private way may also be claimed by prescription at common law. As to this mode of claim see *ante*, p. 21. A tenant for years claiming in this manner must, according to rules laid down before the Prescription Act, 1832, s. 5, *ante*, p. 15, have set forth the seisin in fee of the owner, and then have traced his own title from the owner of the fee (2 Salk. 562; Com. Dig. Chimin (D. 2); *Cantrell v. Stephens*, Styl. 300; *Dawney v. Cashford*, Carth. 432). A right of way could be claimed in respect of a dominant tenement which had been inclosed from a common within fifty years (*Codling v. Johnson*, 5 B. & C. 933). The user on which the prescription at common law is based must be uninterrupted. Locking a gate across the way is interruption, although the claimant is given a key (*Barry v. Lowry*, 1 R. 11 C. L. 483; compare *Davies v. Stephens*, 7 C. & P. 570).

A private right of way may also be claimed by prescription under the Prescription Act, 1832. As to this method of claim, see *ante*, p. 7.

by prescrip-
tion under
act;

A custom that every inhabitant of a certain village shall have a way over certain land, either to church or to market, is good, because it is only an easement, but not a profit (6 Rep. 60 b.; Co. Litt. 110 b.; Cro. Eliz. 180; see 2 H. Bl. 393). See, as to a church way, *Batten v. Gedye*, 41 Ch. D. 507; *Brocklebank v. Thompson*, 1903, 2 Ch. 344).

by custom.

An act which extinguished all ways over land allotted to B., contained a proviso that nothing in the act should deprive A. of the right of access to a watercourse to cleanse the same; this reserved to A. his right of way for the purposes mentioned (*Adeane v. Mortlock*, 5 Bing. N. C. 236). An act authorizing the appropriation of land as a way for the improvement of an estate and the accommodation of tenants authorized the creation of exclusive private rights of way (*White v. Leeson*, 5 H. & N. 53). Commissioners of partition may award a right of way over the lands of one party to the lands of another party (*Lister v. Lister*, 3 Y. & C. 140).

(d)
Acquisition
by statute.

Primâ facie, the grant of a right of way is a grant having regard to the nature of the *locus in quo* over which it is granted and to the purpose for which it is intended to be used. Both these circumstances may be called in aid in determining whether it is a general right of way, or a footway, or a driftway (*Cannon v. Villars*, 8 Ch. D. 421; see *Osborn v. Wise*, 7 C. & P. 761, *ante*, p. 66). On this principle, a way was held to be a footway in *Cousens v. Rose*, 12 Eq. 366; and a way for all purposes in *Watts v. Kelson*, 6 Ch. 166; see also *Wood v. Stourbridge Co.*, 16 C. B. N. S. 222. On the construction of a lease the grant of a right of way was restricted to the way

(3)
Nature of
right of way
acquired by
express grant.

Rights of
Way.

existing at the date of the lease (*Collins v. Slade*, 23 W. R. 199). Where a lease reserved to the lessor a right of way for the purpose of rebuilding erections on adjoining premises which belonged to the lessor, and the lessor erected a dispensary on those premises, the user of the way as an access to such dispensary was restrained (*Ardley v. St. Pancras*, 1870, W. N. 203; 39 L. J. Ch. 871; see *Sloan v. Holliday*, 30 L. T. 757). Compare the ruling as to the extent of an easement to discharge drainage over another's land (*Wood v. Saunders*, 10 Ch. 582). The right of a landowner whose land had been severed by a railway to use a level crossing granted to him by the company was limited to what was intended at the date of the grant (*G. W. R. v. Talbot*, 1902, 2 Ch. 759). So the user of a level crossing as a means of access to a tennis club subsequently established was held excessive (*Taff Vale Co. v. Gordon Canning*, 1909, 2 Ch. 48).

Again, as regards additions to the dominant tenement, it has been laid down that if a man has a right of way to one close he cannot use the right for the purpose of going to another close adjoining the former (*Harris v. Flower*, 1904, W. N. 180; *Colchester v. Roberts*, 4 M. & W. 773). If a man has a right of way to a close called A., he cannot justify using the way to go to A., and from thence to another close of his own adjoining to A. (1 Roll. Abr. 391, pl. 3; *Howell v. King*, 1 Mod. 191; *Lawton v. Ward*, 1 Ld. Raym. 75; and 1 Lutw. 111; *Skull v. Glenister*, 16 C. B. N. S. 81). As regards subdivisions of the dominant tenement, the right goes with every part (*Newcomen v. Coulson*, 5 Ch. Div. 141), at least where the burden is not increased (*Bower v. Hill*, 2 Bing. N. C. 339).

On the other hand, where there is an express grant of a private right of way to particular land, to the unrestricted use of which land the grantee of the right of way is entitled, the grant is not to be restricted to access to the land for purposes for which access would be required at the time of the grant (*Finch v. G. W. R. Co.*, 5 Ex. D. 254; see *Harris v. Flower*, 1904, W. N. 180; *United Land Co. v. G. E. R. Co.*, 10 Ch. 586; *Newcomen v. Coulson*, 5 Ch. D. 133). In *Allan v. Gowme* (11 Ad. & E. 759), the grantee of a right of way was limited to the use of a way to a place which should be in the same predicament as it was at the time of the grant. This ruling, however, was not approved of by *Parke, B.* (*Henning v. Burnet*, 8 Exch. 192), and the case was treated by *Stephen, J.*, as turning on the construction of the particular deed (*Finch v. G. W. R. Co.*, 5 Ex. D. 259). The grant of a footway was not so limited (*Sketchley v. Berger*, 69 L. T. 754). A way over a private road to land abutting on the private road was not limited to a way through gates which existed at the time of the grant (*South Metropolitan Co. v. Eden*, 16 C. B. 42; compare the wide construction placed upon the grants of ways in *Cooke v. Ingram*, 68 L. T. 671; *Sketchley v. Berger*, 69 L. T. 754). A grant of a right of way for the grantee, his executors, administrators and assigns under tenants and servants extended to licensees (*Baxendale v. North Lambeth Club*, 1902, 2 Ch. 427). And a right for "visitors" included pupils (*Thornton v. Little*, 1907, W. N. 68).

Under a grant of a free and convenient horse and foot way, and for carts, &c., "to carry stones, timber, coals, and other things whatsoever," the grantee may lay a framed way across the land for carrying coals as being most convenient (*Senhouse v. Christian*, 1 T. R. 560). Where in 1630 land was granted excepting and reserving out of the grant all mines of coal with sufficient way-leave to the said mines the right was not confined to such ways as were in use at the time of the grant (*Dand v. Kingscote*, 6 M. & W. 174; see *Newcomen v. Coulson*, 5 Ch. D. 139; *Durham R. Co. v. Walker*, 2 Q. B. 940; *Farrow v. Vunsittart*, 1 Ry. Cas. 614). Where, however, A. granted land reserving a waggon or cart road of the width of eighteen feet, to be at all times thereafter kept in repair at his own cost, this reservation did not enable A. to lay down a railroad for carrying coals from his neighbouring colliery (*Bidder v. North Staffordshire R. Co.*, 4 Q. B. Div. 412). Where a lease of premises described them as abutting on an intended way, thirty feet wide, not then set out, the soil of which was the property of the lessor: and the lessee granted an underlease, describing the premises as

Rights of Way.

abutting on an intended way, without specifying the breadth: the sub-lessee was entitled to a *convenient* way only (*Harding v. Wilson*, 2 B. & C. 96; see *Espley v. Wilkes*, L. R. 7 Ex. 298). The grant of a right of way which did not express the intention was rectified (*Cowen v. Truefitt*, 1899, 2 Ch. 309). Where a way was granted for a particular purpose, but the land had never been, and was not likely to be, used for that purpose, a declaration of right to the way was refused (*Metropolitan R. Co. v. G. W. R. Co.*, 84 L. T. 333).

A grant of a right of way over a private road only confers a right to a reasonable use of such road, and not necessarily over the whole surface of the road (*Clifford v. Hoare*, L. R. 9 C. P. 362; see *Sketchley v. Berger*, 69 L. T. 754; *Strick v. City Offices Co.*, 22 T. L. R. 667). So in the case of a private way over waste land (*Hulton v. Hamboro*, 2 F. & F. 218). Where a right of way is granted for the occupation of a dwelling-house, the grantee has everything needful for such occupation and may put down a flagstone in front of a door opening into the land over which the right exists (*Gerrard v. Cooke*, 2 Bos. & P. N. R. 109). Where premises are conveyed with a right of way thereto, it may be a question for the jury what is a reasonable use of such right (*Hawkins v. Carbine*, 27 L. J. Exch. 44). Where a right of way was expressed to be "through the gateway of the plaintiff" (which gateway led to other premises of the plaintiff), and, at the time of the lease, carts could come in to load, but through subsequent alterations could not do so without trenching upon the plaintiff's premises, the defendant had, in the reasonable use of the right of way, a right to do this (*Ib.*).

The grant of the "exclusive use of a gateway" conferred on the grantee the ownership of the gateway as a corporeal hereditament (*Reilly v. Booth*, 44 Ch. D. 12: compare the grant of the exclusive right of drainage through a tunnel which gave the grantee possession of the tunnel (*Holywell v. Halkyn*, 1895, A. C. 117; see *Metropolitan R. Co. v. Fowler*, 1893, A. C. 416).

As to the nature of the right in the case of a way acquired by implied grant, it was said in one case that the nature of the right depends on the user (*Milner's Co. v. G. N. & City R.*, 1907, 1 Ch. 220). See *Gayford v. Moffatt*, *Serff v. Acton*, *London v. Rigg*, all quoted *ante*, p. 68.

Nature of right of way acquired by implied grant.

(4)

Where a right of way is acquired by user, the extent of the right must be measured by the extent of the user (*Williams v. James*, L. R. 2 C. P. 581; right of way see *Finch v. G. W. R. Co.*, 5 Ex. D. 258). Accordingly a prescriptive right acquired by user of way acquired for agricultural purposes only did not give a right of way for mineral purposes (*Bradburn v. Morris*, 3 Ch. D. 812), nor a right to cart building materials (*Wimbledon Conservators v. Dixon*, 1 Ch. D. 363). If, however, the way is proved to have been used for a variety of purposes, the jury may be warranted in finding a way for all purposes (*Cowling v. Higginson*, 4 M. & W. 245; see *Dare v. Heathcote*, 26 L. J. Ex. 245; *Ballard v. Dyson*, 1 Taunt. 279; *Jackson v. Stacey*, Holt, N. P. C. 455; *Higham v. Rubbett*, 5 Bing. N. C. 622). When a way to a dwelling-house had been acquired by user, there was no excess of user by opening a small shop (*Sloan v. Holliday*, 30 L. T. 757).

Nature of right of way acquired by user.

(5)

A person having a private way over the land of another cannot, when the way is become impassable by the overflowing of a river, justify going on the adjoining land, although such land, as well as the land over which the way runs, belongs to the grantor of the way (*Taylor v. Whitehead*, 2 Dougl. 475; *Bullard v. Harrison*, 4 M. & S. 387; 1 Wms. Saund. 322 a, n. (3); *Duncombe's case*, Cro. Car. 366; see *Robertson v. Gauntlett*, 16 M. & W. 289). But where a private way has been obstructed by the grantor, the grantee may deviate over the grantor's land (*Selby v. Nettlefold*, 9 Ch. 111).

Right to deviate.

(6)

The grantee of a way has a right to repair it, as incident to the grant (Com. Dig. Chimin (D. 6); Godb. 53; *Gerrard v. Cooke*, 2 Bos. & P. N. R. 108; Vin. Abr. Incidents (A.); *Newcomen v. Coulson*, 5 Ch. D. 143), and the grantor is not bound to repair (Com. Dig. Chimin (D. 6); *Jones v. Pritchard*, 1908, 1 Ch. 637); unless by prescription or stipulation, express or implied (1 Saund. 322 a, n.; *Rider v. Smith*, 3 T. R. 766; *Miller v. Hancock*, 1893,

Repair of way.

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2 Q. B. 181). The grantee of a private way is to make it (*Osborn v. Wise*, 7 C. & P. 764). By common law, unless the grantor has bound himself to do so, he who has the use of a thing ought to repair it (*Taylor v. Whitehead*, 1 Doug. 720; *Pomfret v. Ricroft*, 1 Wms. Saund. 557; *Miller v. Hancock*, *sup.*). This is not an obligation to which the grantee is subject; it is no more than this, that if he wants the way to be repaired he must repair it himself (*Duncan v. Louch*, 6 Q. B. 909, 910; see *Ingram v. Morecraft*, 33 Beav. 49). But in some cases the grantee might be liable for non-repair (*Jones v. Pritcard*, 1908, 1 Ch. 638). As to rebuilding a bridge, see *Campbell Davys v. Lloyd*, 1901, 2 Ch. 518.

Liability for negligence.

As to the liability for negligence attaching to a landowner who permits others to pass over his land, see *Gallagher v. Humphrey*, 10 W. R. 664; *Corby v. Hill*, 4 C. B. N. S. 556; *Belch v. Smith*, 7 H. & N. 736; *Gautret v. Egerton*, L. R. 2 C. P. 371; *Gwinnell v. Eames*, L. R. 10 C. P. 658; *Tarry v. Ashton*, 1 Q. B. D. 314.

(7)

Extinction of rights of way: by unity of seisin; by abandonment;

Where a person having a right of way over the land of another purchases such land, the right of way is extinguished by the unity of seisin and possession (*Heigate v. Williams*, Noy, R. 119; see *James v. Plant*, 4 Ad. & El. 761).

A long forbearance to exercise a right of way may reasonably be accounted for by supposing a release of the right (*Doe v. Hilder*, 2 B. & Ald. 791; see *Moore v. Rawson*, 3 B. & C. 339). But a mere suspension of the exercise of a right is not sufficient to prove an intention to abandon it (*Crossley v. Lightowler*, 2 Ch. 482; *James v. Stevenson*, 1893, A. C. 162). It is the nature of the act done, or of the adverse act acquiesced in by the owner of the easement, and the intention thereby indicated, which are material (*R. v. Chorley*, 12 Q. B. 519; *Mulville v. Fallon*, 1 R. 6 Eq. 458). Where a right of way has been once established by clear evidence of enjoyment, it can be defeated only by distinct evidence of interruptions acquiesced in (*Harvie v. Rogers*, 3 Bligh, N. S. 444—447; see *Hillary v. Waller*, 12 Ves. 265; *Norbury v. Meade*, 3 Bligh, 211, 241).

The discontinuance for upwards of twenty years of the use of a right of way to a close, because the occupiers had a more convenient access, is not evidence of an intention to abandon (*Ward v. Ward*, 7 Exch. 838; where it was said, "The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances to raise that presumption. The right is acquired by adverse enjoyment. The non-user must be the consequence of something which is adverse to the user." Cf. *Cooke v. Ingram*, 68 L. T. 671). A parol agreement for the substitution of a new way for an old prescriptive way, and the consequent discontinuance to use the old way, afford no evidence of the abandonment thereof (*Lovell v. Smith*, 3 C. B. N. S. 120; see *Hulbert v. Dale*, 1909, 2 Ch. 570). It is always a question of fact, to be ascertained by a jury or by the court from the surrounding circumstances, whether the act amounts to an abandonment or was intended as such (*Cook v. Bath*, 6 Eq. 179; *Young v. Star Omnibus Co.*, 86 L. T. 41). The owner of closes A and B, connected by a right of way, who sold A without granting any right of way to the purchaser or reserving one to himself, was held to have abandoned the connecting way (*Midland R. Co. v. Gribble*, 1895, 2 Ch. 827).

by alteration of dominant tenement;

Where the mode of enjoyment of an easement has been altered, and an attempt has been made to usurp a greater right than the party was entitled to, the previously-existing right will not be affected by acts of usurpation in the case of those easements which depend upon repeated acts of man, such as rights of way (see *Luttrell's case*, 4 Rep. 86 a). Where a grant was implied of a right of way to a dominant tenement on which a warehouse was standing, and a railway station was substituted for the warehouse, it was said that under the existing circumstances the right was not exercisable at all (*Milner's Co. v. G. N. & City Ry.*, 1907, 1 Ch. 227). If a right of way be granted for the purpose of being used as a way to a cottage, and the cottage is changed into a tan yard, the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by the cottage being altered (*Henning v. Burnet*, 8 Exch. 192; see *Sloan v. Holliday*, 30 L. T. 757).

By the Inclosure Act, 1801, sects. 8, 10 and 11, the commissioners are directed to set out private ways, and it is declared that all ways not set out shall be extinguished; but there is a proviso that no old or accustomed road shall be stopped up without the order of two justices. A private way, not set out by the commissioners, was held to have been extinguished, the proviso only applying to public roads (*White v. Reeves*, 2 Moore, 23; *Holden v. Tilley*, 1 F. & F. 650); compare sects. 62—68 of the Inclosure Act, 1845, *Turner v. Crush*, 4 App. Cas. 221; *Hornby v. Silvester*, 20 Q. B. Div. 797. As to the construction of local inclosure acts giving powers to stop up roads, see *Logan v. Burton* (5 B. & C. 513); *Harber v. Rand* (9 Price, 58); *R. v. Hatfield* (4 Ad. & Ell. 156).

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—by statute.

The owner of a right of way may, after proper notice requesting the removal of an obstruction, himself remove it, even if the obstruction is a house which is inhabited (*Lane v. Capsey*, 1891, 3 Ch. 411). The refusal by the court to grant a mandatory injunction would not interfere with such a right (*Ib.*); and leave was given to exercise the right where the house was in the possession of a receiver appointed by the court (*Ib.*). Notice before abatement is unnecessary in case of emergency or where the person in possession of the land himself creates the nuisance (*Lemmon v. Webb*, 1894, 3 Ch. 13). It is doubtful whether the right to abate exists in case of nonfeasance (*Campbell Davys v. Lloyd*, 1901, 2 Ch. 518).

(8)

Remedy for a disturbance: by abatement.

An action lies for the disturbance of a right of way, created either by reservation, grant, or prescription (Com. Dig. Action on the Case for Disturbance (A. 2); 1 Roll. Abr. 109); and such disturbances may be either by absolutely stopping up the way, or by ploughing up the land through which the way passes (2 Roll. Abr. 140), or by damaging the way with carriages, so that it is of no use (*Lawton v. Ward*, 1 Lutw. 111). A reversioner cannot sue for the obstruction of a right of way unless the obstruction be such as either permanently injures the estate, or operates in denial of the right (*Hopwood v. Scholfield*, 2 M. & Rob. 34; see *Young v. Spencer*, 10 B. & C. 145; *Baxter v. Taylor*, 4 B. & Ad. 72; *Jackson v. Pesked*, 1 M. & S. 234; *Alston v. Scales*, 2 M. & Scott, 5; *Mott v. Shoolbred*, 20 Eq. 22; *Kidgill v. Moor*, 9 C. B. 364). There was such permanent injury from the obstruction of a siding by a railway company (*Bell v. Midland R. Co.*, 10 C. B. N. S. 287).

Remedy by action;

action by reversioner;

The Railway Clauses Act, 1845, s. 53, takes away the common law right of action for an interference by a railway company under its powers with a private right of way, except when special damage has been sustained (*Watkins v. G. N. R. Co.*, 16 Q. B. 961). As to compensation under the Lands Clauses Act, 1845, see *London School Board v. Smith*, 1895, W. N. 37.

companies;

In all cases for disturbance of a way, the obstruction ought to be alleged as occurring in the way itself to which the party has a right (*Tebbutt v. Selby*, 6 Ad. & Ell. 786). Where in an action for wrongfully stopping up a way the precise locality of the way is material to the defence, the defendant is bound to show it in his pleadings (*Ellison v. Iles*, 11 Ad. & Ell. 665).

pleading;

In an action brought since the Jud. Acts for obstructing a private way the pleading should, under the R. S. C., show the termini of the way and its course; and whether the plaintiff claims by prescription or grant (*Harris v. Jenkins*, 22 Ch. D. 481; compare *Pledge v. Pomfret*, 1905, W. N. 56). And where the defendant in an action of trespass pleads that the *locus in quo* was a highway, he must now state how it became a highway (*Spedding v. Fitzpatrick*, 38 Ch. Div. 410; see under the old law, *Williams v. Wilcoar*, 8 Ad. & Ell. 331). As to variances under the old law, see *Duncan v. Louch* (6 Q. B. 904); *Colchester v. Roberts* (4 M. & W. 769).

Where a bill was filed by a lessee to establish a right of way, an objection for want of parties, because the plaintiff's lessor was not before the court, was allowed under the Chancery practice before the Jud. Acts (*Poore v. Clark*, 2 Atk. 515). As to the certainty required in such bills, see *Gell v. Hayward* (1 Vern. 312); *Cresset v. Milton* (3 Bro. C. C. 481; 1 Ves. jun. 449). Agreements as to right of way were enforced by injunction in *Newmarch v.*

actions in the Chancery Division.

Rights of
Way.

Brandling (3 Swan. 99); *Phillips v. Treeby* (3 Giff. 632); *Collins v. Slade* (23 W. R. 199).

As to the remedy in equity, in the case of a licence for a right of way which has been executed, and where expense has been incurred, see *Mold v. Wheatcroft* (27 Beav. 510), and the cases quoted *ante*, p. 36.

As to the obstruction of a right of way by the acts of several persons, see *Thorpe v. Brumfitt*, 8 Ch. 650, and other cases quoted p. 111, *post*. Injunctions have been granted to restrain interference with the private access of the owner of property abutting on the highway to and from the highway (*Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; *Original Hartlepool Co. v. Gibb*, 5 Ch. D. 713; see *Fritz v. Hobson*, 14 Ch. D. 542). In a proper case a mandatory injunction will be granted (*Krehl v. Burrell*, 7 Ch. D. 551; 11 Ch. Div. 146). The remedy of a parishioner in respect of a churchway is in the Ecclesiastical Court (*Batten v. Gedye*, 41 Ch. D. 507). See further the forms of injunctions, Seton, 6th ed. 585 *et seq.*

V.—WATERCOURSES AND RIGHTS IN RELATION TO WATER.

- (1) *Natural Rights in Natural Streams with defined Channel*...74.
- (2) *Natural Rights in Water in undefined Channels*...76.
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This note deals in the first instance with non-navigable streams. As to navigable streams, see *post*, p. 89.

Different
kinds of
streams.

Non-navigable streams flow through watercourses which are either natural or artificial. As regards the water of a non-navigable stream flowing through a natural watercourse, the channel may be either a defined channel or an undefined channel. And the defined channel may be either overground or underground. In this water flowing through a natural watercourse with a defined channel, riparian owners have by the general law certain rights called natural rights. And they may by prescription acquire other rights called prescriptive rights.

(1)
Natural
rights in
water in
natural water-
course with
defined
channel.

The natural rights of a riparian owner in water flowing through a natural watercourse with a defined channel may be said to be threefold: (1) the right of user, (2) the right of flow, (3) the right of purity. The rights of user and flow in overground streams have been described in the following cases: "The flow of a natural stream creates mutual rights and liabilities between all the riparian proprietors along the whole of its course. Subject to reasonable use by himself, each proprietor is bound to allow the water to flow on without altering the quantity or quality" (*Gaved v. Martyn*, 19 C. B. N. S. 732).

"By the general law applicable to running streams, every riparian proprietor has a right to what may be called the ordinary use of water flowing past his land; for instance, to the reasonable use of the water for domestic purposes and for his cattle; and this without regard to the effect which such use may have in case of a deficiency upon proprietors lower down the stream. But, further, he has a right to the use of it for any purpose, for what may be deemed the extraordinary use of it, provided he does not thereby interfere with the rights of other proprietors, either above or below him. Subject to this condition, he may dam up a stream for the purpose of a mill, or divert the water for the purpose of irrigation. But he has no right to intercept the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors, and inflicts upon them a sensible injury" (*Per Lord Kingsdown, Miner v. Gilmour*, 12 Moo. P. C. 156; adopted ever since; *John White v. White*, 1906, A. C. 79; see *Young v. Bankier Co.*, 1893, A. C. 696, 698).

Of Water-courses.

(1) Rights of user and flow.

(a)

Overground streams.

Again, Lord Cairns said: "The lower riparian owner is entitled to the accustomed flow of the water for the ordinary purposes for which he can use the water. That is quite consistent with the right of the upper owner also to use the water for all ordinary purposes (namely, as has been said, *ad lavandum et ad potandum*), whatever portion of the water may be thereby exhausted and may cease to come down by reason of that use. But farther, there are uses no doubt to which the water may be put by the upper owner, namely, uses connected with the tenement of that upper owner. Under certain circumstances, and provided no material injury is done, the water may be used and may be diverted for a time by the upper owner for the purpose of irrigation. That may well be done; the exhaustion of the water which may thereby take place may be so inconsiderable as not to form a subject of complaint by the lower owner, and the water may be restored, after the object of irrigation is answered, in a volume substantially equal to that in which it passed before. Again, it may well be that there may be a use of the water by the upper owner for, I will say, manufacturing purposes, so reasonable that no just complaint can be made upon the subject by the lower owner. Whether such a use in any particular case could be made for manufacturing purposes connected with the upper tenement would, I apprehend, depend upon whether the use was a reasonable use. Whether it was a reasonable use would depend, at all events in some degree, on the magnitude of the stream from which the deduction was made for this purpose over and above the ordinary use of the water" (*Swindon Co. v. Wilts Co.*, L. R. 7 H. L. 704). Again, Lord Macnaghten speaks of the "ways in which a person whose lands are intersected or bounded by a running stream may use the water to which the situation of his property gives him access. He may use it for ordinary or primary purposes, for domestic purposes, and the wants of his cattle. He may use it also for some other purposes—sometimes called extraordinary or secondary purposes—provided those purposes are connected with or incident to his land, and provided that certain conditions are complied with. . . . In the ordinary or primary use of flowing water a person dwelling on the banks of a stream is under no restriction. In the exercise of his ordinary rights he may exhaust the water altogether. No lower proprietor can complain of that. In the exercise of rights extraordinary but permissible, the limit of which has never been accurately defined and probably is incapable of accurate definition, a riparian owner is under considerable restrictions. The use must be reasonable. The purposes for which the water is taken must be connected with his tenement, and he is bound to restore the water which he takes and uses for those purposes substantially undiminished in volume and unaltered in character" (*M'Cartney v. Londonderry Co.*, 1904, A. C. 306).

As regards the ordinary use and extraordinary use to which under the above cases the riparian owner is entitled, it has been said that the user which may at one time have been extraordinary may, by changes in the condition, become ordinary; and also that a user which might be extraordinary in an agricultural district might not be extraordinary in a manufacturing district (*per Lord Esher, in Ormerod v. Todmorden*, 52 L. J. Q. B. 450; see 11 Q. B. Div. 168).

Of Water-
courses.

According to Lord *Cairns*, the extraordinary use includes manufacturing purposes; as to which see *Dakin v. Cornish*, 6 Exch. 360; and irrigation; as to which *Parke, B.*, said, if the irrigation takes place not continuously but at intermittent periods when the river is full and no damage is done thereby to the working of a mill on the stream, and the diminution of water is not perceptible to the eye, it is not prohibited (*Embrey v. Owen*, 6 Exch. 372; see *Sampson v. Hoddinott*, 1 C. B. N. S. 603). But the right of a riparian owner to an extraordinary use does not enable him to divert water to supply a lunatic asylum and county jail (*Medway Co. v. Romney*, 9 C. B. N. S. 575; 30 L. J. C. P. 236). Or to supply a town (*Swindon Co. v. Wilts Co.*, *sup.*; *Roberts v. Gwyrfai*, 1899, 2 Ch. 612; *Owen v. Davies*, 1874, W. N. 175). Nor did it enable a railway company who owned a tenement on a stream to divert water to a place outside that tenement and use it to supply locomotives along their line (*McCartney v. Londonderry Co.*, 1904, A. C. 306).

In a case where a stream had from time to time changed its course, it was laid down that the accustomed course of a natural stream which a riparian owner is entitled to have preserved is the natural and apparently permanent course existing when the right is asserted or called in question (*Withers v. Purchase*, 60 L. T. 819).

(b)
Underground
streams.

As regards the water of a natural stream flowing through a defined channel, where the course is subterranean but well known, as is the case with many, which sink underground a short space and then emerge again, the owner of the soil under which the stream flows can maintain an action for diversion, if it took place under such circumstances as would have enabled him to recover if the stream had been wholly above ground (*Dickenson v. Grand Junction Co.*, 7 Ex. 300; *Chasemore v. Richards*, 7 H. L. C. 374; see *Dudden v. Clutton Union*, 1 H. & N. 630).

The above are the natural rights of user and flow possessed by a riparian owner in the water of a natural stream flowing through a defined channel (whether overground or underground), as laid down in modern authorities. The doctrine of appropriation referred to in the earlier cases is not now accepted (see *Orr Ewing v. Colquhoun*, 2 A. C. 854; *Arkwright v. Gell*, 5 M. & W. 220).

The rules regulating the right of flow laid down as to water flowing in an undefined channel (see below) differ from those above stated as to defined channels. And in the case of water flowing from surface springs, there is often a difficulty in distinguishing whether they fall under the rules as to defined or undefined channels (see *Ennor v. Barwell*, 2 Giff. 423; *Briscoe v. Drought*, 11 Ir. C. L. R. N. S. 250). Where a natural defined stream issued from a springhead, it was held that the "stream" began at the springhead, and that the owner of the land could only take such water from either as was incident to his right as riparian owner (*Dudden v. Clutton Union*, 1 H. & N. 627; *Bunting v. Hicks*, 70 L. T. 458; *Ewart v. Belfast*, 9 L. R. Ir. 172). The same principle applied even where at some remote period the springhead had been built round (*Mostyn v. Atherton*, 1899, 2 Ch. 360).

(2) Right of
purity.

A riparian owner has a right to the natural stream of water flowing through the land in its natural state; and if overground water is polluted by a superior owner, the inferior owner has a cause of action against the superior owner, unless the latter has gained by enjoyment or grant a right to pollute (*Wood v. Waud*, 3 Ex. 748; see *Weeks v. Heward*, 10 W. R. 557). The same rule applies, if the character of the water be altered (*Young v. Bankier Co.*, 1893, A. C. 691). The natural right to purity extends to subterranean water when appropriated (*Hodgkinson v. Ennor*, 4 B. & S. 229; *Turner v. Mirfield*, 34 Beav. 390; *Ballard v. Tomlinson*, 29 Ch. Div. 115).

(2)
Water
flowing in
undefined
channels.

Turning to undefined channels, water flowing through these may be overground or underground. As regards such water when overground, it is settled that the right of a riparian owner does not extend to water flowing over or soaking through land previous to its arrival at such watercourse

(1) Rights of user and flow. (*Broadbent v. Ramsbottom*, 11 Ex. 602). So the owner of land has an unqualified right to drain it for agricultural purposes in order to get rid of

mere surface water, the supply of the water being casual and its flow following no regular definite course (*Rawstron v. Taylor*, 11 Exch. 369; see *Van Breda v. Silberbauer*, L. R. 3 P. C. 84).

Underground water flowing through an undefined channel is governed by the same rule (*Chasemore v. Richards*, 7 H. L. C. 376). The last-mentioned case decided that every man has a right to divert or appropriate all water of this nature which he can find on his own land (*Ballard v. Tomlinson*, 29 Ch. Div. 123; *Salt Union v. Brunner*, 1906, 2 K. B. 822.; *English v. Metropolitan Board*, 1907, 1 K. B. 602). And this right he can exercise notwithstanding that his neighbour's well may be thereby left dry (*Acton v. Blundell*, 12 M. & W. 353), or that the stream which the neighbour owns may be diminished in consequence of the diverted or appropriated water not coming into it (*Bradford v. Pickles*, 1895, A. C. 586). No action will lie against a man who, by digging in his own land, drains his neighbour's land either by intercepting the flow of the water percolating through the soil, or by causing water already collected on his neighbour's soil to percolate away (*Ballacorkish Co. v. Harrison*, L. R. 5 P. C. 60; see *New River Co. v. Johnson*, 6 Jur. N. S. 374; 7 W. R. 179; *South Shields Co. v. Cookson*, 15 L. J. Ex. 315; *R. v. Metropolitan Board*, 3 B. & S. 710).

The decision in *Grand Junction Co. v. Shugar*, 6 Ch. 483, which seems inconsistent with the rules last stated, must be explained as relating to a direct tapping of an overground stream flowing in a defined channel, and not to a mere withdrawal of percolating underground water (*Jordeson v. Sutton Co.*, 1899, 2 Ch. 251; *English v. Metropolitan Board*, 1907, 1 K. B. 601).

As to the withdrawal of underground water support, see cases stated, *post*, p. 96.

In the case of underground water flowing through a channel defined but (as being only ascertainable by excavation) not known, the rule applicable to undefined channels was applied, and the lower riparian proprietor had no right of flow and could not restrain diversion (*Bradford Corporation v. Ferrand*, 1902, 2 Ch. 655).

Where water in an undefined channel is poisoned by a landowner, his (2) Right of neighbour, on appropriating the water, would it seems have a right of action purity. (*Ballard v. Tomlinson*, 29 Ch. D. 126).

In dealing with the natural or ordinary rights of a riparian proprietor, it may be convenient here to refer to the notes as to his right to divert flood-water, *post*, p. 84; as to his right to build on the bed, *post*, p. 84; and his right to fish, *ante*, p. 45.

In the case of water flowing through a natural watercourse with a defined channel, rights may be acquired by prescription which interfere with what would otherwise be the natural rights of other proprietors above and below (*John White v. White*, 1906, A. C. 80). A riparian owner may by user acquire a right to use the water in a manner not justified by his natural rights; but such acquired right has no operation against the natural rights of a landowner higher up or lower down the stream, unless the user affects the use such landowner has of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above or below a servient tenement (*Sampson v. Hoddinott*, 1 C. B. N. S. 590). Before the Prescription Act, 1832, twenty years' exclusive enjoyment of water in any particular manner afforded a strong presumption of right in the party so enjoying it, derived from grant or act of parliament (*Bealey v. Shaw*, 6 East, 208; *Cox v. Matthews*, 1 Vent. 237; 2 Wms. Saund. 113 b; see *Dewhirst v. Wrigley*, 1 C. P. Coop. 329). In *Prescott v. Phillips* (cited *Bealey v. Shaw*, 6 East, 213; *Mason v. Hill*, 5 B. & Ad. 23) it was ruled, "that nothing short of twenty years' undisturbed possession of water diverted from the natural channel, or raised by a weir, could give a party an adverse right against those whose lands lay lower down the stream, and to whom it was injurious. The right of diverting water, which in its natural course would flow over or along the land of a riparian owner, can be created only by grant, or enjoyment from which a grant may be presumed, or by statute. Such an easement

Of Water-courses.

Overground water.

Underground water.

(3)

Prescriptive rights with regard to water; in natural stream; with defined channel.

Prescriptive right acquired by user; to divert;

- Of Water-courses.** exists for the benefit of the dominant owner alone, and the servient owner acquires no right to insist on its continuance (*Mason v. Shrewsbury R. Co.*, L. R. 6 Q. B. 587). Previously to the Prescription Act, 1832, the acquiescence of lessees would not bind the landlord; similarly, the uninterrupted possession of the water for over fifty years, with the acquiescence of tenants for life, did not affect the reversioner (*Bradbury v. Grinsell*, 2 Wms. Saund. 516). Evidence of user for twenty years of a head-stock to pen up a rivulet was insufficient to raise the presumption of a grant to warrant its continuance to the injury of church land; for one vicar could not bind his successor (*Wall v. Nixon*, 3 Smith's R. 316; see *Barker v. Richardson*, 4 B. & Ald. 579). As to enjoyment since the Prescription Act during a life tenancy, see *Bright v. Walker*, 1 C. M. & R. 211. As between absolute owners, the right to pen back a stream may be acquired by prescription (*Cooper v. Barber*, 3 Taunt. 99). So an inferior riparian proprietor can acquire a right to place a hatch on the land of the superior proprietor to regulate the flow of water (*Wood v. Hewett*, 8 Q. B. 913; see *Greenslade v. Halliday*, 6 Bing. 379); or for the latter purpose to go on the land of the superior proprietor and open lock gates (*Simpson v. Godmanchester*, 1897, A. C. 696). Again, the right to a fishing weir may be acquired in non-navigable rivers by grant from other riparian owners, or by enjoyment, or by any means by which such rights may be constituted (*Rolle v. Whyte*, L. R. 3 Q. B. 286; *Leconfield v. Lonsdale*, L. R. 5 C. P. 657; see *Barker v. Faulkner*, 1898, W. N. 69); and even in a navigable river a riparian proprietor can acquire an interest in its water power as derived from a reservoir artificially formed by a dam across its channel (*Hamelin v. Bannerman*, 1895, A. C. 237).
- to pen back; A right to pollute a stream can be acquired by prescription (*Baxendale v. McMurray*, 2 Ch. 790; see *Eastwood v. Henley*, 1901, 1 Ch. 645), but only through the continuance of perceptible injury for twenty years (*Goldsmid v. Tunbridge*, 1 Ch. 349; see *Millington v. Griffiths*, 30 L. T. 65; *Murgatroyd v. Robinson*, 7 E. & B. 391; *Sampson v. Hoddinott*, 1 C. B. N. S. 611; *O'Brien v. Enright*, I. R. 1 Ch. 718). And there can be no prescriptive right to justify a public nuisance (*A.-G. v. Barnsley*, 1874, W. N. 37).
- to obstruct; A right to discharge sewage through a drain can be acquired by prescription (*A.-G. v. Dorking*, 20 Ch. Div. 601; *Brown v. Dunstable*, 1899, 2 Ch. 378; see *Wright v. Williams*, 1 M. & W. 77). Such a right may be binding on a local authority (*R. v. Staines*, 60 L. T. 261; *Ogilvie v. Blything*, 65 L. T. 338; *Harrington v. Derby*, 1905, 1 Ch. 219). See as to discharging sewage into a tidal river, *Somersetshire v. Bridgwater*, 81 L. T. 732; or into the sea, *Foster v. Warblington*, 1906, 1 K. B. 665, 678; *Hobart v. Southend*, 75 L. J. K. B. 305.
- to pollute water; In the case of water which percolates in an undefined course, no right to the uninterrupted flow can be acquired by prescription, for no grant can be presumed in the case of such water (*Chasemore v. Richards*, 7 H. L. C. 349, 370, 385). But an express grant of all streams of water that might be found in certain closes prevented the grantor and those claiming under him from working mines under adjoining land so as to divert underground water from wells in the closes (*Whitehead v. Parkes*, 2 H. & N. 870).
- to discharge sewage. (4)
- No prescription in water with undefined channel. The natural rights of a riparian proprietor are limited to natural streams, and do not attach in the case of artificial watercourses (*Sampson v. Hoddinott*, 1 C. B. N. S. 500). Prescriptive rights, however, may be acquired in artificial watercourses of a permanent character (*Rameshur v. Koonj*, 4 App. Cas. 126; *Wood v. Waud*, 3 Exch. 777; *Blackburne v. Somers*, 5 L. R. Ir. 1; see *Bunting v. Hicks*, 70 L. T. 455; *Beeston v. Weate*, 5 El. & Bl. 986; *Gaved v. Martyn*, 19 C. B. N. S. 732; *Ivimey v. Stocker*, 1 Ch. 396; *Powell v. Butler*, I. R. 5 C. L. 309; and compare *Bankart v. Tennant*, 10 Eq. 141). The enjoyment must be as of right (*Chamber v. Hopwood*, 32 Ch. Div. 349).
- of a temporary character; But where the enjoyment of an artificial watercourse depends on temporary circumstances, no right to the uninterrupted flow of water can be acquired by prescription against the creator of the stream. Thus, a party receiving no right to

water drained from a mine had no right to compel the owners of the mine to continue such discharge (*Arkwright v. Gell*, 5 M. & W. 203; see *Magor v. Chadwick*, 11 Ad. & Ell. 571). So in the case of a watercourse constructed for the purpose of a mill (*Burrows v. Lang*, 1901, 2 Ch. 502). A watercourse is constructed for a temporary purpose when it is constructed for a purpose which may within the reasonable contemplation of the parties come to an end (*Ib.* 508). Further, it is more difficult to presume an agreement as to enjoyment when a watercourse is constructed entirely over the land of the creator than in the case of water pumped over another's land (*Ib.*; see *M'Evoy v. G. N. R.*, 1900, 2 Ir. R. 325).

Of Water-courses.

uninterrupted flow can be acquired by prescription against creator of stream;

Where the owners of a colliery had suffered water pumped out of their colliery to flow along an artificial channel no action lay (in the absence of any grant or prescriptive title) by the owner of land through which the water had been so accustomed to flow against an owner of land above, and through whose land the sough likewise passed, for diverting such water; for the owners, by discharging the water into such sough, could not be considered as giving it to one more than to others of the proprietors of the land through which such sough had been constructed, and the proprietor of the land below had no right to compel the owners above to permit the water to flow through their land for his benefit (*Wood v. Waud*, 3 Exch. 748; see *Wardle v. Brocklehurst*, Ell. & Ell. 1058; *Mason v. Shrewsbury R. Co.*, L. R. 6 Q. B. 584).

In ascertaining the rights in an artificial watercourse you must take into account, first, the character of the watercourse, whether it is temporary or permanent; secondly, the circumstances under which it was presumably created; and thirdly, the mode in which it has been used and enjoyed (*Baily v. Clark*, 1902, 1 Ch. 668). The conclusion may be that the watercourse was originally constructed upon the condition that the rights of owners abutting should be the same as they would have been had the watercourse been a natural one (*Ib.*; *Whitmores v. Stanford*, 1909, 1 Ch. 427; see *Greatrex v. Hayward*, 8 Exch. 291; *Hanna v. Pollock*, 1900, 2 L. R. 664; *Holker v. Porritt*, L. R. 8 Ex. 116; *Roberts v. Richards*, 44 L. T. 271; *Sutcliffe v. Booth*, 32 L. J. Q. B. 136; *Nield v. L. & N. W. R. Co.*, L. R. 10 Ex. 4).

As regards purity, it seems that (apart from prescription) appropriation of water in an artificial watercourse by a person entitled to appropriate it gives such a person a right to insist that the water shall not be polluted to his injury (*Whaley v. Laing*, 2 H. & N. 476; 3 H. & N. 675; *Wood v. Waud*, 3 Exch. 779; but see *Wood v. Sutcliffe*, 21 L. J. Ch. 254; *Magor v. Chadwick*, 11 Ad. & Ell. 571).

Independently of the prescriptive rights mentioned above, which are mainly called in question between riparian owners, other miscellaneous rights may be mentioned. Thus a landowner can acquire by prescription the right to bring water to his house through pipes over his neighbour's land (*Goodhart v. Hyatt*, 25 Ch. D. 182); or the right to go on his neighbour's land and draw water there from a spring (*Race v. Ward*, 4 E. & B. 702); or from a pump (*Folden v. Bastard*, L. R. 1 Q. B. 156).

As regards discharging water upon adjoining land, it has been laid down that an action may be maintained for the erection of a roof with eaves projecting over another's land, and discharging rain water on to it, without proof that rain has actually fallen (*Fay v. Prentice*, 1 C. B. 828). The reversioner may sue (*Tucker v. Newman*, 11 Ad. & Ell. 40). Although, however, every one in building is bound not to overhang his neighbour's property, and to construct his roof in such a manner as not to throw rain water upon the neighbouring land (11 Hen. 7, f. 257), yet a right by user for twenty years for the owner to project his wall or eaves over the boundary line of his property, or to discharge rain from the roof of his house upon the adjoining land, has been recognised (*Thomas v. Thomas*, 2 C. M. & R. 34; see *Wright v. Williams*, 1 M. & W. 77; *Lady Browne's case*, cited in *Stanley v. Pigott*, Palm. 446; Com. Dig. Action on Case for Nuisance (A.); *Baten's case*, 9 Rep. 50, n. (b); Vin. Abr. Nuisance (G. 5)). Such a right will not be lost by raising the house (*Harvey v. Walters*, L. R. 8 C. P. 162).

To discharge water upon adjoining land.

Of Water-courses.

The occupier of a house who has a right to have the rain fall from the eaves of it upon another man's land, cannot by spouts discharge it upon such land in a body (*Reynolds v. Clarke*, *Ld. Raym.* 1399). For such an act trespass would not lie, but case (*Reynolds v. Clarke*, 1 Str. 634; 8 Mod. 272; Fort. 212). The flow of water for twenty years from the eaves of a house will not give a right to the neighbour to insist that the house shall not be altered so as to diminish the quantity of water flowing from the roof (*Wood v. Waud*, 3 Exch. 748; *Greatrex v. Hayward*, 8 Exch. 293, 294; *Arkwright v. Gell*, 5 M. & W. 233). A legal origin was presumed for the right of discharging water from a highway through a pipe on to adjoining land (*A.-G. v. Copeland*, 1902, 1 K. B. 690).

(5)
Modes of acquisition of rights with regard to water.

Grant presumed from enjoyment.

Before the Prescription Act, 1832, twenty years' exclusive enjoyment of water in any particular manner afforded a strong presumption of right in the party so enjoying it derived from grant or act of parliament (*Bealey v. Shaw*, 6 East, 208; *Finch v. Resbridger*, 2 Vern. 390; *Gilb. Eq. C.* 3). In *Deeble v. Lineham*, 12 Ir. C. L. N. S. 1, there was sufficient evidence of enjoyment to support the presumption of a grant. A grant, however, was not presumed where it would have been void by statute (*Rochdale Co. v. Radcliffe*, 18 Q. B. 287; *A.-G. v. G. N. R.*, 1909, 1 Ch. 775; see *A.-G. v. Grand Junction Co.*, 1909, 2 Ch. 516), or where the user was precarious (*Gaved v. Martyn*, 19 C. B. N. S. 732), or where the owner of the dominant tenement was during the user tenant of the servient tenement (*Outram v. Maude*, 17 Ch. D. 391). And see *Bradbury v. Grinsell*, and *Wall v. Nixon*, quoted *ante*, p. 78. For the nature of the enjoyment requisite for obtaining under the Prescription Act acquired rights with regard to water, see the note to the Prescription Act, 1832, s. 2, *ante*, p. 7.

Acquisition under Prescription Act.

Acquisition by custom.

As to the acquisition by custom of a right to divert water in Devonshire, see *Bastard v. Smith* (2 M. & Rob. 129); and in Cornwall, *Gaved v. Martyn* (19 C. B. N. S. 732; 14 W. R. 62). For a customary right to pollute water, see *Carlyon v. Lovering* (1 H. & N. 784); and for a customary right to the use of water, see *Harrop v. Hirst* (L. R. 4 Ex. 43).

Acquisition by express grant;

Water rights may be acquired by express grant. As to the construction of an express grant it has been laid down that the grant of a "watercourse" may mean (1) the right to the running of water; or (2) the drain which contains the water; or (3) the land over which the water flows (*Taylor v. S. Helens*, 6 Ch. Div. 271; where the effect of the grant of an artificial watercourse was considered). The reservation of right to make a watercourse included the right to divert water and to use the water diverted (*Remfry v. Natal*, 1896, A. C. 558). A "spring of water" means a natural source of water of a definite and well-marked extent (*Taylor v. S. Helens*, 6 Ch. Div. 273). A "stream" is water which runs in a defined course, so as to be capable of diversion (*Ib.*). The word did not include either the spring or water soaking through marshy ground (*M'Nab v. Robertson*, 1897, A. C. 129). In *Northam v. Hurley* (1 El. & Bl. 665), it was held on the construction of the grant of a watercourse from the land of the grantor to the land of the grantee, that the grantor could not alter the channel on his own land although no damage had occurred to the grantee. The effect of special words in an express grant or reservation of water was also considered in *Rawstron v. Taylor*, 11 Exch. 369; *Lee v. Stevenson*, 27 L. J. Q. B. 263; *Finlison v. Porter*, L. R. 10 Q. B. 188. A grant (in pursuance of a statute) of the exclusive right of drainage through a watercourse gave the grantee, not merely an easement but (for the purpose of rating) possession of the watercourse (*Holywell v. Halkyn*, 1895, A. C. 117). A watercourse may be vested in a corporation; as where there was a grant to the corporation of Carlisle of water to turn the city mills (*Carlisle v. Blamire*, 8 East, 487).

As to conveyances of land since 1881 carrying rights of water and watercourses, see Conv. Act, 1881, s. 6, *post*. Independently of that act it was held that if land with a run of water upon it be sold, the water passes with the land (*Canham v. Fisk*, 2 Cr. & Jer. 126; see *Hamelin v. Bannerman*, 1895, A. C. 237). The rights, however, of a riparian proprietor cannot be

granted apart from the land, so as to entitle the grantee as against the other riparian proprietors, even to the rights in respect of the ordinary use of water possessed by the grantor. The only right acquired by the grantee would be as against the grantor himself (*Ormerod v. Todmorden Co.*, 11 Q. B. Div. 155; *Nuttall v. Bracewell*, L. R. 2 Ex. 1; *Stockport Co. v. Potter*, 3 H. & C. 300; *Jones v. Dorothea Co.*, 58 L. T. 80; see *Insole v. James*, 1 H. & N. 243; and compare the licence to a stranger given in *Mostyn v. Atherton*, 1899, 2 Ch. 360).

Of Water-
courses.

By the grant of part of a tenement, there pass by implication to the grantee all those continuous and apparent easements over the other part which are necessary to the enjoyment of the part granted and have been used therewith (*Wheeldon v. Burrows*, 12 Ch. Div. 31. Compare the cases as to light, *post*, p. 103). This principle was applied to a watercourse (*Watts v. Kelson*, 6 Ch. 166; see *Pullan v. Roughfort*, 21 L. R. Ir. 73; *Key v. Neath*, 95 L. T. 771). As a general rule, however, there is no corresponding implication in favour of the grantor (*Wheeldon v. Burrows*, *sup.*, disapproving of *Pyer v. Carter*, 1 H. & N. 916, in which case the grant of a right to a drain by the grantee of land had been implied in favour of the grantor). *Pyer v. Carter* had been approved in *Ewart v. Cochrane*, 4 Macq. H. L. C. 117; *Watts v. Kelson*, *sup.*; but had been disapproved by Lord Westbury in *Suffield v. Brown*, 33 L. J. Ch. 249. As to implying the reservation of an easement of necessity, see *Union Co. v. London Dock Co.*, 1902, 2 Ch. 557; *Ruy v. Hazeldine*, 1904, 2 Ch. 17. A grant of the right to pollute a stream was implied in *Hall v. Lund* (1 H. & C. 676).

As a general rule, it requires a deed to create a right and title to have a passage for water (*Fentiman v. Smith*, 4 East, 107; *Hewlins v. Shippam*, 5 B. & C. 233). As to creating rights with regard to water by parol licence, see *Liggins v. Inge* (7 Bing. 682), and the note on licences, p. 36, *ante*.

Where land and buildings were demised, together with the free passage of water and soil to a cesspool, the easement was restricted to a reasonable use for the purposes of the premises in the condition in which they were at the time of the demise, and was not extended to buildings subsequently erected (Wood v. Saunders, 10 Ch. 582; see *New Windsor v. Stovell*, 27 Ch. D. 665; *Metropolitan Board v. L. & N. W. R. Co.*, 17 Ch. Div. 246). When a lease reserved the free running of water and soil through the demised premises from other contiguous lands, the reservation extended to water and soil coming from contiguous lands whether arising thereon or not, but was not extended to the refuse of tan pits (*Chadwick v. Marsden*, L. R. 2 Ex. 285).

Where by an inclosure award drains were set out, the occupiers of the land to keep the same of sufficient depth to carry off the water, the plaintiff was not thereby authorized to make an underdrain so as to cause increased water to pass into one of the awarded drains (*Sharpe v. Hancock*, 7 M. & Gr. 354). An inclosure act empowering commissioners to set out ditches in the lands to be inclosed: and also to alter and improve any existing ditches: held, not to empower the commissioners to alter the drains in the common lands, so as to overload an ancient drain from another township (*Darson v. Paver*, 5 Hare, 415).

The extent of a prescriptive right of taking water is defined by the user proved (*A.-G. v. G. N. R.*, 1909, 1 Ch. 779).

As to the mode of enjoyment of water rights; the enjoyment may vary slightly, but the burden on the servient tenement cannot be increased. If one has ancient pits which are supplied by a rivulet, he may cleanse them, but cannot change or enlarge them (*Brown v. Best*, 1 Wils. 174; see *Wood v. Saunders*, 10 Ch. 582; *New Windsor v. Stovell*, 27 Ch. D. 665). A millowner cannot alter his sluice so as to divert more water (*Bealey v. Shaw*, 6 East, 207), nor change the channels of a river to the prejudice of another owner (*Duncombe v. Randall*, Hetl. 32; see *Fletcher v. Smith*, 2 App. Cas. 781).

Scouring a river bed, however, so as to keep the stream in its accustomed course is not only permissible but obligatory on a riparian owner (*Rhodes v.*

Of Water-courses.

Airdale, 1 C. P. D. 392; see *Withers v. Purchase*, 60 L. T. 819). Again, a right to a watercourse is not destroyed by the owners slightly altering the course of the stream (*Hall v. Swift*, 4 Bing. N. C. 381). It is not necessary that the mode of enjoying a watercourse should always have been precisely the same (*Saunders v. Newman*, 1 B. & Ald. 258), where it was said that the owner is not bound to use the water in the same precise manner, or to apply it at the same mill; if he were, it would stop all improvement in machinery. If indeed the alterations made prejudiced the right of the lower mill, the case would be different; (*Ib.*; see *Luttrell's case*, 4 Rep. 87 a; *Frechette v. La Compagnie*, 9 App. Cas. 170; *Greenslade v. Halliday*, 6 Bing. 379). To destroy an easement the change must be material either in the nature or in the quantum of the servitude imposed (*Harvey v. Walters*, L. R. 8 C. P. 166). Compare the increased burden of support for a railway (*G. W. R. v. Cefn Co.*, 1894, 2 Ch. 157). A right to a watercourse which had been used to supply cattle sheds was held not to be lost by the erection of cottages in the place of cattle sheds (*Watts v. Kelson*, 6 Ch. 165). Where a person, who had a right to send down clean water through a gutter, sent down foul water, so that it was impossible to stop the nuisance without altogether interfering with his enjoyment, the whole enjoyment might be obstructed (*Cavkwell v. Russell*, 26 L. J. Ex. 34; see *Hill v. Cook*, 26 L. T. 185). A person entitled to the use of a drain which communicated with a sewer, could where the sewer was lowered by public authority also lower his drain (*Finlinson v. Porter*, L. R. 10 Q. B. 188).

Extent of right to pollute.

Where a prescriptive right to foul a stream has been acquired, the fouling must not be considerably enlarged to the prejudice of other people (*Crossley v. Lightowler*, 2 Ch. 478; *McIntyre v. McGavin*, 1893, A. C. 268). Where town sewage had drained into a stream without perceptibly polluting it, but in consequence of the recent increase of the town, the stream became perceptibly polluted; an injunction was granted (*Goldsmid v. Tunbridge*, 1 Ch. 349; *A.-G. v. Barnsley*, 1874, W. N. 37; see *Foster v. Warblington*, 1906, 1 K. B. 678). Where a right to pollute water by a certain manufacture had been acquired it was said that the right would not be destroyed by altering the materials used (*Baxendale v. M'Murray*, 2 Ch. 790). But the discharge of the refuse of a different manufacture was held unjustifiable (*Clark v. Somersetshire*, 36 W. R. 890; see *Wood v. Saunders*, 10 Ch. 582; compare *Metropolitan Board v. L. & N. W. R. Co.*, 17 Ch. Div. 249; *A.-G. v. Acton Board*, 22 Ch. D. 221).

**(8)
Repair of drains, &c.**

The cleansing and repairing of drains and sewers is *primâ facie* the duty of him who occupies the premises, and does not devolve upon the owner merely as such (*Brent v. Haddon*, Cro. Jac. 555; *Cheetham v. Hampson*, 4 T. R. 319; *Boyle v. Tamlyn*, 6 B. & C. 329; *Russell v. Shenton*, 3 Q. B. 449; see *R. v. Kerrison*, 1 M. & S. 435; *Bullard v. Harrison*, 4 M. & S. 387; *Tenant v. Goldwin*, 1 Salk. 21, 360; 2 Salk. 770; *Payne v. Rogers*, 2 H. Bl. 349; *R. v. Pedley*, 1 Ad. & E. 822; see *Smith v. Archibald*, 5 App. Cas. 512). If the owner of land, on which is a house, construct on other part of the land a sewer, and let the house, and afterwards by reason of the original faulty construction of the sewer, and the continued use of it by the owner in such a faulty state, the house is injured, the owner is liable to his lessee for keeping and continuing the sewer so constructed (*Alston v. Grant*, 3 Ell. & Bl. 128). If a lease be made of a house and piece of land, except the land on which a pump stands, with the use of the pump, the lessee may repair the pump, but an action of covenant does not lie against the lessor for not repairing it (*Pomfret v. Ricroft*, 1 Wms. Saund. 320; see *ante*, p. 71; *Buckley v. Buckley*, 1898, 2 Q. B. 608). Where an easement exists giving the owner of a house a right to bring water to his house through a pipe over adjoining land, such owner has the right to go on the adjoining land to repair the pipe (*Goodhart v. Hyett*, 25 Ch. D. 182; see *Smith v. Archibald*, 5 App. Cas. 512; *Jones v. Pritchard*, 1908, 1 Ch. 638; *Caldwell v. Kilkelly*, 1905, 1 I. R. 434). The right, however, being only for such access as was reasonably necessary did not prevent the owner of the servient tenement

from constructing an embankment thereon (*Birkenhead v. L. N. W. R.*, 15 Q. B. Div. 572). As to the obligation to repair drains, see further Tudor, L. C. Conv. 4th. ed. 791.

Of Water-courses.

If the owner of a mill, formerly worked by a breast-shot wheel, which requires a high head of water, for twenty years discontinues the use of the breast-shot wheel, and uses a ground-shot wheel, he will lose his right to the high head of water (*Drewett v. Sheard*, 7 C. & P. 465; where see as to abandoning the right to keep a ditch opening into a stream). The right to have water flow into an old pond is not lost by discontinuing the use of such pond, and obtaining the same or a greater advantage from the use of three new ponds; a substitution of such a nature not being an abandonment of the right (*Hale v. Oldroyd*, 14 M. & W. 789). The mere suspension of the exercise of a prescriptive right is not sufficient to destroy the right without evidence of an intention to abandon it: but where dye-works had not been used for more than twenty years, and had been allowed to go to ruin, any right of fouling a stream attached to them was lost (*Crossley v. Lightowler*, 2 Ch. 478). As to non-user of a well, see *Millington v. Griffiths*, 30 L. T. 65. In a case depending on Roman Dutch law a prescriptive right to water was held not lost by the owner applying for a licence (*Commrs. of French Hoek v. Hugo*, 10 App. Cas. 336).

(9)
Extinction:
by abandon-
ment;

It seems that nothing of necessity to a building, e.g. a gutter in *alieno solo*, by unity of to carry off water, &c., is extinguished by unity of ownership (*Pheysey v. Vicary*, 16 M. & W. 484). As regards natural rights in water it was laid down in *Shury v. Piggott* (3 Bulstr. 339; Poph. 166; W. Jones, 145, which was an action on the case for stopping a watercourse) that the right to the flow of water in a natural stream is not extinguished by unity of ownership; in which respect it is distinguished from a way. *Whitlock, J.*, says (3 Bulstr. 340), "There is a difference between a way, a common, and a watercourse. Bracton (lib. 4, fol. 221-2) calls them *servitutes prædiales*; those which begin by private right, by prescription, by assent, as a way or common, being a particular benefit to take part of the profits of the land. This is extinct by unity, because the greater benefit shall drown the less. A watercourse does not begin by prescription, nor yet by assent, but the same doth begin *ex jure nature*, having taken this course naturally, and cannot be averted" (see *Pyer v. Carter*, 1 H. & N. 916). As regards prescriptive rights in water, if the same person becomes absolute owner of the land from which a stream of water flows, and also of the land into which it flows, the easement which the latter might have claimed is extinguished (*Ivimey v. Stocker*, 1 Ch. 407).

(10)

A party entitled to a watercourse may legally enter the land of a person who has occasioned a nuisance to a watercourse, to abate it (2 Smith's R. 9; Com. Dig. Pleader, 3 M. 41). Where there is excessive user by the owner of the dominant tenement, the owner of the servient tenement, if he abates the nuisance, is bound to do so in the most reasonable manner (*Hill v. Cock*, 26 L. T. 185). An abatement was held reasonable in *Roberts v. Rose*, L. R. 1 Ex. 82; *Macartney v. Londonderry Co.*, 1904, A. C. 301. An individual cannot abate a nuisance if he be not otherwise injured by it than as one of the public (*Colchester v. Brooke*, 7 Q. B. 339).

Remedies for
disturbance
of rights with
regard to
water;
Abatement.

When the injury from a nuisance in respect of water is an injury to all the King's subjects, the remedy is by indictment (*R. v. Bristol Dock Co.*, 12 East, 429), or by information (*Stoke v. Price*, 1899, 2 Ch. 277). When, however, the inhabitants of a district had by custom a right to water, one inhabitant could sue without proving individual damage, on the ground of interference with right (*Harrop v. Hirst*, L. R. 4 Ex. 47); but such an action cannot be brought by a parish council suing alone (*Stoke v. Price*, 1899, 2 Ch. 277). As to local authorities suing, see *Tottenham v. Williamson*, 1896, 2 Q. B. 353).

Indictments.

Proof of actual damage is not necessary to enable a riparian proprietor to maintain an action for the obstruction or diversion of a natural stream (*Sampson v. Hoddinott*, 1 C. B. N. S. 590; *Harrop v. Hirst*, L. R. 4 Ex.

Action:

- Of Water-courses.** 43; *Ormerod v. Todmorden, &c. Co.*, 11 Q. B. D. 159). For the older law, see *Palmer v. Kibbleshwaite*, 1 Show. 64; *Glynne v. Nicholas*, 2 Show. 507; *Mason v. Hill*, 5 B. & Ad. 26; *Williams v. Morland*, 2 B. & C. 915. It is sufficient to show violation of the right, and the law will presume damage (*Embrey v. Owen*, 6 Ex. 353; compare *Young v. Bankier Co.*, 1893, A. C. 691). Where water was taken from a river and afterwards returned unpolluted and undiminished, it was held that the right of a lower riparian proprietor had not been interfered with, and an injunction was refused (*Kensit v. G. E. R. Co.*, 27 Ch. Div. 122).
- for diversion; Diversion of water is actionable without proof of actual damage where the defendant might thereby acquire a right injurious to the plaintiffs (*Wilts Co. v. Swindon Co.*, 9 Ch. 961; *Harrop v. Hirst*, *sup.*; *Roberts v. Gwyrfa*, 1899, 2 Ch. 608), and will be restrained (*ib.*).
- for obstruction; Obstruction is also actionable irrespective of actual damage (*Norbury v. Kitchen*, 15 L. T. 501; *McGlone v. Smith*, 22 L. R. Ir. 559); and will be restrained (*Dewhurst v. Wrigley*, 1 C. P. Coop. 319; see *Elwell v. Crowther*, 31 Beav. 163; *Belfast Co. v. Boyd*, 21 L. R. Ir. 560).
- Right of riparian proprietor to place erections on bed, The owner of both banks of a non-tidal river may build on the bed provided he do not alter the natural flow of the water above or below his property (*Orr-Ewing v. Colquhoun*, 2 App. Cas. 839). Again, the owner of one bank only cannot as against the opposite proprietor build on his own moiety of the bed in such a manner as to interfere with the natural flow of the stream; and was restrained, although there was no proof that damage had been sustained or was likely to be sustained (*Bickett v. Morris*, L. R. 1 H. L. Sc. 47). This principle has been extended to tidal navigable rivers (*A.-G. v. Lonsdale*, 7 Eq. 377; *A.-G. v. Terry*, 9 Ch. 423; see *Exeter v. Devon*, 10 Eq. 232).
- or to divert flood water. As regards the rights of erection possessed by a riparian owner generally, it seems that he may erect a post for a ferry or for mooring a boat, or plant stakes to prevent poaching (*Withers v. Purchase*, 60 L. T. 821; compare *A.-G. v. Wright*, 1897, 2 Q. B. 318); or place an erection on his own bank to protect it (*Ridge v. Midland Co.*, 53 J. P. 55; see *Bickett v. Morris*, L. R. 1 H. L. Sc. 56). So it has been laid down that a riparian owner has a right to raise the banks upon his own land, so as to prevent the water from overflowing his land, with this restriction, that he does not occasion injury to the property of others (*R. v. Trafford*, 1 B. & Ad. 874; 8 Bing. 204; 2 Cr. & Jerv. 265; *Menzies v. Breadalbane*, 3 Bligh, N. S. 414, 418; *A.-G. v. Lonsdale*, 7 Eq. 377). Compare the easement of opening locks acquired by a corporation for the protection of their land (*Simpson v. Godmanchester*, 1897, A. C. 696). If an extraordinary flood is seen to be coming on land, the owner may protect his land from it without being responsible for consequences, although his neighbour may be injured (*Nield v. L. & N. W. R. Co.*, L. R. 10 Ex. 4; see *Whalley v. Lancashire R. Co.*, 13 Q. B. Div. 136, 140. Compare the similar right on the sea-shore: *R. v. Pagham*, 8 B. & C. 355). But if the flood has already come, the owner must not, for the purpose of getting rid of the mischief, injure his neighbour (*Whalley v. Lancashire R. Co.*, *sup.*). As to the duties in respect of a river-wall incumbent on the owner of land on a tidal navigable river, see *Nitro-Phosphate Co. v. London and S. Katharine's Docks*, 9 Ch. Div. 524; *Burt v. Victoria Co.*, 47 L. T. 378.
- Action by reversioner; A lower riparian proprietor cannot as against the owner of a fishery in the upper stream, erect a weir which will prevent trout from mounting (*Barker v. Faulkner*, 1898, W. N. 69; see as to salmon, *Pirie v. Kintore*, 1906, A. C. 484).
- If the nuisance be of a permanent nature, and injurious to the reversion, an action may be brought by the reversioner as well as by the tenant in possession, each of them being entitled to recover his respective loss (*Beddingfield v. Onslow*, 3 Lev. 209; *Queen's College v. Hallett*, 14 East, 489; 1 Wms. Saund. 567, ed. 1871; *Jesser v. Gifford*, 4 Burr. 2141; Com. Dig. Action on the case for Nuisance (B.); see *Brown v. Mallett*, 5 C. B. 599; *Bell v. Twentyman*, 1 Q. B. 766; *Peter v. Daniel*, 5 C. B. 568; *Egremont v. Pulman*, 1 Moo. & M. 403).

An action will lie for the continuance of a nuisance (*Todd v. Flight*, 9 C. B. N. S. 377; *R. v. Bradford Navigation*, 6 B. & S. 631); but the owners of the soil of a stream were not liable for the continuance of an obstruction which had been erected by another without their authority, and where they had offered permission to the plaintiff to remove it (*Saxby v. Manchester R. Co.*, L. R. 4 C. P. 198).

Of Water-courses,

for continuance of nuisance;

A right to take water from a well by reason of the occupation of a dwelling-house is an interest in land; and nominal damages having been recovered in an action for disturbing such a right, which were certified to be under forty shillings, the plaintiff was entitled to his full costs under 43 Eliz. c. 6, s. 2 (*Tyler v. Bennett*, 4 Ad. & E. 377; see 3 & 4 Vict. c. 24; *Shuttleworth v. Cocker*, 2 Sc. N. R. 47; *Thompson v. Gibson*, 5 Jur. 390). The expenses of the surveying to ascertain whether a weir had been improperly used will not be allowed on taxation (*Ormerod v. Thompson*, 16 M. & W. 860).

damages and costs;

Before the Jud. Acts, a bill in equity would lie for the establishment of relief in the the enjoyment of a watercourse, and for the performance of a covenant to cleanse it (*Holmes v. Buckley*, 1 Eq. Cas. Abr. 27, pl. 4; 2 Vern. 390; *Gilb. Eq. C. 3*; *New River Co. v. Graves*, 2 Vern. 431). And a man who had been in possession of a watercourse sixty years might sue a mortgagee, who foreclosed, to be quieted in possession, although he had not established his right at law (*Bush v. Western*, Prec. Ch. 530; see *Dorset v. Girdler*, Ib. 531). The diversion of watercourses, or the pulling down their banks, and causing inundation, were nuisances against which a court of equity would grant an injunction (*Martin v. Stiles*, Mos. 144; see *Anon.*, 1 Ves. sen. 476; *Whitchurch v. Hide*, 2 Atk. 391; *Birch v. Holt*, 3 Atk. 726; *Anon.*, 1 Vern. 120, 129). An injunction might be granted on the ground of danger to property (*Robinson v. Byron*, 1 Br. C. C. 588; see *Anon.*, 1 Ves. jun. 140; *Crowder v. Tinkler*, 19 Ves. 620); or on account of the irreparable injury (*Chalk v. Wyatt*, 3 Mer. 688). Injunctions may now be granted by any court whenever it appears just or convenient; Jud. Act, 1873, sect. 25 (8). Forms of injunctions as to water rights are given, Seton, 6th ed. 591. An mandatory injunction which directs the defendant to perform an act, may, under special circumstances, be granted before trial (*Blakemore v. Glamorganshire Navigation*, 1 M. & K. 154; see *Von Joel v. Hornsey*, 1895, 2 Ch. 774). Such orders in actions relating to water have been made before trial to enforce a covenant (*Mezborough v. Bower*, 7 Beav. 127); or to prevent irreparable damage (*Westminster Co. v. Clayton*, 36 L. J. Ch. 476). Such orders should now be made in a direct mandatory form (*Jackson v. Normanby Co.*, 1899, 1 Ch. 438).

Chancery Division;

injunction;

As to the effect of laches and acquiescence in depriving parties of their laches and remedy by injunction, see *Weller v. Smeaton* (1 Br. C. C. 572; 1 Cox, 102); acquiescence. *Birmingham Canal Co. v. Lloyd* (18 Ves. 515; Coop. C. C. 77, 193); *Blakemore v. Glamorganshire Navigation* (1 M. & K. 154); where the action is by the Att.-Gen., see *A.-G. v. Grand Junction Co.*, 1909, 2 Ch. 505; *A.-G. v. Birmingham Board*, 1910, 1 Ch. 48.

Whenever the Court of Chancery had jurisdiction to entertain an application for an injunction against a breach of any agreement, or against the commission or continuance of any wrongful act, it might award damages, either in addition to, or in substitution for, such injunction (21 & 22 Vict. c. 27, s. 2). This act has been repealed by 46 & 47 Vict. c. 49, but the repeal has not affected the jurisdiction of the Chancery Division (*Sayers v. Collier*, 28 Ch. Div. 103); as to which see now *Elmore v. Pirrie*, 57 L. T. 333, and the cases quoted p. 108, *post*.

(11)

A riparian proprietor has a right of action for pollution of the water of a stream, unless a right to pollute has been acquired by user (*Wood v. Waud*, 3 Exch. 748; *Magor v. Chadwick*, 11 Ad. & Ell. 571; see *Moore v. Webb*, 1 C. B. N. S. 673). And it is no defence that the pollution arises from a trade carried on in a reasonable and proper manner (*Stockport Co. v. Potter*, 7 Il. & N. 160; see *Bamford v. Turnley*, 3 B. & S. 66). As to

Pollution. Action for damages.

- Of Water-courses.** whether a person having permission from an owner of land on the bank of an artificial watercourse to take water thereout, can sue for pollution, see *Whaley v. Laing* (2 H. & N. 476; 3 H. & N. 675). An action may be maintained for the pollution of underground water (*Hodgkinson v. Ennor*, 4 B. & S. 229; *Ballard v. Tomlinson*, 29 Ch. Div. 115).
- Injunctions to restrain pollution;** Having regard to the nature of the injury caused by pollution of water, an injunction, rather than damages, is the appropriate remedy (*Pennington v. Brinsop, &c. Co.*, 5 Ch. D. 769). For the general grounds upon which such an injunction will be granted, see the remarks of *Kindersley, V.-C.*, in *Wood v. Sutcliffe*, 2 Sim. N. S. 165. A *quia timet* action to restrain an apprehended pollution may be maintained on proof of imminent danger or a substantial kind, or that the apprehended injury would be irreparable (*Fletcher v. Bealey*, 28 Ch. D. 688). A riparian proprietor can maintain an action to restrain actual pollution without showing that the fouling is injurious to him (*Crossley v. Lightowler*, 2 Ch. 478; *Lingwood v. Slowmarket Co.*, 1 Eq. 79; see *Elmhirst v. Spencer*, 2 Mac. & G. 45). The fact that the stream is fouled by others is not a defence to a suit to restrain the fouling by one (*Crossley v. Lightowler*, 2 Ch. 478; *Blair v. Deakin*, 57 L. T. 522; see *Wood v. Waud*, 3 Exch. 748; *A.-G. v. Leeds*, 5 Ch. 583; compare *A.-G. v. Birmingham Board*, 1910, 1 Ch. 48). The grantee of a right of fishing can obtain an injunction to restrain pollution (*Fitzgerald v. Firbank*, 1897, 2 Ch. 96). Where there is jurisdiction to grant an injunction damages in substitution therefor may be given for injury which has occurred, whether before or since the commencement of the action (*Chapman v. Auckland Union*, 23 Q. B. Div. 298; *Warwick Co. v. Burman*, 63 L. T. 673).
- actual injury not necessary;** A public body exercising its statutory powers so as to create or increase a nuisance by means of the sewage of a town may be made liable in damages or restrained by injunction in the same manner as an individual, unless it can show a statutory justification (*Goldsmid v. Tunbridge Commissioners*, 1 Ch. 349; *Holt v. Rochdale*, 10 Eq. 354; *A.-G. v. Basingstoke*, 24 W. R. 817; *A.-G. v. Acton*, 22 Ch. D. 221; and see *Glossop v. Heston Board*, 12 Ch. Div. 111). The principles applicable to the construction of a statute in such a case are stated by the C. A. in *Price's Co. v. London C. C.*, 1908, 2 Ch. 543. Where the plaintiff has proved his right the court will grant an injunction at once, it being the duty of the defendant to find his own way out of the difficulty, whatever inconvenience or expense it may put him to. But the operation of the injunction may be suspended (*A.-G. v. Colney Hatch*, 4 Ch. 146; *A.-G. v. Birmingham*, 4 K. & J. 528; and see the orders made in *A.-G. v. Richmond*, 2 Eq. 306; *A.-G. v. Acton*, 22 Ch. D. 221; *Islington v. Hornsey*, 1900, 1 Ch. 695). An injunction against a local authority may be enforced by sequestration (R. S. C., Ord. XLII. r. 31; see *Selous v. Croydon Board*, 53 L. T. 209; *Spokes v. Banbury*, 1 Eq. 42; *A.-G. v. Walthamstow*, 1878, W. N. 90). An injunction to restrain pollution by the sewage of a town will not in general be granted, unless serious injury is proved (*A.-G. v. Kingston*, 34 L. J. Ch. 481; *Lillywhite v. Trimmer*, 15 W. R. 763; *A.-G. v. Gee*, 10 Eq. 131; *A.-G. v. Cockermouth*, 18 Eq. 172). In determining whether the injury is serious or not, regard must be had to all the consequences which may flow from it (*Goldsmid v. Tunbridge Commissioners*, 1 Ch. 355). Where, however, no serious damage was proved injunctions were granted, on the ground that the defendants, by their pleading, claimed a right to continue a wrongful act (*A.-G. v. Acton*, 22 Ch. D. 221); or that they were acting in violation of a statute (*A.-G. v. Cockermouth*, 18 Eq. 172; see *A.-G. v. Shrewsbury Co.*, 21 Ch. D. 752).
- previous pollution no justification;** Where a sewage nuisance has been created by the acts of others, and a local authority is subsequently constituted, but does not act to create or increase the nuisance, it cannot be made liable in damages or restrained by injunction (*Glossop v. Heston Board*, 12 Ch. Div. 102; *A.-G. v. Dorking*, 20 Ch. Div. 595; *A.-G. v. Clerkenwell*, 1891, 3 Ch. 527). But the jurisdiction to grant an injunction and give damages arises as soon as the local authority begins to alter the sewers (*Warwick Co. v. Burman*, 63 L. T. 673), or itself commits acts bringing about a nuisance (*Foster v. Warblington*, 1906,
- public bodies liable.**

1 K. B. 648). The court will not interfere by injunction to compel a local authority to perform its statutory duty of effectual drainage (*Glossop v. Heston Board*, 12 Ch. Div. 115; *A.-G. v. Clerkenwell*, 1891, 3 Ch. 527; *Harrington v. Derby*, 1905, 1 Ch. 205; compare *Stretton's Co. v. Derby*, 1894, 1 Ch. 431; the appropriate remedy in such a case is by complaint to the Local Government Board under sect. 299 of P. H. Act, 1875; see *Robinson v. Workington*, 1897, 1 Q. B. 619; *Pasmore v. Oswaldtwistle*, 1898, A. C. 387). Nor will the court interfere by injunction to compel a local authority to take proceedings against others (*A.-G. v. Dorking*, 20 Ch. D. 609; *A.-G. v. Clerkenwell*, *sup.*).

Where a nuisance arises from connections with the sewer of a local authority, made in the past by third parties, and which the local authority has no right to stop up, no injunction will be granted against the authority (*A.-G. v. Acton*, 22 Ch. D. 232; *A.-G. v. Clerkenwell*, 1891, 3 Ch. 527; *Brown v. Dunstable*, 1899, 2 Ch. 378); *secus*, in the case of connections which the authority has the right to stop up (*Charles v. Finchley*, 23 Ch. D. 767). As regards connections to be made in the future which the authority has no right to prevent, injunctions have been granted restraining the authority from "directing or authorizing" them (*A.-G. v. Acton*, *sup.*; *Brown v. Dunstable*, *sup.*), but not from permitting them (*Ib.*).

Under the Public Health Act, 1875, local authorities have statutory powers of discharging their sewers into streams (sects. 15, 16, and 17). See *Durrant v. Branksome Council*, 1897, 2 Ch. 291; *A.-G. v. Birmingham Board*, 1908, 2 Ch. 551.

Several forms of injunctions in the case of pollution of water are given in Seton, 6th ed. 615.

The right of a riparian proprietor to immediate relief by injunction is not interfered with by the month's notice required by Metropolis Management Act, 1862, s. 106 (*A.-G. v. Hackney*, 20 Eq. 626; *Bateman v. Poplar Board*, 33 Ch. Div. 360); or Public Health Act, 1875, s. 264 (*Flower v. Low Leyton*, 5 Ch. Div. 347; *Chapman v. Auckland Union*, 23 Q. B. Div. 294, where damages were given in substitution).

The doctrine of acquiescence, as applied to the right of riparian proprietors to restrain the pollution of a stream by sewage, was considered in *A.-G. v. Halifax* (17 W. R. 1088); and as to delay in such a case, see *A.-G. v. Bradford Canal* (2 Eq. 71); *A.-G. v. Leeds* (5 Ch. 583). A public body was not bound by acquiescence where their acts were held to have been *ultra vires* (*Islington v. Hornsey*, 1900, 1 Ch. 695).

The Rivers Pollution Act, 1876, provides a summary means of preventing the pollution of rivers (see *Yorkshire v. Holmfirth*, 1894, 2 Q. B. 842; *River Ribble v. Halliwell*, 1899, 2 Q. B. 385; see also Public Health Act, 1875, ss. 68—70).

Where in the ordinary and proper working of the defendant's mine water, which was naturally present there, flowed from his mine into the plaintiff's, the defendant was not liable (*Smith v. Kenrick*, 7 C. B. 564; *Olegg v. Dearden*, 12 Q. B. 576; compare *Wilson v. Waddell*, 2 App. Cas. 95; *West Cumberland, &c. Co. v. Kenyon*, 11 Ch. Div. 782). On the other hand, where the defendant, the owner of an upper mine, pumped water into his mine which flooded a lower mine belonging to the plaintiff, it was held, that the defendant was liable (*Baird v. Williamson*, 15 C. B. N. S. 376; see *Young v. Bankier Co.*, 1893, A. C. 697). These decisions were followed by the House of Lords in a case which arose as to liability for the escape of water from a mine; and it was laid down, that where the owner of land without wilfulness or negligence uses his land in the ordinary manner of its use, though mischief should thereby be occasioned to his neighbour, he will not be liable in damages. But if he brings upon his land anything which would not naturally come upon it, and which is in itself dangerous, and may become mischievous if not kept under proper control, though in so doing he may act without personal wilfulness or negligence, he will be liable in damages for any mischief thereby occasioned (*Rylands v. Fletcher*, L. R.

(12)

Action for escape of water.

Of Water-courses.

3 H. L. 330; see *Carstairs v. Taylor*, L. R. 6 Ex. 217; *Nichols v. Marsland*, 2 Ex. Div. 1; *Box v. Jubb*, 4 Ex. D. 78; *Hurdman v. N. E. R. Co.*, 3 C. P. D. 168; *Whalley v. Lanc. & Yorks. R. Co.*, 13 Q. B. D. 131; *Snow v. Whitehead*, 27 Ch. D. 588). Where a landowner brought water upon his land in a goit, and his neighbour subsequently acquired from him a right to use the water in the goit (and to repair the goit for that purpose), this did not affect the original obligation of the landowner to keep the goit in repair (*Buckley v. Buckley*, 1898, 2 Q. B. 608). For the case, however, where the neighbour assents to the water being on the landowner's premises, see further *Gill v. Edouin*, 72 L. T. 579, and *Blake v. Woolf*, 1898, 2 Q. B. 426.

The occupier of the upper floor of a house was held not liable to the occupier of the lower floor for escape of water (*Ross v. Fedden*, L. R. 7 Q. B. 661; see *Anderson v. Oppenheimer*, 5 Q. B. Div. 602).

(13)

Actions in respect of water rights arising by contract.

Where an injunction was granted against heating water contrary to agreement, it was laid down that where the construction of a contract is clear and the breach clear, it is not a question of damage; but the mere circumstance of the breach of covenant affords sufficient ground for the court to interfere by injunction (*Tipping v. Eckersley*, 2 K. & J. 264; *Dickenson v. Grand Junction Co.*, 15 Beav. 260). "There is a manifest distinction between cases depending on nuisance and those depending on contract. Where there is a contract the court cannot attach the same importance to the question whether the damage is serious or not, as it does in mere cases of nuisance; the main point is whether the contract has been broken" (*A.-G. v. Mid Kent R. Co.*, 3 Ch. 104; compare the language of Lord Cairns in *Doherty v. Allman*, 3 App. Cas. 720; and see, as to damages, *Lord Manners v. Johnson*, 1 Ch. D. 679; *Richards v. Revitt*, 7 Ch. D. 224). Injunctions were granted to restrain breaches of agreements as to sewage in *Wood v. Harrogate*, 1874, W. N. 132, 225; *Nuneaton v. General Sewage Co.*, 20 Eq. 127. As to specific performance of a contract to purchase the right to divert the water of a river, see *Wright v. Howard*, 1 S. & Stu. 190; *Shackleton v. Sutcliffe*, 1 De G. & S. 609; and of a contract to erect a pump and reservoir and supply water, see *Cooke v. Chilcott*, 3 Ch. D. 694.

(14)

Statutory powers.

Those who obtain from the legislature powers to interfere with rights of property are bound not to exceed those powers (*Westminster Corporation v. L. N. W. R.*, 1905, A. C. 430; *Liverpool v. Chorley Co.*, 2 D. M. & G. 852; *Dawson v. Paver*, 5 Hare, 415); and are also bound to act reasonably (*Ib.*; *Southwark Water Co. v. Wandsworth*, 1898, 2 Ch. 611). Further, a public body, which has powers given it by a statute for the performance of a particular object, is responsible for injury caused by it in the exercise of its powers, unless the act done was absolutely necessary for the object of the statute (*A.-G. v. Colney Hatch*, 4 Ch. 146; *Metropolitan District v. Hill*, L. R. 6 H. L. 193; *Truman v. L. B. & S. C. R. Co.*, 29 Ch. Div. 108; compare *Vernon v. St. James'*, 16 Ch. Div. 449; *A.-G. v. Hackney*, 20 Eq. 626; *Ogston v. Aberdeen Co.*, 1897, A. C. 111). A corporation empowered by statute to improve the navigation of the river were not liable to clear away weeds, which were no detriment to navigation (*Parrett Co. v. Robins*, 10 M. & W. 593; *Cracknell v. Thetford*, L. R. 4 C. P. 629). But the statutory powers may be so framed as to throw on the corporation an obligation to take care that no injury shall be caused to adjoining lands (*Gaddis v. Bann Reservoir*, 3 App. Cas. 430).

Where water is diverted in a manner, or to an extent not authorized by statutory powers, the diversion will not be restrained except at the instance of the A.-G. (who need not prove damage), or of an individual who can show special damage (*Liverpool v. Chorley Co.*, 2 D. M. & G. 852; *Ware v. Regent's Canal Co.*, 3 De G. & J. 212; *London Association v. London & India Docks Committee*, 1892, 3 Ch. 270). As to the duty of the A.-G. in such a case, see *A.-G. v. G. E. R. Co.* (11 Ch. Div. 449; *A.-G. v. Birmingham Board*, 1910, 1 Ch. 48); and as to private injury, see *Pudsey Co. v. Bradford* (15 Eq. 167).

A penalty for suffering washings to flow into and foul a well was held recoverable from a gas company in *Pipkins v. Birmingham Gas Co.* (5 H. & N. 74; 6 H. & N. 250). A power for a navigation company to alter a dam was held to continue, although the compensation commission had become extinct (*Kennet Co. v. Witherington*, 18 Q. B. 581). The funds of conservators of river banks were allowed to be applied in opposing a bill for a project likely to be injurious to the banks (*Bright v. North*, 2 Ph. 216).

Of Water-
courses.

The Waterworks Clauses Act, 1847, consolidates the provisions usually contained in acts authorizing the making of waterworks for supplying towns with water. This act places the taking of streams upon the same footing as the taking lands under the L. C. C. Act, 1845; and a waterworks company was restrained from diverting a stream belonging to the plaintiff, without first complying with the provisions of the latter act (*Ferrand v. Bradford*, 21 Beav. 412; see *Purnell v. Wolverhampton Co.*, 10 C. B. 576; *Hildreth v. Adamson*, 8 W. R. 470; *Busby v. Chesterfield Co.*, 1 El. Bl. & El. 176). As to compensation, see *Bush v. Trowbridge Co.*, 10 Ch. 459. A waterworks company was restrained from polluting a river, its act not authorizing the pollution (*Clowes v. Staffordshire Co.*, 8 Ch. 125). The Waterworks Clauses Act, 1863, consolidates additional clauses frequently inserted in acts relating to waterworks.

Waterworks
companies.

(15)

Whether a river be navigable or not is a question of fact for the jury (*Vooght v. Winch*, 2 B. & Ald. 662). The test in French law is, the possible use of the river for transport in some practical and profitable manner (*Bell v. Quebec*, 5 App. Cas. 84). The flux or reflux of the tide is evidence of a navigable river (*Miles v. Rose*, 5 Taunt. 705; *Colchester v. Brooke*, 7 Q. B. 373; see *Ilchester v. Raishleigh*, 61 L. T. 477). Proof of the fact of navigation is decisive (*A.-G. v. Simpson*, 1901, 2 Ch. 687). Instances of persons going up a creek on parties of pleasure, without the consent of the person claiming exclusive property in the creek, are evidence of a public navigable river (*Miles v. Rose*, 1 Marsh. 313; 5 Taunt. 705; 4 M. & S. 101).

Navigable
rivers.

The public right over a navigable river is a right to use the river for the purposes of navigation, similar to the right the public have to passage along a public road or footpath through a private estate (*Orr-Ewing v. Colquhoun*, 2 App. Cas. 839; *Original Hartlepool Co. v. Gibb*, 5 Ch. D. 713; *Blount v. Layard*, 1891, 2 Ch. 689, n.; *Fitzhardinge v. Purcell*, 1908, 2 Ch. 168). But the analogy between a navigable river and a public road is not complete (*A.-G. v. Simpson*, 1901, 2 Ch. 687; 1904, A. C. 509). Windermere is a public highway (*Dixon v. Curwen*, 1877, W. N. 4); as to public rights on the Norfolk broads, see *Micklethwaite v. Vincent*, 67 L. T. 225. As to a piece of water which is a *cul de sac*, see *Bourke v. Davis*, 44 Ch. D. 110. The public have a right to use steam power in navigating public canals, provided it occasions no more than the ordinary injury to it (*Case v. Midland R. Co.*, 27 Beav. 247). An artificially navigable river may be dedicated as a public highway (*A.-G. v. Simpson*, 1901, 2 Ch. 709, 716; see *Simpson v. A.-G.*, 1904, A. C. 494). The liberty of passage on a public navigable river is not suspended when the tide is too low for vessels to float. It is no trespass if a vessel remains aground till the tide serves, although, by custom or agreement, a fine may be payable to the lord of the soil for such grounding (*Colchester v. Brooke*, 7 Q. B. 339). Such right is not strictly an easement (*Hawkins v. Rutter*, 1892, 1 Q. B. 668). There is also a public right to fix moorings in the soil of navigable waters, such being an ordinary incident of navigation (*A.-G. v. Wright*, 1897, 2 Q. B. 318). The same right, if enjoyed immemorially in a locality, might also be supported by presuming a grant from the Crown subject to the right (*Ib.*). The public right of navigating a river may be connected with a right of access to a particular part of the bank, which latter is a private right (*Lyon v. Fishmongers' Co.*, 1 App. Cas. 662; *Bell v. Quebec*, 5 App. Cas. 84). In general, a riparian proprietor on a navigable river has (subject to the public right of navigation) the same rights of access to the river as such a proprietor on a non-navigable river (*Ib.*; *North Shore R. Co. v. Pion*, 14 App. Cas. 612). This right of access

Right of
navigation.

Of Water-courses.

extends over a portion of the bed left dry even when vested in another (*Hindson v. Ashby*, 1896, 2 Ch. 30). The reasonable limits of the right of a riparian owner to moor a vessel alongside his wharf are stated in *Original Hartlepool Co. v. Gibb*, 5 Ch. D. 713. As to acquiring prescriptive rights in a navigable river, see *Hamelin v. Bannerman*, 1895, A. C. 237.

Extinction of right of navigation.

Although adverse enjoyment for twenty years is, as against a private individual, evidence of a grant by him, yet it is otherwise in the case of a public navigable river: for no such obstruction will bar a public right (*Vooght v. Winch*, 2 B. & Ald. 662; *Weld v. Hornby*, 7 East, 195). A public right of navigation may be extinguished either by an act of parliament, a writ *ad quod damnum* and inquisition, or, under certain circumstances, by commissioners of sewers, or by natural causes, such as the recess of the sea, or accumulation of silt or mud (*R. v. Montague*, 4 B. & C. 598). Where by any natural cause the channel becomes choked up the river ceases to be navigable, at least until such causes are by some means counteracted (*Colchester v. Brooke*, 7 Q. B. 374). Where water which is a highway changes its course, the new channel becomes a highway (*Carlisle v. Graham*, L. R. 4 Ex. 367).

Obstructions to navigation.

An action will lie for the special damage occasioned to a party conveying goods along a navigation, by its obstruction by a barge moored across, whereby he was compelled to unload and carry his goods overland (*Rose v. Miles*, 4 M. & S. 101). Where the defendant wrongfully placed timber in a navigable river, whereby the access to the plaintiff's public-house was obstructed, an action lay for the particular injury (*Rose v. Groves*, 5 M. & G. 613; *Dobson v. Blackmore*, 9 Q. B. 991).

A weir appurtenant to a fishery, obstructing the whole or part of a navigable river, is legal, if granted by the Crown before the commencement of the reign of Edward the First. Such a grant may be inferred from evidence of its having existed before that time. Where the Crown had no right to obstruct the whole passage of a navigable river, it had no right to erect a weir obstructing a part, except subject to the rights of the public; and therefore in such a case the weir would become illegal upon the rest of the river being so choked that there could be no passage elsewhere (*Williams v. Wilcox*, 8 Ad. & Ell. 314; *Rolle v. Whyte*, L. R. 3 Q. B. 286; *Leconfield v. Lonsdale*, L. R. 5 C. P. 657). It is not competent, either to the Crown or to a subject, to use the soil of a navigable river for any purpose amounting to a nuisance (*A.-G. v. Johnson*, 2 Wils. C. C. 87). Where the defendant, as grantee of the Crown, was entitled to the soil of a navigable river, such ownership did not justify him in constructing a jetty which interfered with the navigation (*A.-G. v. Lonsdale*, 7 Eq. 377; *A.-G. v. Tomline*, 14 Ch. Div. 69; *Liverpool Co. v. Mersey Co.*, 1908, 2 Ch. 460). A corporation, being the conservators of a river, and the owners of the soil between high and low water mark, cannot authorize their lessee to erect a wharf there which produces inconvenience to the public in the use of the river for the purposes of navigation (*R. v. Grosvenor*, 2 Stark. N. P. C. 511).

As regards an owner of land at the side of a public navigable river who is not the owner of the soil of the river, it was said that he cannot, for the benefit of his own trade, erect on such soil any structure, whether an obstruction to navigation or not (*A.-G. v. Terry*, 9 Ch. 423; see *White v. Phillips*, 15 C. B. N. S. 245). But he may moor to his bank a floating wharf which is no obstruction (*Booth v. Ratte*, 15 A. C. 188).

The liability of wharfers in respect of the soil of a navigable river adjoining their jetty is dealt with in *The Moorcock*, 14 P. D. 64; *The Calliope*, 1891, A. C. 11. And the liability of the owner of a sunken wreck in a navigable river in *Brown v. Mallett*, 5 C. B. 599; *The Snark*, 1900, P. 105. And as to the right of persons entitled to land from a navigable river on the bank adjoining, to pass over permanent obstructions, see *Eastern Counties R. Co. v. Dorling*, 5 C. B. N. S. 821; *Marshall v. Ulleswater Co.*, L. R. 7 Q. B. 166. Navigators were liable for injuring oysters placed in the channel of a navigable river (*Colchester v. Brooke*, 7 Q. B. 339; *Hawkins v. Rutter*, 1892, 1 Q. B. 668; *The Swift*, 1901, P. 168).

Conservators empowered by statute to remove obstructions to navigation were not liable for damage to a barge injured by an obstruction, as being unpaid public trustees with a discretionary power, but no compulsory duty, of removing obstructions (*Forbes v. Lea Board*, 4 Ex. D. 116; see also *Jolliffe v. Wallasey Board*, L. R. 9 C. P. 62, where a public body was held guilty of negligence in the performance of a public duty with regard to navigation). A corporation empowered by statute to improve navigation was held entitled to sue in respect of abstraction of water without proof of actual damage to navigation (*Medway Co. v. Romney*, 9 C. B. N. S. 575). The Att.-Gen. can restrain interference with the public right of navigation without showing actual injury (*A.-G. v. Shrewsbury Co.*, 21 Ch. D. 752; compare *A.-G. v. Birmingham Board*, 1910, 1 Ch. 61). As to purpresture and the remedy in that case, see *A.-G. v. Johnson* (2 Wils. C. C. 87).

Of Water-courses.

(16)

The presumption as to the ownership of the soil of rivers depends on whether they are tidal or non-tidal (see *Orr-Ewing v. Colquhoun*, 2 App. Cas. 847). In the case of navigable tidal waters (including rivers, estuaries, and arms of the sea), the presumption is that the soil is vested in the Crown (*Gann v. Free Fisheries of Whitstable*, 11 H. L. C. 192; *A.-G. v. Tomline*, 14 Ch. Div. 69; *A.-G. v. Emerson*, 1891, A. C. 649). But the soil of tidal waters may be vested in a subject (*A.-G. v. Emerson, sup.*; *Neil v. Devonshire*, 8 App. Cas. 135), e.g. where he can claim it as included in an adjoining manor (*Le Strange v. Rowe*, 4 F. & F. 1048; *Fitzhardinge v. Purcell*, 1908, 2 Ch. 139); or where he is the owner of a several fishery (*A.-G. v. Emerson, sup.*; *Fitzhardinge v. Purcell*, 1908, 2 Ch. 139). A title to the foreshore on a tidal navigable river was established as against the Crown by acts of possession on the part of an adjoining owner, subject to the public right of navigation (*Lord Adv. v. Blantyre*, 4 App. Cas. 770; see *A.-G. v. Emerson, sup.*). The city of London has been stated to own the soil of the Thames (Dav. 56, b; Com. Dig. Navigation (B)); see, however, *A.-G. v. London*, 2 Mac. & G. 247; *A.-G. v. Johnson*, 2 Wils. C. C. 87. See further as to the bed of the Thames and the powers of the conservators, *Thames Conservators v. Port of London*, 1894, 1 Q. B. 647; *Thames Conservators v. Smeed*, 1897, 2 Q. B. 334; *Palmer v. Thames Conservators*, 1902, 1 Ch. 163. As to the duties of an owner of land abutting on a tidal navigable river, in respect of a river wall, see *Nitro-Phosphate Co. v. London and St. Katharine's Docks* (9 Ch. Div. 524); *Burt v. Victoria Co.* (47 L. T. 378).

Ownership of soil of tidal waters.

In the case of a non-tidal navigable lake, the Crown has no *de jure* right to the soil (*Bristowe v. Cormican*, 3 App. Cas. 641). It is, however, doubtful whether the riparian owners are entitled *ad medium filum* (*Ib.* 666; see *Mackenzie v. Bankes*, 3 App. Cas. 132, n.). In the case of non-tidal navigable rivers, the presumption is that the soil is the property of the owners on each side to the middle of the river, and if a man owns the land on both sides, the presumption is that the whole bed of the river belongs to him (*Blount v. Layard*, 1891, 2 Ch. 689, n.). The same presumptions apply in the case of a non-navigable river (Hale, *De Jure Maris*, Cap. I.; *Carter v. Murcot*, 4 Burr. 2162; Harg. L. Tracts, 5; Davies, R. 155; *R. v. Wharton*, 12 Mod. 510; *Bickett v. Morris*, L. R. 1 H. L. Sc. 58). Where a non-tidal river was divided by an island, the *medium filum* was drawn between the island and one bank (*Great Torrington v. Moore Stevens*, 1904, 1 Ch. 347; see *Zetland v. Glover*, L. R. 2 H. L. Sc. 70). But in each case the ownership of the soil is a question of fact. Thus the soil may form part of the waste of a manor (*Tilbury v. Silva*, 45 Ch. D. 110). Again, the owner of the land on one side of a river only may be entitled to the whole bed (*Jones v. Williams*, 2 M. & W. 326). See the evidence of acts of ownership in the last-mentioned case, and in *Smith v. Andrews*, 1891, 2 Ch. 678; *Blount v. Layard, Ib.* 681, n.; *Lord Adv. v. Blantyre*, 4 App. Cas. 770, 791. The above presumption *prima facie* applies to the ownership of the bed of an artificial channel (*Whitmores v. Stanford*, 1909, 1 Ch. 427). The relation of the ownership of the soil to the ownership of the fishery is stated *ante*, p. 46.

Soil of non-tidal waters (whether navigable or non-navigable);

Of Water-courses.

As to pleadings in an action to establish title to the soil of a watercourse, see *Pledge v. Pomfret*, 1905, W. N. 56.

when soil of river passes by conveyance of bank.

The right of ownership of the moiety of the soil of a non-tidal river passes, according to a legal presumption, under a conveyance of land on one bank, whether the land is freehold, copyhold, or leasehold (*Tilbury v. Silva*, 45 Ch. Div. 98); and this even where the conveyance points to a boundary which would not include any part of the bed (*Crossley v. Lightowler*, 3 Eq. 279); or where the quantity specified in the deed and the colouring on the map, excludes the bed (*Micklethwait v. Newlay Co.*, 33 Ch. Div. 133; *Mellor v. Walmesley*, 1905, 2 Ch. 179); or where the river is of more than ordinary breadth (*Dwyer v. Rich*, 1 R. 6 C. L. 144). The presumption applies also where the grantor is owner of both banks of the river (*Micklethwait v. Newlay Co.*, *sup.*). The presumption may be rebutted by surrounding circumstances (*Devonshire v. Pattinson*, 20 Q. B. Div. 263); but not by reason of subsequent circumstances not contemplated at the time of the grant (*Micklethwait v. Newlay Co.*, *sup.*). It is doubtful whether the presumption applies when the bank is acquired by statutory award made under an Inclosure Act (*Ecroyd v. Coulthard*, 1897, 2 Ch. 567; *Hindson v. Ashby*, 1896, 2 Ch. 9. See the cases quoted *ante*, pp. 46, 61).

Rights of navigation proprietors in the soil of river;

An act of parliament, passed to make navigable a natural river, does not vest in the undertakers of the navigation the bed of the river, but gives them the privilege of cleansing it, which is a mere easement (*R. v. Mersey Navigation*, 9 B. & C. 114; *R. v. Thomas*, *ib.* 95). The proprietors of a navigation have no property either in the soil over which the water flows or in the adjoining banks under an act of parliament allowing them the use of the land through which the river passes (*Hollis v. Goldfinch*, 1 B. & C. 221). A right to the use of flowing water does not necessarily depend upon the ownership of the soil covered by such water (*Lord v. Sydney*, 12 Moo. P. C. C. 473).

rights in banks.

The fee simple in the towing-path by the River Lee remains in the adjoining owner, subject to the rights of the conservators in connection with navigation (*Lee Conservators v. Button*, 6 App. Cas. 685). As to the liability of conservators for the condition of a towing-path, see *Winch v. Thames Conservators* (L. R. 9 C. P. 378). The public are not entitled at common law to tow on the banks of ancient navigable rivers; the right must be founded on statute or on usage (*Ball v. Herbert*, 3 T. R. 256; see 1 Lord Raym. 725; Bull. N. P. 90; 6 Mod. 163, *contra*; see also *Pierce v. Falconberge*, 1 Burr. 292).

The use of the banks of the river for more than twenty years by fishermen, who occasionally levelled them, is evidence of a grant of a right of landing by the owner of the soil, although both fishery and landing-place once belonged to the same person, and there was no evidence to show that the owners knew of the user (*Gray v. Bond*, 2 Brod. & Bing. 667).

(17)

Rights as to the seashore. Foreshore. Definition. *Primâ facie* title of Crown.

Apart from usage, the Crown is entitled to the "*littus maris*," as well as to the soil of the sea adjoining the coast (*A.-G. v. Chambers*, 4 D. M. & G. 213); its right landward being limited *primâ facie* by the line of the medium high tide between the springs and the neaps (*ib.* 218). The land between medium high and low water marks is ordinarily referred to as "the foreshore" (*Mellor v. Walmesley*, 1905, 2 Ch. 164; see the definitions of "sea-shore" quoted by *Romer, L.J.*, *ib.* 177). As to the landward limits of the foreshore prescribed by the law of Scotland, see *Musselburgh v. M.*, 1905, A. C. 494, 495. Subject to the rights mentioned below, the Crown's title is a beneficial one (*Brinckman v. Matley*, 1904, 2 Ch. 325).

Title against the Crown.

As against the Crown a title to the foreshore can be acquired by proving either an express grant from the Crown or facts from which such grant may be presumed (*A.-G. v. Emerson*, 1891, A. C. 653). The ownership of a several fishery over the foreshore raises a presumption that the soil is vested in such owner (*ib.* 649). Again, the foreshore may be shown to be parcel of the adjoining manor (*Constable's Case*, 5 Rep. 107; Harg. Law Tracts, 12), *e.g.* where the lord has the franchise of taking wreck (*Hale De Jure Maris*, Cap. 6). It was treated as such in *A.-G. v. Hammer*, 27 L. J. Ch. 837;

Lord of Manor.

A.-G. v. Tomline, 14 Ch. Div. 18; *Truro v. Rowe*, 1902, 2 K. B. 709; *Brinckman v. Matley*, 1904, 2 Ch. 313; *Foster v. Warblington*, 1906, 1 K. B. 648. As to evidence in support of the lord's title, either in the shape of entries on the Court rolls, or previous decisions, see *Ex parte Tomline*, 21 W. R. 475; *Le Strange v. Rowe*, 4 F. & F. 1048; *Foster v. Warblington*, 1906, 1 K. B. 659. Where by an ancient Crown grant of a manor its limits were not defined, modern usage was admissible to show that the foreshore was parcel of the manor (*Beaufort v. Swansea*, 3 Ex. 413; *A.-G. v. Jones*, 2 H. & C. 347; *Calmady v. Rowe*, 6 C. B. 861; *Ex parte Alston*, 28 L. T. 337). Crown grants of wreck coupled with usage may also support as against the Crown a title to foreshore (*Chad v. Tilsed*, 2 Brod. & Bing. 403; see *A.-G. v. Emerson*, 1891, A. C. 660; *Healey v. Thorne*, Ir. Rep. 4 C. L. 495; *Hamilton v. A.-G.*, 5 L. R. Ir. 555). Foreshore in Cornwall belonged to the Duke of Cornwall (*Philpot v. Bath*, 1905, W. N. 114). As against Title by the Crown, a title to foreshore in Scotland may be acquired by prescriptive possession. possession (*Lord Adv. v. Blantyre*, 4 App. Cas. 770; *Lord Adv. v. Young*, 12 App. Cas. 544). In other parts of the United Kingdom a title to foreshore may be acquired by possession; as against the Crown under the Nullum Tempus Act (*Ex parte Alston*, 28 L. T. 337); and as against a subject of the Crown under the ordinary Statutes of Limitation (see *Philpot v. Bath*, 1905, W. N. 114; *Foster v. Warblington*, 1906, 1 K. B. 658; *Truro v. Rowe*, 1902, 2 K. B. 715). Erecting piles on the foreshore was an act of ownership only as regards the site of the piles (*Beaufort v. Aird*, 20 T. L. R. 603).

The title of the Crown and of those claiming under it to foreshore is Public rights subject to an obligation to protect the realm from the inroads of the sea by controlling maintaining natural barriers (*A.-G. v. Tomline*, 14 Ch. Div. 58; *West Norfolk v. Archdale*, 16 Q. B. Div. 754; see *Musselburgh v. M.*, 1905, A. C. 491) and the destruction of natural barriers by removing shingle was restrained (*Ib.*). Such title is also subject to other rights of the public (*Brinckman v. Matley*, 1904, 2 Ch. 325), which are as follows:—

When the foreshore is covered with water, every subject of the king has a right of navigation, and has also *primâ facie* a common of fishery (*Ib.* 315; *Fitzhardinge v. Purcell*, 1908, 2 Ch. 139). When the foreshore becomes dry there is for purposes of navigation a common law right to cross the foreshore in case of peril or necessity; and for the purpose of fishing, there may be a right to launch a boat (1904, 2 Ch. 316). As to drawing up fishing boats on the shore, see *Ilchester v. Rashleigh*, 61 L. T. 478. There is also a right to get shell-fish on the dry foreshore (*Bagott v. Orr*, 2 Bos. & P. 472; *Brinckman v. Matley*, 1904, 2 Ch. 327). There is not, however, *primâ facie* a public highway along the foreshore (*Brinckman v. Matley*, 1904, 2 Ch. 324), nor a right of entry either for taking sea-weed (*Howe v. Stowell*, 1 Alcock & Napier, 348), or for shooting wild duck (*Fitzhardinge v. Purcell*, 1908, 2 Ch. 139), or for holding religious services (*Llandudno v. Woods*, 1899, 2 Ch. 705). Nor is there any common law right to bathe in the sea, and as incident thereto to cross the foreshore on foot or with bathing machines (*Blundell v. Catterall*, 5 B. & Ald. 268; *Brinckman v. Matley*, 1904, 2 Ch. 313; *Mace v. Philcox*, 15 C. B. N. S. 600), or any common law right to appropriate foreshore for storing oysters to the exclusion of others (*Truro v. Rowe*, 1902, 2 K. B. 715). Nor is there any common law right to discharge sewage into the sea so as to cause a nuisance (*Foster v. Warblington*, 1906, 1 K. B. 665, 689; *Hobart v. Southend*, 75 L. J. K. B. 305). The owner of a tenement adjoining the sea was held to have the same right of access to the sea as a riparian proprietor has to a tidal river (*A.-G. Straits Settlement v. Wemyss*, 13 App. Cas. 192).

A person in possession of foreshore may maintain trespass against a Occupier of wrongdoer without displacing the Crown's title (*Hastings v. Ivall*, 19 Eq. foreshore. 558). So, irrespectively of title, trespass was maintained by the occupier of oyster ponds on the foreshore (*Foster v. Warblington*, 1906, 1 K. B. 648).

As to what words in the grant will pass the soil of the foreshore, see Grant of *Scrutton v. Brown*, 4 B. & C. 485; *Hastings v. Ivall*, 19 Eq. 558; *Mellor v. foreshore.*

Of Water-courses.

Walmsley, 1905, 2 Ch. 164, where the land was described as "situate on the sea-shore."

A grant by the Crown (as lord of a manor adjoining an estuary) of minerals within the waste was held to pass minerals under the foreshore (*A.-G. v. Hammer*, 27 L. J. Ch. 837). The effect of a lease by the Crown of minerals below low water mark was considered in *Lord Adv. v. Wemyss*, 1900, A. C. 48. Acts of user of foreshore by the grantee were relevant to explain a Crown grant of land adjoining the sea (*Van Diemen Co. v. Table Board*, 1906, A. C. 92). Crown grants of non-manorial lands were shown by usage to include foreshore (*Brew v. Haren*, 11 C. L. 198; *Daly v. Murray*, 17 L. R. Ir. 185; *Re Belfast Dock Act*, 1 R. 1 Eq. 128). The courts have presumed grants by the Crown of a licence to discharge sewage over foreshore (*Somersetshire v. Bridgwater*, 81 L. T. 732), of a several fishery in tidal waters (*Goodman v. Saltash*, 7 App. Cas. 633). An express grant of fishing over the foreshore of Canada was considered, *Cabot v. A.-G. of Quebec*, 1907, A. C. 511. Possession by the Crown of foreshore after a grant thereof by it to another created a presumption against the grant (*Par-meter v. A.-G.*, 1 Dow. 328). A modern grant of foreshore by the Crown was dealt with, *Liverpool Co. v. Mersey Co.*, 1909, 1 Ch. 209. As to management of the Crown's foreshore and disputes in relation thereto, see Crown Lands Act, 1906, secs. 2 and 3.

Where a parish lies on the seashore or extends up to a tidal river, the land between medium high water and low water mark is *prima facie* extra-parochial (*Bridgwater v. Bootle-cum-Linacre*, L. R. 2 Q. B. 4; see *Smart v. Suva*, 1893, A. C. 301).

(18)
Accretions
and alluvium.

Gradual accretions of land from the sea belong to the owner of the land gradually added to (*R. v. Yarborough*, 3 B. & C. 91; 5 Bing. 163; 2 Bligh, N. S. 147; *Doe v. East India Co.*, 10 Moo. P. C. 140; *Mellor v. Walmsley*, 1904, 2 Ch. 530; see *Scrutton v. Brown*, 4 B. & C. 485, where a grant of foreshore was held to pass the foreshore as it shifted from time to time). Similarly in the case of gradual accretions from a non-navigable river (*Ford v. Lacey*, 30 L. J. Ex. 351; *Zetland v. Glover*, L. R. 2 H. L. Sc. 70). As to accretions which are not gradual, see *A.-G. v. Reeve*, 1 T. L. R. 675. Conversely land gradually encroached upon by water ceases to belong to the former owner (*Re Hull and Selby R. Co.*, 5 M. & W. 327). This law is based on the impossibility of identifying from day to day small additions to or subtractions from land caused by the constant action of running water (see *Foster v. Wright*, 4 C. P. D. 446). In the case of a river, it was doubted whether the doctrine of accretion would apply where the original bank remained clearly defined (*Hindson v. Ashby*, 1896, 2 Ch. 27, 28). The question whether accretions passed by a conveyance of land "bounded by the seashore" was discussed *Mellor v. Walmsley*, 1904, 2 Ch. 530; 1905, 2 Ch. 164. Land added by accretion becomes subject to any custom affecting the land to which it is added (*Mercer v. Denne*, 1905, 2 Ch. 538).

The title to alluvium, arising from artificial causes, does not differ as to the rights of landowners from the title to alluvium arising from natural causes, where the artificial causes arise from a fair use of the land adjoining the seashore, and not from acts done with a view to the acquisition of the seashore. Where the acts of ownership relied on consisted merely of turning cattle upon a marsh which crossed the invisible line of boundary separating the marsh from the seashore, and the cattle were allowed to stray without interruption, Lord Chelmsford, C., said, "The effect of acts of ownership must depend partly upon the acts themselves, and partly upon the nature of the property upon which they are exercised. If cattle are turned upon enclosed pasture ground, and placed there to feed from time to time, it is strong evidence that it is done under an assertion of right; but where the property is of such a nature that it cannot be easily protected against intrusion, and if it could it would not be worth the trouble of preventing it; there, mere user is not sufficient to establish a right, but it must be founded upon some proof of knowledge and acquiescence by the party interested in

resisting it, or by perseverance in the assertion and exercise of the right claimed in the face of opposition" (*A.-G. v. Chambers*, 4 De G. & J. 65; and see *Re Hainault Forest Act*, 9 C. B. N. S. 648, and Lord *Blackburn's* remarks in *Lord Adv. v. Blantyre*, 4 App. Cas. 791; *Hindson v. Ashby*, 1896, 2 Ch. 24; *Hanbury v. Jenkins*, 1901, 2 Ch. 421; *Re Vernon*, 1901, 1 Ir. R. 1).

Of Water-
courses.

(19)

A ferry is the exclusive right to carry passengers and goods across a river Ferries. or arm of the sea either (1) from one vill to another, or (2) to connect a continuous highway leading from one township or vill to another (*Newton v. Cubitt*, 12 C. B. N. S. 32; *Cowes Council v. Southampton Co.*, 1905, 2 K. B. 295). It is not a servitude imposed upon a large area of land and is wholly unconnected with the ownership or occupation of land (*Ib.*; see *Matthews v. Peache*, 5 E. & B. 546). A ferry is not a monopoly to carry by any means whatever, but only to carry by means of a ferry (*Dibden v. Skirrow*, 1908, 1 Ch. 47).

A disturbance of a ferry may arise from the establishment of a new ferry in proximity to an ancient ferry (*Newton v. Cubitt*, *sup.*; *Huzzey v. Field*, 2 Cr. M. & R. 432). But there was no disturbance where a new ferry was established to provide for a new traffic (*Cowes Council v. Southampton Co.*, 1905, 2 K. B. 287); or where a new bridge was made (*Hopkins v. G. N. Ry.*, 2 Q. B. Div. 224; *Dibden v. Skirrow*, 1908, 1 Ch. 41).

A ferry forms part of the highway, and its owner, in consideration of the monopoly, is bound under pain of indictment to have his ferry always ready (*Letton v. Goodden*, 2 Eq. 131; *Anon.*, 1 Ves. sen. 476). All ancient ferries had their origin in Royal grant or in prescription which presumes a Royal grant (*Simpson v. A.-G.*, 1904, A. C. 490). Thirty-five years' usage was sufficient to show a legal origin (*Trotter v. Harris*, 2 Y. & J. 285). A ferry is a matter of public interest, and accordingly evidence in support of the right may be given in the form of reputation or of a judgment of a competent court (*Pym v. Currell*, 6 M. & W. 234). A custom of keeping a ferry boat was alleged by a parish (*Pain v. Patrick*, 3 Mod. 289, 294).

VI.—RIGHT OF SUPPORT.

- (1) *Support for Land in its Natural Condition*...95.
- (2) *Support for Incumbered Land or Excavated Land*...96.
- (3) *Support for one Building by another*...97.
- (4) *When Right of Action arises*...97.

(1)

Certain rights in respect of support have been held to be easements within Support for land in its natural condition : from land. *Primâ facie* rules. sect. 2 of the Prescription Act, 1832 (*Dalton v. Angus*, 6 App. Cas. 798; *Lemaître v. Davis*, 19 Ch. D. 291; see *Simpson v. Godmanchester*, 1897, A. C. 709). And the right to damage surface by withdrawing support has also been held to be an easement (*Sitwell v. Loundesborough*, 1905, 1 Ch. 465; *Rowbotham v. Wilson*, 8 H. L. C. 348; see *Richards v. Harper*, L. R. 1 Exch. 199). Accordingly a short note is here added as to support.

First, as to land in its natural condition, unincumbered by building and unexcavated.

Questions as to support arise where the title to land A. has been severed from the title to land B., which is subjacent to land A. vertically; or from the title to land C., which is adjacent to land A. laterally. It is settled that, independently of the result of any facts or instruments connected with the severance, and also of custom, the owner of land A. is of common right entitled to have it supported vertically by land B. (*Humphries v. Brogden*, 12 Q. B. 739), and laterally by land C. (*Hunt v. Peake*, John. 705; *Dalton v. Angus*, 6 App. Cas. 808); the right to lateral support extending only over "that portion of land the existence of which in its natural state is necessary for the support of" land A. (*Birmingham v. Allen*, 6 Ch. Div. 289). The

Right of Support.

surface owner's right of support is a right, not to an easement, but to the ordinary enjoyment of his land (*West Leigh Co. v. Tunncliffe*, 1908, A. C. 30).

Further, as regards instruments effecting the severance. Where the owner of the surface and subsoil severs them, and the instrument contains no provision bearing on support, the *primâ facie* rule is, that the right of support is attached as of common right to the surface; not only where the surface is granted and the subsoil retained (*Proud v. Bates*, 34 L. J. Ch. 412), but also where the surface is retained and the subsoil is granted (*Davis v. Treharne*, 6 App. Cas. 460). This *primâ facie* rule is explained in *Butterley v. New Hucknall*, 1909, 1 Ch. 37. The rule holds good whether the instrument is a lease, or a grant, or reservation, or inclosure act or award (*Butterknowle Co. v. Bishop Auckland Co.*, 1906, A. C. 313).

Exceptions to *primâ facie* rule.

The *primâ facie* rule may, however, be altered by the express words of the instrument of severance or necessary intendment therefrom (*Ib.*; *Aspden v. Seddon*, 10 Ch. 401; *Davis v. Treharne*, 6 A. C. 467; *Dixon v. White*, 8 A. C. 843). As to the meaning in such an instrument of the words "mines" and "minerals" see *Glasgow v. Farrow*, 13 A. C. 687, 689.

Words of instrument. Inclosure Act.

Again, where the title to the surface and the underlying minerals is severed in pursuance of an inclosure act, while the above rule giving the surface owner a right to support ordinarily applies (*Love v. Bell*, 9 App. Cas. 297), the right may be expressly or impliedly limited by the act (*Bell v. Dudley*, 1895, 1 Ch. 186; *Conssett Co. v. Ritson*, 22 Q. B. Div. 318, 702; 43 W. R. 122; *Butterknowle Co. v. Bishop Auckland Co.*, 1904, 2 Ch. 424; 1906, A. C. 305).

**Railway
Clauses Act,
1845.**

Again, the *primâ facie* rule may, in the case of a purchase by a railway company, be altered by the provisions of the Railways Clauses Act, 1845. For where under that act a railway company purchases the surface without the underlying minerals, the owner of the minerals, when not compensated therefor, may after notice so work them (working properly) as to let down the surface (*Pountney v. Clayton*, 11 Q. B. Div. 820); even in the case of minerals gotten by open workings (*Midland R. Co. v. Robinson*, 15 App. Cas. 19; see *G. W. R. v. Blades*, 1901, 2 Ch. 625). See, generally, as to the statutory provisions which limit or extend the *primâ facie* right, *L. & N. W. R. Co. v. Evans*, 1893, 1 Ch. 16; and *Bell v. Dudley*, 1895, 1 Ch. 182, and cases there referred to.

Custom.

Again, the *primâ facie* rule may be altered by custom, e.g. a custom that the lord may, by working his own subjacent minerals, let down the surface of a copyholder, making, however, compensation (*Aspden v. Seddon*, 1 Ex. Div. 510).

**Support from
subterranean
water.**

It has been said that at common law there is no right of support from subterranean water (*Popplewell v. Hodgkinson*, L. R. 4 Ex. 248; *Elliot v. N. E. R. Co.*, 10 H. L. C. 333; *English v. Metropolitan Board*, 1907, 1 K. B. 588; see, however, the judgments in *Jordeson v. Sutton Co.*, 1899, 2 Ch. 217). But where land is supported by a bed of wet sand or running silt, an adjoining owner who, by excavating and pumping, withdraws this support is liable in damages (*Jordeson v. Sutton Co.*, *sup.*). So also in the case of a bed of semi-fluid pitch (*Trinidad Asphalt Co. v. Ambard*, 1899, A. C. 594). See also the Brine Pumping (Compensation for Subsidence) Act, 1891; and *Salt Union v. Brunner*, 1906, 2 K. B. 822.

(2)

**Support for
incumbered
land.**

Secondly, as to land incumbered by buildings, &c.

**Right may
arise under
grant;
express;
or implied;**

Where the title to land A., on which a building has been or is about to be erected, is severed from the title to the subjacent or adjacent land, the right to have such building supported by the subjacent or adjacent land is not of common right, but must be acquired (*Dalton v. Angus*, 6 App. Cas. 792, 809). When acquired the right is precisely the same as that of support for land (*Ib.*). The right may be acquired by grant, whether express (*Ib.*) or implied (*Ib.*). And the implication may be made not only where at the time of the severance land A. had buildings standing on it (*Dalton v. Angus*, 6 App. Cas. 792), but also where it was conveyed

expressly with a view to the erection of buildings (*Caledonian Co. v. Sprot*, 2 Macq. H. L. C. 449; *Rigby v. Bennett*, 21 Ch. Div. 559). A reservation of such a right will not generally be implied in favour of the grantor (*Union Co. v. London Dock Co.*, 1901, 2 Ch. 300; 1902, 2 Ch. 557).

Right of Support.

When a statute gives the right to make and maintain something or under requiring support, e.g. a canal, and provision is made for compensation to statute; landowners, the requisite right of support is also given (*L. & N. W. R. Co. v. Evans*, 1893, 1 Ch. 16).

The right of support may be acquired by enjoyment for buildings which or by enjoyment; have in fact been standing for twenty years (*Dalton v. Angus*, 6 App. Cas. 740; see *Jordeson v. Sutton Co.*, 1898, 2 Ch. 625). And even where buildings are in an infirm condition damages may be recovered from the owner of the servient tenement, if the injury has resulted from his acts (*Dodd v. Holme*, 1 A. & E. 506). The enjoyment, however, must not be clam. Thus, no right of support for dock sides from underground rods was acquired by twenty years' enjoyment which had not been open and visible (*Union Co. v. London Dock Co.*, 1902, 2 Ch. 557).

Where buildings have been standing for less than twenty years, damages may be recovered on proof that the unincumbered land would have sunk (*Hamer v. Knowles*, 6 H. & N. 454; 30 L. J. Ex. 102; see *A.-G. v. Conduit Co.*, 1895, 1 Q. B. 301).

Apparently, the right of support for buildings may also be acquired by lost by lost grant. (*Dalton v. Angus*, 6 App. Cas. 811).

As regards acquiring a right of support for excavated land, see *Partridge v. Scott*, 3 M. & W. 220; *Birmingham v. Allen*, 6 Ch. Div. 284.

Excavated land.

Further, as to support for one building by an adjacent building. This right is similar to the right of support for a building by land (*Lemaitre v. Davis*, 19 Ch. D. 290). The right may be claimed by implied grant or reservation on the severance of two houses erected by the same owner (*Richards v. Rose*, 9 Ex. 218; see *Howarth v. Armstrong*, 77 L. T. 62). Where the owner of building A. and building B. (which is subjacent to A. and supports it) demises A., the lessor cannot withdraw the support, but there is no covenant implied by him to repair B. (*Colebrook v. Girdlers Co.*, 1 Q. B. D. 234). In the case of houses belonging to different owners, the right may be claimed by prescription (*Lemaitre v. Davis*, 19 Ch. D. 281; see *Waddington v. Naylor*, 60 L. T. 480); in which case the enjoyment must have been as of right (see *Tone v. Preston*, 24 Ch. D. 739), and therefore open (*Lemaitre v. Davis*, 19 Ch. D. 281; *Solomon v. Vintners' Co.*, 4 H. & N. 601—603; *Gately v. Martin*, 1900, 2 Ir. R. 269; see *Dalton v. Angus*, 6 App. Cas. 740). As to adjoining buildings in London, see *London Building Act*, 1894.

(3)
Support for one building by another.

The right called the right of support is not a right on the part of the landowner to have the adjoining soil remain in its natural state (*Dalton v. Angus*, 6 App. Cas. 808), but a right to have his own land remain in its natural condition unaffected by any act done in the neighbouring land (*Bonomi v. Backhouse*, E. B. & E. 657; 28 L. J. Q. B. 381). Accordingly, if on the working of the subjacent soil a subsidence can be prevented by the use of artificial means of support, no cause of action arises (*Bower v. Peat*, 1 Q. B. D. 327); but if an actual subsidence takes place, a cause of action arises by reason of the injury to the right, even though there is no pecuniary loss (*A.-G. v. Conduit Co.*, 1895, 1 Q. B. 311; *Mitchell v. Darley Main Co.*, 14 Q. B. Div. 137).

(4)
When right of action arises.

The Statute of Limitations only runs from the date of the subsidence (*Backhouse v. Bonomi*, 9 H. L. C. 503; see *Spoor v. Green*, L. R. 9 Ex. 99); and each successive subsidence gives rise to a separate cause of action (*Darley Main Co. v. Mitchell*, 11 App. Cas. 127; *Crumbie v. Wallsend*, 1891, 1 Q. B. 503; *West Leigh Co. v. Tunncliffe*, 1908, A. C. 27). A lessee of mines, however, is not liable for subsidence occurring during his lease, but caused by the acts of his predecessors (*Greenwell v. Low Beechburn Co.*, 1897, 2 Q. B. 165; *Hall v. Norfolk*, 1900, 2 Ch. 493).

Right of Support.

In addition to damages, a person whose right to support is infringed may claim an injunction (*Mundy v. Rutland*, 23 Ch. Div. 81; see Seton, 6th ed. 574).

VII.—OF THE RIGHT TO PEWS AND VAULTS.

- (1) *Rights in regard to Pews*...98.
- (2) *Proof of Prescriptive Rights to Pews*...99.
- (3) *Voting in respect of Pews and Mortgage of Pew Rents*...100.
- (4) *Chancels*...100.
- (5) *Remedies for Disturbance of Pews*...100.
- (6) *Vaults*...102.

Lord Penzance expressed an opinion that a prescriptive right to a pew in the nave of a parish church cannot be claimed under sect. 2 of the Prescription Act (*Crisp v. Martin*, 2 P. D. 15; see *Halliday v. Phillips*, 23 Q. B. Div. 54; *Proud v. Price*, 62 L. J. Q. B. 490). It is clear, however, that the right to a pew or vault can be claimed as a prescriptive easement annexed to an ancient house in the parish (*Mainwaring v. Giles*, 5 B. & Ald. 361; *Stileman Gibbard v. Wilkinson*, 1897, 1 Q. B. 749; *Bryan v. Whistler*, 8 B. & C. 288). Accordingly a note is added on the right to pews and vaults.

(1)
General right
with regard
to pews.

Of common right, the soil and freehold of the church is the parson's; the use of the body of the church, and the repair of it, common to the *parishioners*; and the disposing of the seats therein the right of the ordinary (Hob. 69; Gibs. Cod. tit. 9, c. 4).

According to the common law the rector, whether endowed or spiritual only, is entitled to the chief seat in the chancel, unless some other person be in a condition to prescribe for it from time immemorial. The ecclesiastical court, in the exercise of its ordinary authority, would allot to him such sitting and protect him against the disturbance of such right (*Spry v. Flood*, 2 Curt. 357). By the general law, and of common right, all the pews in a parish church are the common property of the parish; they are for the use *in common* of the parishioners, who are all entitled to be seated orderly and conveniently, so as best to provide for the accommodation of all. The distribution of seats rests with the churchwardens, as the officers, subject to the control of the ordinary (12 Rep. 105; 3 Inst. 202; *Halliday v. Phillips*, 23 Q. B. Div. 53; *Blake v. Osborne*, 3 Hagg. Eccl. R. 733; *Claverley v. C.*, 1909, P. 213). The churchwardens have a discretionary power to appropriate the pews in the church amongst the parishioners, and may remove persons intruding on seats already appropriated (*Reynolds v. Monkton*, 2 M. & Rob. 384; *Asher v. Calcraft*, 18 Q. B. D. 607; *Taylor v. Timson*, 20 Q. B. D. 676); and, in allotting seats in a church built under the Church Building Acts, may give preference to subscribers to church expenses (*St. Saviour, Westgate on Sea, Vicar of*, 1898, P. 217).

Particular
rights.

The general right then being in the parish and the ordinary, any particular rights in derogation of these are *stricti juris*; it is the policy of the law that few of these exclusive rights should exist, because it is the object of the law that all the inhabitants should be accommodated; and it is for the general convenience of the parish that the occupation of pews should be altered from time to time, according to circumstances. Mere possession is not good against the churchwardens and the ordinary (*Halliday v. Phillips*, 23 Q. B. Div. 53). The churchwardens may displace, and make new arrangements, but they ought not without cause to displace persons in possession; if they do, the ordinary would reinstate them: the possession therefore will have its weight,—the ordinary would give a person in possession, *ceteris paribus*, the preference over a mere stranger (1 Phill. R. 324). The churchwardens are not justified in dispossessing any one of a sitting which he has enjoyed for a time, without giving notice of their intention, and offering an opportunity for explanation (*Horsfall v. Holland*, 6 Jur. N. S. 278). Mere

possession, however, is sufficient to maintain a suit against a mere disturber (*Spry v. Flood*, 2 Curt. 356). The fact of possession implies either the actual or virtual authority of those having power to place. The disturber may show that he has been placed there by this authority, or must justify his disturbance by showing a paramount right,—a right paramount to the ordinary himself; namely, a faculty by which the ordinary has parted with the right; or if there be no proof of a faculty, there may be proof of prescription, and such immemorial usage as presumes the grant of a faculty (1 Phill. R. 324). Such a grant may be presumed although there may be evidence that the pew was originally acquired under circumstances which would not confer a legal right (*Halliday v. Phillips*, 1891, A. C. 228). Where the prescription is interrupted, the jury are not bound to presume a faculty from long undisturbed possession (*Morgan v. Curtis*, 3 M. & R. 389). On the expiration of a faculty, as where one was granted for ninety-nine years, the right of the parishioners to the use of the pew revives (3 Hagg. Eccl. R. 733). A faculty (for annexing a pew to a messuage) obtained by surprise and undue contrivance may be revoked (2 Hag. Eccl. R. 417).

Of the Right
to Pews.

It was laid down in 1 Phillim. 325, that a *prescriptive right* must be clearly proved; the facts must not be left equivocal; and they must be such as are not inconsistent with the general right. In the first place, it is necessary to show that the use and occupation of the seat have been from time immemorial appurtenant to a certain messuage, not to lands; the ordinary himself cannot grant a seat appurtenant to lands. Secondly, it must be shown that if any acts have been done by the inhabitants of such messuage they maintained and upheld the right. At all events, if any repairs have been required within memory, it must be proved that they have been made at the expense of the party setting up the prescriptive right (compare *Crisp v. Martin*, 2 P. D. 15). The *onus* and *beneficium* are supposed to go together. The possession must be ancient, and going beyond memory, though on this subject the high legal memory, even before the Prescription Act, 1832, was not required (1 Hagg. Cons. R. 322). As against the ordinary, mere occupancy of the pew does not prove the right (*Proud v. Price*, 63 L. J. Q. B. 61; *Stileman Gibbard v. Wilkinson*, 1897, 1 Q. B. 749). But the uniform and exclusive possession of the pew by the inhabitants of a particular messuage connected with the burthen of maintaining and repairing the seat is evidence sufficient to establish a prescriptive title. To exclude the jurisdiction of the ordinary, the strongest evidence is the building and repairing time out of mind; but mere repairing for thirty or forty years will not exclude the ordinary (*Stocks v. Booth*, 1 T. R. 428; *Walter v. Gunner*, 1 Hagg. 322). The evidence was considered (*Halliday v. Phillips*, 23 Q. B. Div. 54; 1891, A. C. 228). Evidence of repair to a pew claimed by prescription is not absolutely necessary, as no repair may have been done within the period of anyone living (*Knapp v. Willesden*, 2 Rob. Ec. Rep. 358; see *Stileman Gibbard v. Wilkinson*, 1897, 1 Q. B. 759, where evidence of other acts of user was held sufficient). Twenty years' adverse possession seems to bar the right to a pew (1 Phill. R. 328).

Where the members of a corporation have as such occupied a particular pew in the parish church, the repairs of it may be properly charged on the borough fund (*R. v. Warwick*, 10 Jur. 262; 15 L. J. Q. B. 306).

Extra-parochial persons cannot establish a claim to seats in the body of a parish church without proof of a prescriptive title (*Byerly v. Windus*, 5 B. & C. 1; as to prohibition against granting a faculty, see *Hallack v. Cambridge*, 1 Q. B. 593). A pew in the body of the church may be prescribed for as appurtenant to a house out of the parish (*Davis v. Witts*, Forr. R. 14; *Lonsley v. Hayward*, 1 Y. & J. 583). A pew in an aisle or chancel may belong to a non-parishioner, for the case of an aisle or chancel depends upon, and is governed by, other considerations (2 Addams, R. 427). A man may prescribe for a chancel or for an aisle, or for a pew in an aisle, or even in the nave of a church, if he prescribes for that he and those whose estate he has, have always had it, and have always repaired it, even though the estate or house in question be out of the parish (*per Kindersley*, V.-C., *Churton v. Frewen*, 2 Eq. 656).

(2)

Prescriptive
right to pews,
how proved.

Extra-paro-
chial persons.

Of the Right to Pews.

Prescriptive right to pew cannot be severed from occupancy of messuage.

A pew annexed by prescription to a certain messuage cannot be severed from the occupancy of the house, but passes with the messuage to the tenant for the time being (1 Hagg. Cons. R. 319; *Stocks v. Booth*, 1 T. R. 430; 3 M. & R. 334; 2 Ad. 428); and the pew cannot be sold nor let without a special act of parliament (1 Hagg. Eccl. R. 319, 321); or under the provisions of the Church Building Acts (see 58 Geo. 3, c. 45, ss. 65, 66, 75—79; 59 Geo. 3, c. 134, ss. 26, 32; 8 & 9 Vict. c. 70, s. 11). Where an occupier of a pew ceases to be an inhabitant of the parish, he cannot let the pew with and thus annex it to his house, but it reverts to the disposal of the churchwardens (1 Hagg. Eccl. R. 34). A person who has permission from the churchwardens to sit in a pew temporarily, and in order to carry into effect the conditions of sale of a house with a pew, cannot bring a suit for perturbation of seat against a mere intruder, such permission being illegal, as confirming the sale of the pew (*Blake v. Osborne*, 3 Hagg. Eccl. R. 726). Customs pleaded, "that pews are appurtenant to certain houses, and are let by the owners to persons who are not inhabitants of the parish," are bad (1 Hagg. Cons. R. 317). But if a house to which a pew is appurtenant be let to a *parishioner*, in that character he is clearly entitled to the pew (2 Add. 428). Custom, "that persons who had not pews appurtenant pay rent for seats, which is applied in payment of the parish rate," is a practice which has been constantly reprehended by the ecclesiastical courts, and discouraged as often as set up (1 Hagg. Cons. R. 317).

32 & 33 Vict. c. 94 contains provisions for the surrender of pews which are private property, or subject to any trust, to the bishop of the diocese or the ecclesiastical commissioners. And by 35 & 36 Vict. c. 49, provision is made for the free use of seats in certain churches.

(3)

Right to vote in respect of pews.

On the construction of private acts it was held that the proprietors of pews did not acquire such a freehold interest in the soil of the church as entitled them to a county vote; but only a right to sit in it to hear divine service, which right was of the nature of an easement (*Hinde v. Chorlton*, L. R. 2 C. P. 104; *Brunfitt v. Roberts*, L. R. 5 C. P. 224; *Greenway v. Hockin*, *Ib.* 235).

Mortgage of pew rents.

A mortgage of pew rents made by a vicar of a district church is void under 13 Eliz. c. 20 (*Ex p. Arrowsmith*, 8 Ch. Div. 96), where it was said that the pew rents resembled the payment which the lord of a manor received for stallage in a market.

(4)

Chancels.

The rector is entitled to the principal pew in the chancel, but the ordinary may grant permission to other persons to have pews there (*Clifford v. Wicks*, 1 B. & A. 498; see *Stileman Gibbard v. Wilkinson*, 1897, 1 Q. B. 749). A pew in a chancel may legally belong to a party in respect of the ownership of a house (*Parker v. Leach*, 4 Moore, P. C. C. 180). The above rules as to claiming pews by prescription were applied in the case of a pew in the chancel (*Stileman Gibbard v. Wilkinson*, *sup.*).

Immemorial repair of a chapel or lesser chancel, which is part of a parish church, coupled with other acts of ownership, is evidence of a freehold of inheritance in it. Such a freehold may be vested in a private person; and the enjoyment of such a chapel or chancel, and the right to its exclusive use is not necessarily annexed to a dwelling-house (*Chapman v. Jones*, L. R. 4 Ex. 273). Immemorial occupation, coupled with reparation, may entitle the lord of the manor to the exclusive use of the chancel without the freehold, and such a right may be appendant to an estate or house not situate in the parish (*Churton v. Frewen*, 2 Eq. 634). On the question whether a building forms part of the chancel of a parish church, or is private property, see *Norfolk v. Arbutnot*, 5 C. P. Div. 390.

(5)

Remedy for disturbance of pews by action.

Where a pew is claimed as annexed to a house by faculty or prescription, the courts of common law exercise jurisdiction, on the ground of the pew being an easement to the house, and the proper remedy for a disturbance is

an action (*Mainwaring v. Giles*, 5 B. & Ald. 361). So where the pew is in a chancel, the freehold of an individual (*May v. Gilbert*, 2 Bulstr. 151). The ecclesiastical court has jurisdiction in all suits respecting pews; but where prescriptive rights come in question, prohibition will be granted on the application of either party, for the purpose of having the prescription tried by a jury (Report of Eccl. Commrs., p. 49; see *Re Bateman*, 9 Eq. 660). So if a man claim title by prescription to an aisle, chancel, &c., as his freehold (see 1 Burn's Eccl. Law, 8th ed., 366, 367; *Witcher v. Cheslam*, 1 Wils. 17; *Corwen v. Pym*, 12 Rep. 105; *Jacob v. Dalton*, 2 Raym. 1755; *Boothby v. Bailey*, Hob. 69; *Francis v. Lee*, Cro. Jac. 366; *Day v. Beddingfield*, Noy's Rep. 104; *Buxton or Bunton v. Bateman*, 1 Sid. 89; *S. C.*, 1 Lev. 71; *Sir T. Raym.* 52; *Crook v. Sampson*, 2 Keb. 92; *Brabin v. Tradum*, Poph. 140; 2 Roll. Abr. 287, 288).

Of the Right
to Pews.

The uninterrupted possession of a pew in a church for twenty years affords presumptive evidence of a legal title by prescription or by a faculty against a wrongdoer (*Darwin v. Upton*, 2 Wms. Saund. 506, ed. 1871). But if the right was claimed as appurtenant to an ancient messuage the claim would, before the Prescription Act, 1832, be rebutted by proof that the pew began to exist within time of legal memory (*Griffith v. Matthews*, 5 T. R. 296; see *Crisp v. Martin*, 2 P. D. 15). In an action for disturbing the possession of a pew of which there had been uninterrupted enjoyment for thirty-six years, but which had been an open pew before that period; the jury were directed to presume a title after so long a possession (*Rogers v. Brookes*, 1 T. R. 431, n.; see *Halliday v. Phillips*, 1891, A. C. 228; see, however, *Morgan v. Curtis*, 3 M. & R. 389). A pew in a parish church was claimed in respect of an ancient messuage; and it was proved that, so far as living memory extended, the pew had been one of three pews adjoining all claimed under one and the same claim of right, viz., in respect of the said ancient messuage: it was held, that proof of repairs done to one of the pews, not that in question, was evidence as to all (*Pepper v. Barnard*, 12 L. J. Q. B. 361). The pew must be claimed as appurtenant to a messuage in the parish, otherwise a bare possession of the pew for sixty years and more is not sufficient title to maintain an action for disturbing the enjoyment thereof, but a prescriptive right or faculty must be proved (*Stocks v. Booth*, 1 T. R. 428). Where the action is brought against a stranger, the plaintiff is not bound to state in his declaration that he has repaired the pew, though it is otherwise when the action is brought against the ordinary; in which case a title or consideration must be shown in the declaration and proved, as the building or repairing of the pew (*Kenrick v. Taylor*, 1 Wils. 326; *Ashley v. Freckleton*, 3 Lev. 73; see *Fiske v. Rovitt*, Loft, 423; Com. Dig. Action upon the Case for Disturbance (A. 3); *Gibs*, 197, 198).

The grant of part of the chancel of a church by a *lay impropiator* to A., Who can sue. his heirs and assigns, is not valid in law, and therefore such grantee cannot maintain trespass for pulling down his pews there erected (*Clifford v. Wicks*, 1 B. & Ald. 498). But the churchwardens have not, as against the incumbent of a church, a joint possession of it, so as to disable him from maintaining trespass against them for pulling down pews; and a chapelwarden of a parochial chapelry has not, by virtue of his office, any authority to enter the chapel and remove the pews without the consent of the perpetual curate (*Jones v. Ellis*, 2 Y. & J. 265). The perpetual curate of an augmented parochial chapelry may maintain trespass for breaking and entering the chapel and destroying the pews (*Ib.*).

As well priority in a seat as a seat itself in the body of a church may be claimed by prescription, as belonging to a house, by the inhabitants of it, pew. who have repaired the seat time out of mind (*Carleton v. Hutton*, Noy, 78; *Gibs*, 221). The right to sit in a pew may be apportioned (*Harris v. Drewe*, 2 B. & Ad. 164). As to a licence by a pew owner to the churchwarden to divide the pew, see *Adams v. Andrews* (15 Q. B. 284).

It seems that a bill in equity would not lie to be quieted in the possession of a pew, though there was a decree for it before the ordinary (*Baker v. Child*, 2 Vern. 226). See *Cardinall v. Molyneux* (7 Jur. N. S. 854), as to the Chancery Division.

Of the Right to Pews. proceedings against an incumbent who removed pews and substituted chairs in the church.

(6) **Vaults.** A man may prescribe that he is tenant of an ancient messuage, and ought to have a separate burial in a particular vault within the church (Com. Dig. Cemetery (B.)). It seems that the same rules are applicable to vaults as to pews (*Bryan v. Whistler*, 8 B. & C. 293; see *Francis v. Ley*, Cro. Jac. 366; Gibs. Cod. 542).

VIII.—RIGHTS TO LIGHT.

- (1) *Creation of Right to Light by Statute*...102.
- (2) *Acquisition of Right to Light by Grant, express or implied. Nature of this Right*...102.
- (3) *Acquisition by User of Prescriptive Right to Light. Nature of this Prescriptive Right*...104.
- (4) *Effect of Alteration of Ancient Lights*...105.
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(1) **Creation by statute.** A right to light may be created by statute. The right may also arise as an adventitious advantage from a statute not dealing with the creation of easements (*Boyce v. Paddington*, 1903, 1 Ch. 115).

(2) **Acquisition by express grant.** A right to light may also be acquired by express grant (*Booth v. Alcock*, 8 Ch. 667). A conveyance since 1881 of land with buildings thereon, includes a grant of "light" (Conv. Act, 1881, sect. 6 (2)). At law such an easement can only be granted by deed (*McManus v. Cooke*, 35 Ch. D. 689). But in equity a verbal agreement for such a right may be enforced when there has been part performance (*Ib.* 681).

Cases as to contracts. An equitable right to light claimed under a contract did not bind a purchaser for value without notice of the servient tenement (*Prinsep v. Belgravia*, 1896, W. N. 39). But such an equitable right, of which an intending purchaser of the servient tenement had notice, was an objection to title (*Pemsel v. Tucker*, 1907, 2 Ch. 191). The mere fact of there being windows in an adjoining house which overlook a purchased property is not constructive notice of any agreement giving a right to the access of light to them (*Allen v. Seckham*, 11 Ch. Div. 790). A contract for the sale of a house with windows looking over the land of a third person implies no representation that the windows are entitled to light over that land (*Greenhalgh v. Brindley*, 1901, 2 Ch. 324).

Cases as to express grants. A., owning Blackacre, with lights overlooking Whiteacre, and also owning Whiteacre, demised Blackacre and its lights to B., and subsequently demised Whiteacre to C.; it was held that A. could not have blocked the lights, and that C. was in no better position (*Davies v. Marshall*, 1 Dr. & Sm. 557): similarly where A. subsequently conveyed Whiteacre to C. in fee (*Richardson v. Graham*, 1908, 1 K. B. 39). The words of a grant, however, must be restricted to what a grantor has power to grant at the time; thus, where A. demised a house with lights to B. for 21 years, having at the time the servient tenement for a shorter term, and subsequently acquired the fee of the servient tenement, A. could after the expiration of the shorter term obstruct B.'s lights (*Booth v. Alcock*, 8 Ch. 663; *Godwin v. Schweppes*, 1902, 1 Ch. 932; compare *Davis v. Town Properties*, 1903, 1 Ch. 797).

Acquisition of right to light by implied grant. The rule that a man may not derogate from his grant is a rule of law, and does not depend on the implication of a covenant (*Cable v. Bryant*, 1903, 1 Ch. 264). Under this rule the grantor of land for a particular purpose expressed or referred to in the deed cannot do anything on his adjoining

property which would prevent the purpose (*Aldin v. Latimer*, 1894, 2 Ch. 437; see *Grosvenor Co. v. Hamilton*, 1894, 2 Q. B. 836).

Rights to Light.

As a man cannot derogate from his own grant, it is established, that where the same person possesses a house with lights, and also the adjoining land, and sells the house retaining the land, there, although the lights be new, neither the vendor nor any one claiming under him can build upon the adjoining land, so as to obstruct those lights (*Palmer v. Fletcher*, 1 Lev. 122; *Robinson v. Grave*, 29 L. T. 7; *Key v. Neath*, 95 L. T. 771). The principle was applied where the vendor was a mortgagee selling under his statutory power of sale (*Born v. Turner*, 1900, 2 Ch. 211). The same principle applies where at the time of the grant the erection of a particular building is contemplated by both parties, though no building has been actually erected (*Bailey v. Icke*, 64 L. T. 789; *Fred. Betts v. Pickfords*, 1906, 2 Ch. 87); but not where there is merely an intention on the part of the purchaser to build which is known to the vendor (*Blanchard v. Bridges*, 4 Ad. & Ell. 176; see *Robinson v. Grave*, 29 L. T. 9). The principle was held not to apply where the vendor had contracted to sell the adjoining land before the sale of the house (*Beddington v. Atlee*, 35 Ch. D. 317, 328; see *Davies v. Thomas*, 1899, W. N. 244), or where the vendor had no right in the adjoining land except a builder's right of entry (*Quicke v. Chapman*, 1903, 1 Ch. 659). A., the owner of two adjoining houses, granted a lease of one of them to B., and afterwards leased the other to C., there then existing in it certain windows. After that B. accepted a new lease of the house from A.: it was held, that B. could not alter his tenement, so as to obstruct the windows existing in C.'s house at the time of his lease from A.: though the windows were not twenty years old at the time of the alteration (*Coutts v. Gorham*, 1 M. & M. 396; see *Cox v. Matthews*, 1 Ventr. 237; *Jacomb v. Knight*, 11 W. R. 585; *Warner v. Macbride*, 36 L. T. 360; *Riviere v. Bower*, 1 Ry. & M. 24). The extent of the implied grant of light must be measured by circumstances existing at date of the lease and known to both parties (*Birmingham Banking Co. v. Ross*, 38 Ch. Div. 295; *Corbett v. Jonas*, 1892, 3 Ch. 137; *Godwin v. Schweppes*, 1902, 1 Ch. 926). And where A. on taking a lease of a building knew that the adjoining land was being laid out for building and stipulated for a passage twenty feet wide adjoining the demised building, there was no implied grant (*Birmingham Banking Co. v. Ross*, *sup.*). But the mere reference in A.'s conveyance to the adjoining land as "building land" would not alone prevent an implied grant. The burden of setting limits to the right lies on the grantor (*Broomfield v. Williams*, 1897, 1 Ch. 602; see *Pollard v. Gare*, 1901, 1 Ch. 834; *Mellor v. Walmsley*, 1905, 2 Ch. 176; and see note to sect. 6 of the Conveyancing Act, 1881, *post*).

Implied grant of right to light upon sale of house by owner of adjoining land;

On a sale by a railway company of surplus land with a house thereon, the company can only obstruct the lights by railway constructions, not by a hoarding (*Myers v. Catterston*, 43 Ch. Div. 470). So in the case of a lease of part of a building estate, the lessor's right of obstructing lights on the demised premises is confined to building on the adjoining land. He cannot erect a hoarding (*Wilson v. Queen's Club*, 1891, 3 Ch. 522).

Where a person owning a house with ancient lights, and also owning the sale of land adjoining land, sells the land retaining the house, the purchaser may obstruct by owner of the lights, there being no implied reservation in favour of the vendor adjoining house; (*Curriers' Co. v. Corbet*, 2 Dr. & Sm. 360; *White v. Bass*, 7 H. & N. 722; see *Tenant v. Goldwin*, 2 Ld. Raym. 1093; *Rosewell v. Prior*, 6 Mod. 116; *Canham v. Fisk*, 2 Cr. & J. 128; *Ellis v. Manchester, &c., Co.*, 2 C. P. D. 13; *Master v. Hansard*, 4 Ch. D. 718). To enable a reservation to be implied, the easement must be one of necessity (*Ray v. Hazeldine*, 1904, 2 Ch. 17; *Wheeldon v. Burrows*, 12 Ch. Div. 57; *Union Co. v. London Co.*, 1902, 2 Ch. 557). If, however, on a sale of land adjoining a house to be built by the vendor, it is agreed that a wall of the house may stand within the lands sold with windows overlooking such lands, and if the house be erected accordingly, the purchaser cannot obstruct (*Russell v. Watts*, 10 App. Cas. 602).

Rights to Light.

simultaneous
sale of land
and house.

Where a person owning a house with lights looking over adjoining land and also owning such land, at the same time sells the house to A. and the land to B., both purchasers being aware of the simultaneous conveyances, B. cannot obstruct the lights of A. (*Allen v. Taylor*, 16 Ch. D. 355; see *Rigby v. Bennett*, 21 Ch. D. 567; *Compton v. Richards*, 1 Price, 27; *Swansborough v. Coventry*, 9 Bing. 305). The same principle was applied to the devise in a will of the house to A., and the adjoining land to B. (*Phillips v. Low*, 1892, 1 Ch. 47; *Barnes v. Loach*, 4 Q. B. D. 494); and to successive mortgages of plots of land comprised in one building scheme, the mortgagees having notice of the scheme (*Russell v. Watts*, 10 App. Cas. 590).

Nature of the
right to light
acquired by
grant express
or implied.

As to the nature of the right to light acquired by express grant, it is clear that a special right to light may be created by express covenant or grant, in which case an injunction would be granted without regard to damage (*Leech v. Schweder*, 9 Ch. 474). It is a question of the construction of the deed, which may be controlled by a collateral agreement (*Salaman v. Glover*, 20 Eq. 444). Or, again, a restrictive covenant may cease to be applicable according to the intent and spirit of the contract (*Bedford v. British Museum*, 2 M. & K. 552). A grant of "lights" among the general words of a deed carries nothing but a right similar to the ordinary right acquired by prescriptive user (*Leech v. Schweder*, 9 Ch. 473. As to the nature of this prescriptive right, see below). And the ordinary covenant for quiet enjoyment does not enlarge such grantee's rights (*Ib.*: see *Potts v. Smith*, 6 Eq. 311). As regards implied grants, the grant usually implied on a disposition by the owner of two tenements carries nothing but a right similar to the ordinary right acquired by prescriptive user (*Leech v. Schweder*, 9 Ch. 472). In the case of leases the court has protected special light required for the business of a diamond merchant so described in the lease (*Herz v. Union Bank*, 2 Giff. 686), but not special light required for a business (that of a wool-broker) not immediately contemplated at the date of the lease (*Corbett v. Jonas*, 1892, 3 Ch. 137).

(3)

Prescriptive
right to light.
Mode of
acquisition.

A prescriptive right to light may be acquired by user. Before the Prescription Act, 1832, the modes of acquiring by user the easement of light were (1) by prescription at common law, (2) by presuming a lost grant. The act has provided an additional mode, but the former modes still exist (*Aynsley v. Glover*, 10 Ch. 283; *Gardner v. Hodyson's Co.*, 1903, A. C. 238). As to the method of claiming light under the act, see the note to sect. 3 (*ante*, p. 10); as to the method of claim by prescription at common law or lost grant, see the note, *ante*, p. 21. The old doctrine of acquiring light by common law prescription was stated in *Moore v. Rawson*, 3 B. & C. 340; and was discussed in *Cross v. Lewis*, 2 B. & C. 686; *Darwin v. Upton*, 2 Wms. Saund. 507.

The acquisition by user of a prescriptive right may be prevented by the servient owner erecting a hoarding during the period of enjoyment. Such a hoarding may be erected by a railway Co. (*Bonner v. G. W. R. Co.*, 24 Ch. Div. 1; *Foster v. L. C. D. R.*, 1895, 1 Q. B. 718, 723; see *Myers v. Catterson*, 43 Ch. Div. 470), or by a local authority (*Paddington v. A.-G.* 1906, A. C. 1).

Nature of
prescriptive
right to light
acquired by
user.

The nature of the prescriptive right to light acquired by user has been recently considered in the House of Lords; where it was laid down that generally speaking an owner of ancient lights is entitled to sufficient light according to the ordinary notions of mankind for the comfortable use and enjoyment of his house as a dwelling-house if it is a dwelling-house, or for the beneficial use and occupation of the house if it is a warehouse, shop or other place of business (*Colls v. Home Stores*, 1904, A. C. 208, 204). The test of the right according to the House of Lords is whether the obstruction complained of is a nuisance (1904, A. C. 185, 204, 210). In considering the question whether a case of nuisance is established, regard may, it seems, be had not only to the present use of his light by the plaintiff, but also to any ordinary uses to which the tenement is adapted (1904, A. C. 202, 211; see the rulings as to possible future user in *Moore v. Hall*, 3 Q. B. D. 183; *Dicker*

v. *Popham*, 63 L. T. 379). Whether in dealing with this question the court can have regard to the previous condition of the premises, and compare the present with the past, see the judgments in *Higgins v. Betts*, 1905, 2 Ch. 210; *Kine v. Jolly*, 1905, 1 Ch. 480, 1907, A. C. 1.

The nature of the prescriptive right to light acquired by user was not altered by the Prescription Act, which was only concerned with the conditions or length of user (*Colls v. Home Stores*, 1904, A. C. 183, 199). The nature of the right to light is the same whether it be claimed by prescription at common law, or under the statute (*Ib.*), or by lost grant (*Leech v. Schweder*, 9 Ch. 463), or by grant implied on a disposition by the owner of the two tenements (*Ib.*).

The nature of the prescriptive right to light enjoyed in respect of a building may differ according as the building is situate in town or country (*Colls v. Home Stores*, 1904, A. C. 183, 185). In the case of nuisances other than obstructions to light the question varies with locality (*Rushmer v. Polsue*, 1906, 1 Ch. 250; 1907, A. C. 123).

As to acquiring by user a prescriptive right to an extraordinary amount of Light for light for a special purpose, it has (since the decision in *Colls v. Home Stores*) special been held that such a right cannot be acquired by twenty years' enjoyment, purpose. even where the owner of the servient tenement was aware of the enjoyment (*Ambler v. Gordon*, 1905, 1 K. B. 417). Before *Colls v. Home Stores* the question of special light had been considered in many cases; see *Mackey v. Scottish Widows Co.*, I. R. 11 Eq. 541 (a seed merchant); *Cartwright v. Last*, 1876, W. N. 60 (a dentist); *Theed v. Debenham*, 2 Ch. D. 165 (a sculptor); *Parker v. First Avenue Hotel Co.*, 24 Ch. D. 282 (a photographer); *Warren v. Brown*, 1902, 1 K. B. 15 (a hosier). See also on this question *Moore v. Hall* (3 Q. B. D. 178); *A.-G. v. Queen Anne's Co.*, 60 L. T. 761; *Lazarus v. Artistic Co.*, 1897, 2 Ch. 214.

As to the rule sometimes suggested that a person who has 45 degrees of light left to him cannot complain, it was said by Lord *Lindley*, "There is no rule of law that if a person has 45 degrees of unobstructed light through a particular window left to him he cannot maintain an action for a nuisance caused by diminishing the light which formerly came through that window (*Theed v. Debenham*, 2 Ch. D. 165). But experience shows that it is, generally speaking, a fair working rule to consider that no substantial injury is done to him where an angle of 45 degrees is left to him, especially if there is good light from other directions as well." *Cotton, L.J.*, pointed this out in *Ecc. Commrs. v. Kino* (14 Ch. D. 228); see also *Parker v. First Avenue Hotel Co.* (24 Ch. D. 282); *Colls v. Home Stores*, 1904, A. C. 210.

The owner of an ancient light may pull down the building with a view (4) Alterations of to restoration without interfering with his right to light (*Ecc. Commrs. v. Kino*, 14 Ch. D. 213); and may change the purpose for which the building lights. is to be used (*Scott v. Pape*, 31 Ch. Div. 569). Such an owner may also make alterations in the framework and glazing of his windows without losing his right (*Turner v. Spooner*, 1 Dr. & Sm. 467). With regard to an alteration in the plane of the window it has been laid down by the C. A. that no such alteration will destroy the right so long as the owner of the dominant tenement can show that he is using through the new apertures in the new building the same or a substantial part of the same light which passed through the old apertures into the old building (*Scott v. Pape*, 31 Ch. Div. 554; see *Newson v. Pender*, 27 Ch. Div. 71; *National Co. v. Prudential Co.*, 6 Ch. D. 757; *Blanchard v. Bridges*, 4 Ad. & Ell. 176; *Barnes v. Loach*, 4 Q. B. D. 494; *Bullers v. Dickinson*, 29 Ch. D. 155). Reference may also be made to some older cases in which a plaintiff who obscured the light and air to his own dwelling but left a substantial part unaffected was held not to be thereby disentitled to an injunction (*Arcedeckne v. Kelk*, 2 Giff. 683; *Staight v. Burn*, 5 Ch. 163; *Bourke v. Alexandra Co.*, 1877, W. N. 30; see also *Dyers' Co. v. King*, 9 Eq. 438).

The above decisions were before *Colls v. Home Stores*, where *Scott v. Pape*

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was criticised. But since *Colls v. Home Stores* the main decision in *Scott v. Pape* has been followed by *Neville, J.*, who has laid down that in the case of an alteration of the dominant tenement, the preservation of the right to light depends on identity of light, not on identity of aperture (*Andrews v. Waite*, 1907, 2 Ch. 500; a case in which the alterations were made during the currency of the statutory period). The rule, however, laid down in *Colls v. Home Stores*, that the plaintiff must prove a nuisance renders the proof of his case (where the dominant tenement has been altered) a matter of difficulty, having regard to the necessity of showing that what is a nuisance under present conditions would have been a nuisance under former conditions (*Andrews v. Waite*, 1907, 2 Ch. 510). This difficulty proved fatal to a plaintiff since *Colls v. Home Stores* (*Ankerson v. Connelly*, 1907, 1 Ch. 678; see the older case of *Raper v. Fortescue*, 1886, W. N. 78).

In the case of an alteration, accurate evidence as to the position, &c., of the old lights should be preserved (*Fowlers v. Walker*, 42 L. T. 356; 51 L. J. Ch. 443; *Scott v. Pape*, 31 Ch. Div. 554; see *Pendarves v. Monro*, 1892, 1 Ch. 611). But evidence of the owner's intention to preserve ancient lights is not necessary (*Smith v. Baxter*, 1900, 2 Ch. 138).

Where there is an ancient light and other lights are added, and an obstruction is raised against the added lights, which from their position cannot be obstructed without also obstructing the ancient light, the House of Lords, overruling older cases, decided that such obstruction is illegal (*Tapling v. Jones*, 11 H. L. C. 290; see *Frechette v. La Compagnie*, 9 App. Cas. 185).

(5)
Effect of
unity of
ownership.

Where the easement of light has been acquired, and the ownership of the dominant and servient tenements subsequently becomes united for different estates, the union does not extinguish the easement, but suspends it: upon a severance of the ownership the easement revives (*Simper v. Foley*, 2 J. & H. 555).

(6)
Abandon-
ment of right.

The abandonment of an easement is a question of intention to be decided on the facts of each case (*Crossley v. Lightowler*, 2 Ch. 482; *James v. Stevenson*, 1893, A. C. 167). Certain acts will clearly amount to abandonment of light, e.g. shutting up windows with bricks and mortar for above twenty years (*Lawrence v. Obee*, 3 Camp. 514). And it was said that if a man pulls down his house and does not use the site for two or three years or converts it into tillage, he may be taken to have abandoned his right (*More v. Rawson*, 3 B. & C. 341). As to the onus of proof, see on the one hand the opinion of *Abbott, C.J.*, that the burden of proving an intention of resuming the use of light lies on the party who has discontinued it (*Ib.*). See, on the other hand, the opinion of *Stirling, J.*, that in the case of rebuilding, evidence on the part of the owner of his intention to preserve ancient lights is unnecessary (*Smith v. Baxter*, 1900, 2 Ch. 142). In general it seems clear that the mere pulling down of a building does not destroy the right (*Ecd. Commrs. v. Kino*, 14 Ch. Div. 223), and the necessity of proving an intention to abandon has been insisted on (*Greenwood v. Hornsey*, 33 Ch. D. 471). Supposing the owner of a dominant tenement to have communicated to the owner of the servient tenement an intention to abandon the right, it was doubted in one case whether such a communication would destroy the right until it was acted upon by the servient owner (*Stokoe v. Singers*, 8 E. & B. 37; see *Moore v. Rawson*, *sup.*; *Cook v. Bath*, 6 Eq. 179).

(7)
Remedies for
disturbance
of right to
light.
Abatement.

As a general rule, a person who is injured by a private nuisance may abate it (Jenk. Cent. 260, Cent. 6, Case 57; *Pennriddock's case*, 5 Rep. 100 b); but no more of a house which is erected as a nuisance can be pulled down than is necessary to abate such nuisance (*James v. Hayward*, 1 W. Jones, 221, 222). If a person builds a house so near that of another that it stops his lights, the person injured may enter upon the owner's soil and pull the house down (*R. v. Rosewell*, 2 Salk. 459; *Lane v. Capsey*, 1891, 3 Ch. 411; see *Perry v. Fitzhowe*, 8 Q. B. 757; *Thompson v. Eastwood*, 8 Exch. 69).

As to the necessity of giving notice before abatement, see *Lemmon v. Webb*, 1894, 3 Ch. 13.

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When a party has acquired a right to light, an action lies for obstructing it (*Aldred's Case*, 9 Rep. 58; *Bury v. Pope*, 1 Leon. 168). A reversioner may sue (*Shadwell v. Hutchinson*, 2 B. & Ad. 97). The ground upon which a reversioner is allowed to sue is, that if the obstruction were acquiesced in it would become evidence of abandonment (*Bower v. Hill*, 1 Bing. N. C. 555; see 1 Wms. Saund. 346 b, n.; *Raine v. Alderson*, 4 Bing. N. C. 702). If anything be done to destroy the evidence of title, an action is maintainable by the reversioner (*Young v. Spencer*, 10 B. & C. 145; *Jesser v. Gifford*, 4 Burr. 2141; see *Metrop. Assoc. v. Petch*, 5 C. B. N. S. 504). And if the obstruction be continued, a new action may be maintained, notwithstanding the former recovery (*Shadwell v. Hutchinson*, 2 B. & Ad. 97).

Action :
by whom
actions may
be brought ;

The court will restrain the interference with ancient lights, although the plaintiff does not occupy or intend to occupy the house interfered with (*Wilson v. Townend*, 1 Dr. & Sm. 324). A tenant from year to year may obtain an injunction (*Simper v. Foley*, 2 J. & H. 555; compare *Inchbald v. Robinson*, 4 Ch. 395); but the injunction will be limited to his tenancy (*Simper v. Foley*, *sup.*). A tenant from year to year under notice to quit may apply (*Jacomb v. Knight*, 11 W. R. 812). And a tenant whose lease had expired, but who had agreed for a renewal (*Gale v. Abbott*, 10 W. R. 748). But where a tenant under an agreement for a lease sued to restrain his lessor from obstructing ancient lights, but did not ask to have the agreement specifically performed, an injunction was refused (*Fox v. Purssell*, 3 Sm. & Giff. 242). An injunction will not be granted where the title to the property sought to be protected has not been accepted by the plaintiff (*Heath v. Maydew*, 13 W. R. 199). An executor can recover damages for an obstruction to the light of a house of his testatrix (*Jones v. Simes*, 43 Ch. D. 607).

The owner of the inheritance of a house may maintain an action against whom his own lessee for obstructing lights (*Thomlinson v. Brown*, Say. R. 215; see actions may also 4 Burr. 2141; 3 Leon. 109). Such an action may be brought not only be brought; against the party who first erected the nuisance, but also against his lessee or assignee for continuing it (*Rosewell v. Prior*, 12 Mod. 635; *S. C.*, 2 Salk. 460; 1 Ld. Raym. 713; see also Carth. 456; 1 Keb. 994; *Clarke v. Midland G. W. R.*, 1895, 2 I. R. 294); but after damages have been recovered from the lessor the right of action against the lessee will be barred, as but one satisfaction will be given (12 Mod. 640; Carth. 455) unless there is a continuance of the nuisance. Not only the person who erected the obstruction, and the occupier of the premises where it is erected, but even the workmen and the clerk who superintended the works are liable to an action (*Wilson v. Peto*, 6 B. Moore, 47). As to making occupiers defendants, see *White v. Jameson* (18 Eq. 303); *Broder v. Saillard* (2 Ch. D. 692). Under the Civil Procedure Act, 1833, s. 2 (*post*), an action may be maintained against the executors of the person obstructing (*Jenks v. Clifden*, 1897, 1 Ch. 694).

Compensation can be recovered, under the L. C. C. Act, 1845, from corporations; tions for diminution of light: *Eagle v. Charing Cross R. Co.*, L. R. 2 C. P. 638; *Badham v. Marris*, 45 L. T. 579; *R. v. Poulter*, 20 Q. B. Div. 132; see *Re Harvey and London Council*, 1909, 1 Ch. 528 (as to compensation for inchoate rights to light, see *Barlow v. Ross*, 24 Q. B. Div. 381; *Re London, Tilbury, &c., R. Co.*, *ib.* 326). Injunctions against corporations were accordingly refused (*Clark v. London Board*, 9 Ch. 120; *Bedford v. Dawson*, 20 Eq. 353; *Wigram v. Fryer*, 36 Ch. D. 87; see *London Board v. Smith*, 1895, W. N. 37). On the construction of an act a company was held liable in damages for obstructing light, the plaintiff not being bound to come in under the compensation clause (*Turner v. Sheffield, &c., R. Co.*, 10 M. & W. 425).

As to the form of relief in an action for obstructing light, the question Form of relief. whether the court shall grant damages or an injunction is a matter for Damages or judicial discretion; *Colls v. Home Stores*, 1904, A. C. 192, where Lord injunction. *Macnaghten* laid down the rule as follows: "In some cases, of course, an

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Light.

injunction is necessary—if, for instance, the injury cannot fairly be compensated by money; if the defendant has acted in a high-handed manner; if he has endeavoured to steal a march upon the plaintiff, or to evade the jurisdiction of the court. . . . But if there is really a question as to whether the obstruction is legal or not, and if the defendant has acted fairly and not in an unneighbourly spirit, I am disposed to think that the court ought to incline to damages rather than to an injunction. It is quite true that a man ought not to be compelled to part with his property against his will, or to have the value of his property diminished, without an Act of Parliament. On the other hand, the court ought to be careful not to allow an action for the protection of ancient lights to be used as a means of extorting money."

21 & 22 Vic.
c. 27.

Before *Colls v. Home Stores*, the form of relief, depending as it did largely on 21 & 22 Vict. c. 27, had been discussed in many cases, the effect of which was stated in *Cowper v. Laidler*, 1903, 2 Ch. 339, as follows: The act gives jurisdiction to substitute damages for an injunction (1) where the plaintiff asks for a mandatory injunction, or (2) for an injunction to restrain a continuing nuisance. But (3) where an injunction is asked to restrain a threatened injury, the jurisdiction is doubtful (*Martin v. Price*, 1894, 1 Ch. 376; *Dreyfus v. Peruvian Co.*, 43 Ch. Div. 316). The cases before *Colls v. Home Stores* also laid down the following principles as to the form of relief. When a legal right has been established the plaintiff is *prima facie* entitled to an injunction (*Martin v. Price*, 1894, 1 Ch. 285; *Shelfer v. City of London Co.*, 1895, 1 Ch. 287; *Jordeson v. Sutton Co.*, 1899, 2 Ch. 217; see *Cowper v. Laidler*, 1903, 2 Ch. 341). And in cases of continuing actionable nuisance the jurisdiction to award damages ought only to be exercised under very exceptional circumstances (*Shelfer v. City of London Co.*, 1895, 1 Ch. 316). Damages may be given in substitution for an injunction where the following requirements exist, viz., where the injury to the plaintiff's legal right (1) is small, (2) capable of being estimated in money, (3) can be adequately compensated by a small money payment, and (4) where the case is one in which it would be oppressive to the defendant to grant an injunction (*Ib.* 322). And the conduct of the parties may make damages the more appropriate remedy (*Ib.*; *Senior v. Pawson*, 3 Eq. 330).

Form of
prohibitory
injunction.

Where a prohibitory injunction is granted, the proper form of it was suggested by Lord Macnaghten in *Colls v. Home Stores*, 1904, A. C. 194. And this form has since been adapted by the court to varying circumstances (*Higgins v. Belts*, 1905, 2 Ch. 218; *Anderson v. Francis*, 1906, W. N. 160; *Andrews v. Waite*, 1907, 2 Ch. 510).

Mandatory
injunction.

An injunction may also be granted in mandatory form ordering the pulling down of anything erected after the commencement of an action, or after notice given to the defendant that his erecting it will be objected to (*Smith v. Day*, 13 Ch. Div. 651; *Kelk v. Pearson*, 6 Ch. 809), even where the erection was completed before writ issued (*Lawrence v. Horton*, 62 L. T. 749), and may be granted on interlocutory application (*Daniel v. Ferguson*, 1891, 2 Ch. 27; *Von Joel v. Hornsey*, 1895, 2 Ch. 774). An undertaking in such a case is not essential (*Smith v. Day*, *sup.*; *Mackey v. Scottish Widows*, 1 R. 10 Eq. 113). On the question of granting such an injunction it is important to see if the defendant knew he was doing wrong (*Smith v. Smith*, 20 Eq. 503—505). But there must be no acquiescence on the part of the plaintiff (*Gaskin v. Balls*, 13 Ch. Div. 324; *Baxter v. Bower*, 23 W. R. 805). In form a mandatory injunction should in direct words order the building to be pulled down (*Jackson v. Normanby Co.*, 1899, 1 Ch. 438).

Interlocutory
injunction.

An injunction may be granted on an interlocutory application. As to the considerations of convenience and otherwise affecting this, see *Newson v. Pender*, 27 Ch. Div. 43. On such injunction the plaintiff should in general give an undertaking as to damages (*Graham v. Campbell*, 7 Ch. D. 494), on which the defendant may obtain an inquiry even where the plaintiff has been guilty of no default in obtaining the injunction (*Griffith v. Blake*, 27 Ch. Div. 474; see *Smith v. Day*, 21 Ch. Div. 421). A cross undertaking by the plaintiff must also be given where the defendant gives an undertaking in lieu of an injunction (*Practice note*, 1904, W. N. 208). As to the effect of the

plaintiff's undertaking where the action is subsequently dismissed, see **Rights to Light.** remarks of *Jessel*, M. R. (Memorandum, 1879, W. N. 74).

In *Leech v. Schweder* (22 W. R. 292), *Jessel*, M. R., gave reasons for refusing to inspect, as a judge, an alleged obstruction to light (see also *Jackson v. Newcastle*, 3 D. J. & S. 275). At the trial a surveyor was appointed to report (*Leech v. Schweder*, 9 Ch. 463; *Kelk v. Pearson*, 6 Ch. 810; *Cartwright v. Last*, 1876, W. N. 60); but the appointment before trial was refused in *Stokes v. City Offices* (13 W. R. 537); *Baltic Co. v. Simpson* (24 W. R. 390). Lord *Macnaghten* approved the court's calling in a competent adviser to report (*Colls v. Home Stores*, 1904, A. C. 192). See now R. S. C. Ord. 50, rr. 3, 4; Ord. 55, r. 19.

In *Dann v. Spurrier* (7 Ves. 235), the court laid down the doctrine that it will not permit a man knowingly, though but passively, to encourage another to lay out money under an erroneous opinion of title. This doctrine was applied in the case of an obstruction to light in *Cotching v. Bassett*, 32 Beav. 101. A plea of acquiescence was a good defence to an action for damages for obstruction of light (*Davies v. Marshall*, 10 C. B. N. S. 697). An injunction to restrain the obstruction of ancient lights was refused on the ground of delay (*Cooper v. Hubbuck*, 30 Beav. 160; *Cocks v. Romaine*, 14 L. T. 390). As to the difference between the acquiescence which will justify the refusal of an interlocutory and of a perpetual injunction, see *Johnson v. Wyatt*, 2 D. J. & S. 18; *Turner v. Mirfield*, 34 Beav. 390. Where the plaintiff had submitted for six years to interference with an ancient light, an injunction was refused (*Gaunt v. Fynney*, 8 Ch. 8).

(8)
The opening of a window, whereby the plaintiff's privacy is disturbed, is not actionable; the only remedy is to build upon the adjoining land, opposite the offensive window (*Chandler v. Thompson*, 3 Campb. 80; see 9 Rep. 58 b; *Cotterell v. Griffiths*, 4 Esp. N. P. C. 69; *Turner v. Spooner*, 1 Dr. & Sm. 467; *Re Penny and South Eastern R. Co.*, 7 Ell. & Bl. 660; *Tapling v. Jones*, 11 H. L. C. 290; compare *Roberts v. Macord*, 1 M. & Rob. 230; *Potts v. Smith*, 6 Eq. 311). But a covenant for the protection of privacy was enforced (*Manners v. Johnson*, 1 Ch. D. 673). An injunction was refused where the application proceeded on a particular right to a long enjoyment of a prospect (*A.-G. v. Doughty*, 2 Ves. sen. 453; see *Squire v. Campbell*, 1 M. & C. 459; *Dalton v. Angus*, 6 A. C. 824). So the building of a wall which merely intercepts the prospect of another, without obstructing his lights, is not actionable (*Knowles v. Richardson*, 1 Mod. 55; 2 Keb. 611, 642). A covenant, however, not to obstruct a prospect will be enforced in equity (*Piggott v. Stratton*, 1 D. F. & J. 33; *Western v. Macdermott*, 2 Ch. 72; compare *Murray v. Dunn*, 1907, A. C. 283). The erection of a building will not be restrained because it injures the plaintiff by obstructing the view of his place of business (*Smith v. Owen*, 35 L. J. Ch. 317; *Butt v. Imperial Gas Co.*, 2 Ch. 158).

Inspection
by judge;
report by
surveyor;

(8)
Privacy.

Prospect.

View of shop
window.

IX.—OF RIGHTS IN REGARD TO AIR, AND OF NUISANCES.

As regards a general right to the access of air passing over the unlimited surface of neighbouring land, it was held that this could not be acquired by prescription either where the claim was for such access of air to a wind mill (*Webb v. Bird*, 10 C. B. N. S. 263; 13 C. B. N. S. 841), or to the chimneys of a building (*Bryant v. Lefever*, 4 C. P. Div. 172, 180), or to a structure for storing timber (*Harris v. De Pinna*, 33 Ch. Div. 250, 259). But a right to the access of air to a defined aperture in a building can be claimed by prescription, not only where such access is claimed through a defined channel over the servient tenement (*Bass v. Gregory*, 25 Q. B. D. 481), but also, it seems where there is no such defined channel (*Cable v. Bryant*, 1908, 1 Ch. 264; *Aldred's case*, 9 Co. 58; *Gale v. Abbot*, 10 W. R. 748; *Dent v. Auction Mart Co.*, 2 Eq. 252; *Chastey v. Ackland*, 1895, 2 Ch. 400; 1897, A. C. 155).

Rights with
regard to air.

Of Rights to
Air, and of
nuisances.

As regards a claim under the Prescription Act to the access of air, it is clear that the claim made in that method cannot succeed where the access cannot be interrupted by the owner of the servient tenement (*Webb v. Bird, sup.*; *Bryant v. Lefever, sup.*; *Harris v. De Pinna, sup.*). But where such access could be interrupted, it might, it seems, be an easement within sect. 2 (*Simpson v. Godmanchester, 1897, A. C. 709*; *Dalton v. Angus, 6 A. C. 798*).

A covenant not to intercept the access of air sufficient for the purposes of a slaughter-house was implied from thirty years' user (*Hall v. Lichfield Co., 43 L. T. 380*). When land is expressly granted for a particular purpose the grantor cannot interrupt air so as to interfere with that purpose (*Aldin v. Latimer, 1894, 2 Ch. 437*; *Tebb v. Cave, 1900, 1 Ch. 642*). But the court will only interfere in special cases (*City of London Brewery v. Tennant, 9 Ch. 221*; *Baxter v. Bower, 33 L. T. 41*).

Remedies for
pollution of
air, at law
and in equity.

An action will lie for pollution of air (*St. Helen's Co. v. Tipping, 11 H. L. C. 642*). And the pollution will be restrained (*Tipping v. St. Helen's Co., 1 Ch. 66*; *Crump v. Lambert, 3 Eq. 409*; see *Swaine v. G. N. R. Co., 12 W. R. 391*). There may be a difference between town and country (*Colls v. Home Stores, 1904, A. C. 183, 185*). The owner of a house has a right at common law to untainted air, unless the business which creates a nuisance has been carried on for such a time as will raise a presumption of grant from neighbouring owners (*Elliottson v. Feetham, 2 Bing. N. C. 134*). Nothing less than a user of twenty years will afford such presumption (*Bliss v. Hall, 5 Scott, 500*; *Crump v. Lambert, 3 Eq. 413*; *Flight v. Thomas, 10 Ad. & El. 590*). There can be no prescription, however, to justify a public nuisance (*A.-G. v. Barnsley, 1874, W. N. 37*).

Nuisance.

What constitutes a private nuisance was thus defined by *Knight-Bruce, V.-C.*: "Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among the English people?" (*Walter v. Selfe, 4 De G. & Sm. 322*, adopted in *Soltan v. De Held, 2 Sim. N. S. 133*; *Crump v. Lambert, 3 Eq. 413*; *Bellamy v. Wells, 63 L. T. 635*; *Fleming v. Hislop, 11 A. C. 691*). What would be a nuisance in one locality might not be so in another (*Rushmer v. Polsue, 1906, 1 Ch. 250*).

Where a man, by burning bricks, causes so much annoyance to a neighbouring tenement, as to amount *prima facie* to a cause of action, it is no answer that the act was done in a proper and convenient spot, and was a reasonable use of the land (*Bamford v. Turnley, 3 B. & S. 66*, overruling *Hole v. Barlow, 4 C. B. N. S. 334*). See *Shotts Iron Co. v. Inglis, 7 App. Cas. 528*; *Cavey v. Ledbitter, 13 C. B. N. S. 470*; *Luscombe v. Steer, 15 W. R. 1191*; and *St. Helen's Co. v. Tipping, 11 H. L. C. 642*, where Lord *Westbury* distinguishes the cases where material injury is done to property, and those where personal discomfort is produced. As to the defence of reasonable user, see the views expressed on the one hand in *Broder v. Saillard, 2 Ch. D. 692*; *Reinhardt v. Mentasti, 42 Ch. D. 68*; and *A.-G. v. Cole, 1901, 1 Ch. 205*; and on the other hand in *Gaunt v. Fynney, 8 Ch. 8*; *Ball v. Ray, Ib. 467*; and *Sanders Clark v. Grosvenor Mansions, 1900, 2 Ch. 373*. An injunction was granted to restrain brick burning (*Beardmore v. Tredwell, 3 Giff. 683*; *Walter v. Selfe, 4 De G. & Sm. 315*; *Boreham v. Hall, 1870, W. N. 57*; *Roberts v. Clarke, 18 L. T. 49*); and the emission of noxious vapours (*Imperial Gas Co. v. Broadbent, 7 H. L. C. 600*). The fact of the plaintiff having come to the nuisance, does not disentitle him to relief (*Tipping v. St. Helen's Co., 1 Ch. 66*). As to how far the delicate nature of the plaintiff's trade can be taken into consideration, see *Cooke v. Forbes, 5 Eq. 166*; *Robinson v. Kilvert, 41 Ch. D. 88*. The plaintiff must prove damage, visible, substantial, and actual (*Salvin v. North Brancepeth Co., 9 Ch. 709*). As to restraining alleged future nuisances, see

Rapley v. Smart, 1894, W. N. 2; *A.-G. v. Manchester*, 1893, 2 Ch. 87; *A.-G. v. Nottingham*, 1904, 1 Ch. 673. Of Rights to Air, and of nuisances.

The right, however, to cause what would otherwise be a private nuisance may be acquired by prescription, e.g. a right to pollute water (*Baxendale v. McMurray*, 2 Ch. 790); or air (*Crump v. Lambert*, 3 Eq. 413); or to annoy a neighbour by noise (*Sturges v. Bridgman*, 11 Ch. D. 863), or by discharging coal dust (*Royal Mail Co. v. George*, 1900, A. C. 480). But the nuisance must not be increased (*Ib.*).

A weekly tenant can obtain an injunction (*Jones v. Chappell*, 20 Eq. 539), Actions to and tenants were added as co-plaintiffs by amendment at the trial (*House* restrain. *Property Co. v. H. P. Horsenail Co.*, 29 Ch. D. 190). As to joining as co-plaintiffs the occupiers of several houses affected by the nuisance, see *Truman v. L. B. & S. C. R. Co.*, 29 Ch. Div. 89; *Unfreville v. Johnson*, 10 Ch. 580; *Hudson v. Maddison*, 12 Sim. 416. A reversioner can sue (*Shelfer v. City of London Electric Co.*, 1895, 1 Ch. 287; *Colwell v. S. Pancras*, 1904, 1 Ch. 707). As to liability of occupiers, see *White v. Jameson*, 18 Eq. 303; *Broder v. Saillard*, 2 Ch. D. 692.

The acts of two or more persons may taken together constitute such a nuisance that the court in separate actions will restrain each of them from doing the acts constituting the nuisance, although the act of one taken alone would not amount to nuisance (*Lambton v. Mellish*, 1894, 3 Ch. 163, where there were several actions; *Blair v. Deakin*, 57 L. T. 522, where there was one action against one such person).

Under the old practice such an injunction was granted in one action against several independent persons (*Thorpe v. Brumfitt*, L. R. 8 Ch. 650). Whether under the present practice one action for an injunction can be maintained against several acting independently is doubtful (*Sadler v. G. W. R. Co.*, 1896, A. C. 450). But damages cannot be recovered in one action against separate tortfeasors (*Ib.*).

Acquiescence in the erection of noxious works while they produce little injury does not warrant the subsequent extension of them to an extent productive of great damage (*Bankart v. Houghton*, 27 Beav. 425). See also, as to the effect of acquiescence in such a case, *Williams v. Jersey, Cr. & Phil.* 91; *Savile v. Kilner*, 26 L. T. 276; *Sanders v. Manley*, 1878, W. N. 181. Acquiescence.

Where a nuisance ceases after writ, but before trial, an injunction may still be granted (*Chester Chapter v. Smelting Corporation*, 1901, W. N. 179; 85 L. T. 67; correcting *Dunning v. Grosvenor Dairies*, 1900, W. N. 265).

LIMITATION OF ACTIONS.

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I.—LIMITATION OF TIME FOR THE RECOVERY OF LAND OR RENT.

THE REAL PROPERTY LIMITATION ACT, 1833.

3 & 4 WILL. IV. c. 27, ss. 1—39, 43, 44.

An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto. [24th July, 1833.]

1. *Interpretation clause*, s. 1, p. 113.
2. *Period of limitation fixed, and when right first accrues*, ss. 2—15; *R. P. Lim. Act*, 1874, ss. 1, 2, p. 125.
3. *Savings in case of disabilities*, ss. 16—19; *R. P. Lim. Act*, 1874, ss. 3, 4, 5, p. 152.
4. *Concurrent rights*, s. 20, p. 158.
5. *Operation of the statute in case of estates tail*, ss. 21—23; *R. P. Lim. Act*, 1874, s. 6, p. 159.
6. *Limitation of time as to suits in equity*, ss. 24—27, p. 161.
7. *Limitation of time between mortgagor and mortgagee*, s. 28; *R. P. Lim. Act*, 1837; *R. P. Lim. Act*, 1874, s. 7, p. 169.
8. *Limitation of time as to church property and advowsons*, ss. 29—33, p. 175.
9. *Final extinction of right*, s. 34, p. 178.
10. *Receipt of rent deemed receipt of profits*, s. 35, p. 181.
11. *Abolition of real and mixed actions, &c.*, ss. 36—39, p. 181.
12. *Limits of act*, ss. 43, 44, p. 182.

1.—Interpretation Clause.

BE it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,) the word “land” (*a*) shall extend to manors, messuages, and all other corporeal hereditaments whatsoever (*b*), and also to tithes (*c*) (other than tithes belonging to a spiritual or eleemosynary corporation sole) (*d*), and also to any share, estate or interest in them or any of them, whether the same shall be a freehold or chattel interest (*e*), and whether freehold or copyhold, or held according to any other tenure; and the word “rent” (*f*) shall extend to all heriots (*g*), and to all services and suits for which a distress may be made (*h*), and to all annuities and periodical sums of money charged upon or payable out of any land (*i*) (except moduses or compositions (*k*) belonging to a spiritual or eleemosynary corporation sole); and the person through whom another person is said to claim shall mean any person by, through or under or by the act of whom, the person so claiming became entitled to the estate or interest claimed, as heir, issue in tail (*l*), tenant by the curtesy of England, tenant in dower, successor, special or general occupant, executor,

3 & 4 Will. 4,
c. 27, s. 1.

Meaning of
the words in
the act.

“Land.”

Person
through
whom
another
claims.

- 3 & 4 Will. 4, c. 27, s. 1. administrator, legatee, husband, assignee, appointee (*n*), devisee or otherwise, and also any person who was entitled to an estate or interest to which the person so claiming, or some person through whom he claims, became entitled as lord by escheat (*n*); and the word "person" shall extend to a body politic, corporate or collegiate, and to a class of creditors or other persons, as well as an individual (*o*); and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.
- "Person."
- Number and gender.

- (1) *Construction of Statutes of Limitation generally*...114.
- (2) *Meaning of the word "Land"*...114.
- (3) *Meaning of the word "Rent," and of Rents generally*...117.
- (4) *Meaning of "Person through whom another claims"*...122.
- (5) *Meaning of "Person"*...122.
- (6) *Claims by and against the Crown, and of Presumption of Grants by the Crown, of Enrolments, and of Statutes*...122.

(1)
Construction of statutes of limitation generally.

The object of all statutes of limitation is to prevent claims at great distances of time when evidences are lost (*Dundee v. Dougall*, 1 Macq. H. L. C. 321). These statutes all rest upon the principle that persons who have at some anterior time been rightfully entitled to land or other property have by neglect on their part to assert their rights slept upon them so long as to render it inequitable that they should disturb an enjoyment to which they have been tacit parties (*Adnam v. Sandwich*, 2 Q. B. D. 489). These statutes being all *in pari materiâ* ought to receive an uniform construction notwithstanding variation in phrase, the object being the same (*Murray v. East India Co.*, 5 B. & Ald. 215). Being statutes of repose, they are to be liberally and beneficially expounded (*Tolson v. Kaye*, 6 Moore, 558; 3 Bro. & B. 217; compare *Roddam v. Morley*, 1 D. G. & J. 23). See the maxims "*Interest reipublicæ ut sit finis litium*" and "*Vigilantibus non dormientibus jura subveniunt*" (Broom's Legal Maxims, 7th ed. 672).

(2)
"LAND," meaning of word.

(a) "Land" refers to specific land, and does not include a right to have dower assigned, or land partitioned (*Williams v. Thomas*, 1909, 1 Ch. 726). Turnpike tolls are not within "land" (*Mellish v. Brooks*, 3 Beav. 22). Nor is an advowson in gross (*Brooks v. Muckleston*, 1909, 2 Ch. 519). Land extends under sect. 1 to corporeal hereditaments and also to any share estate or interest in them. Where land was devised on trust for sale and a beneficiary mortgaged his interest under the will, the property for the purpose of the mortgage was regarded as land within this statute (*Kirkland v. Peatfield*, 1903, 1 K. B. 756; *Re Hazeldine*, 1908, 1 Ch. 34). See further as to this question, the argument in *Re Lloyd L. v. L.*, 1903, 1 Ch. 389, 395; the decisions on the words of sects. 40 and 42, *post*, "money payable out of land," in *Bowyer v. Woodman*, 3 Eq. 313; *Mutlow v. Bigg*, 18 Eq. 246; and compare the cases collected under sect. 77 of the Fines and Recoveries Act, 1833, *post*, as to the meaning of "estate in lands;" the interpretation clause in the last-mentioned statute being wider.

Land given on trust for sale.

(b) Hereditament is a very comprehensive term, including whatever may be inherited, be it corporeal or incorporeal, real, personal or mixed (Co. Litt. 6 a; 3 Rep. 2; Shep. Touch. 91). The word sometimes denotes not the quantum of interest in the subject-matter, but the subject-matter itself of an inheritance (*Tomkins v. Jones*, 22 Q. B. Div. 602; *Moor v. Denn*, 2 Bos. & P. 247). There may be hereditaments entirely personal (*Re Christmas, Martin v. Lacon*, 33 Ch. Div. 338). In a will the word has been held to

Hereditaments.

include money held in trust for investment in land (*Re Gosselin*, G. v. G. 1906, 3 & 4 Will. 4, 1 Ch. 120). Hereditaments are usually divided into two classes: *corporeal*, consisting wholly of substantial and permanent objects; all of which may be comprehended under the general denomination of land (Co. Litt. 4; 2 Bl. Com. 17); and *incorporeal*, which are rights issuing out of a thing corporate (whether real or personal) or concerning, or annexed to, or exercisable within the same (*Ib.* 20; see *Re Brotherton B. v. B.*, 1907, W. N. 230). "Incorporeal hereditaments" include a dignity which descends to heirs, whether it does or does not concern land (*Re Rivett Carnac*, 33 Ch. Div. 139; *Cowley v. Cowley*, 1900, P. 310), but did not include certain harbour dues (*Re Christmas Martin v. Lacon*, *sup.*). Many incorporeal hereditaments are not within this act. Periods for the acquisition of several incorporeal rights are prescribed by the Prescription Act, 1832 (*ante*, pp. 1, 4, 10).

(c) The word "tithes" has an ambiguous meaning, signifying either the estate in the tithes or the chattel itself, the fruits of the estate. Tithes (other than tithes belonging to a spiritual or eleemosynary corporation sole) are included in the word "land," which in its proper sense applies only to cases in which there are two parties, each claiming an estate in the land adverse to each other. It has been held, that the statute does not prevent the tithe-owner from recovering tithes as *chattels* from the occupier, although none had been set out for twenty years, but that the operation of the statute is confined to cases where there are two parties, each claiming an adverse *estate* in the tithes. Therefore a person who has received no tithes for the statutory period cannot recover the possession of them from another, who has for the same period received those tithes from the *terre-tenant* (*Ely v. Cash*, 15 M. & W. 617; *Ely v. Bliss*, 2 D. M. & G. 459; see *Shannon v. Hodder*, 2 Ir. L. R. 223). The effect of time as between tithe-owner and occupier is determined by the Tithe Act, 1832 (see *Salkeld v. Johnston*, 1 Mac. & G. 242, where Lord Cottenham thought that under that act the proof of the enjoyment of the discharge claimed for the prescribed time is a sufficient answer to a demand for tithes: see *S. C.*, 2 Ex. 256; 2 C. B. 749). The cases on that act are collected, Shelford, Tithes, 391, 3rd ed., and Supplement, 47, see Leach's Tithe Acts, 6th ed.

As regards payments for tithe imposed in London by 37 Hen. 8, c. 12, an action for their recovery was brought by a lay impropiator, and the defendant pleaded the Tithe Act, 1832. Held by House of Lords, affirming the C. A. (52 L. T. 532), who had reversed *Kay*, J. (*Ib.* 530), that these payments were not within that act, which only applies to tithes in kind (*Payne v. Esdaile*, 13 App. Cas. 613). The defence of non-payment apart from statute was also held bad in H. L. (*Ib.*), affirming *Kay*, J. (53 L. T. 21). Lastly, the defendant relied on the R. P. Lim. Act, 1833, which the C. A. held did not apply (54 L. T. 705). This was reversed by H. L., who held that these payments fell within the words "periodical sums of money charged upon land" (*Payne v. Esdaile*, 13 App. Cas. 613).

Tithes, moduses or compositions, belonging to a spiritual or eleemosynary corporation sole, are excepted from the operation of the present act. The time for recovering lands belonging to such a corporation is prescribed by sec. 29, *post*, p. 175.

Tithe rent-charge not belonging to a spiritual or eleemosynary corporation sole is "rent" within sect. 2, and the right thereto will be extinguished by non-payment for the statutory period (*Irish Commission v. Grant*, 10 App. Cas. 14; *Irish Commission v. Ryan*, 1900, 2 I. R. 565). A tithe rent-charge belonging to a spiritual corporation sole, and which arose under the Tithe Rent-charge (Ireland) Act, 1838, was not a "composition" within sect. 1, and fell within the general operation of the act (*Ib.*; see *Conolly v. Gorman*, 1898, 1 I. R. 20).

As to the recovery of arrears of tithes and tithe rent-charge, see note to sect. 42, *post*, p. 197.

(d) Spiritual corporations are those of which not only the members composing it are spiritual persons, but of which the object of the institution is also spiritual, such as bishops, some deans, and prebendaries, all archdeacons,

"LAND."

Tithes.

Arrears of tithes.

Corporations.

3 & 4 Will. 4,
c. 27, s. 1.

"LAND."

parsons, and vicars, which are *sole* corporations; deans and chapters at present, and formerly prior and convent, abbot and monks, and the like, bodies aggregate (Co. Litt. 150 a; 1 Bl. Com. 471; 1 Kyd on Corporations, 22).

Eleemosynary corporations are such as are constituted for the perpetual distribution of the free-alms or bounty of the founder of them to such persons as he has directed (1 Bl. Com. 471). These are of two general descriptions; hospitals for the maintenance and relief of poor and impotent persons, and colleges for the promotion of learning, and the support of persons engaged in literary pursuits, of which the greater number are within the universities, and form component parts of these larger corporations; and others are out of the universities, and not necessarily connected with them. Between hospitals having a common seal, and colleges in the universities or out of them, there is no difference in legal consideration, the difference is only in degree; for where in an hospital the master and poor are incorporated, it is a college having a common seal by which it acts, although it have not the name of a college (*per Holt*, Skinn. 484). There are many hospitals not incorporated in which the succession is kept up by trustees (10 Rep. 31, 35). There are other corporations which may be classed under the head of *eleemosynary*, as their object is, by means of trustees or governors incorporated, to carry into execution some public charity; such is the corporation created in the reign of Queen Anne, under the name of "The Governors of the Bounty of Queen Anne, for the Augmentation of the Maintenance of the Poor Clergy" (2 Anne, c. 11; 5 Anne, c. 24; 6 Anne, c. 27; 1 Geo. 1, stat. 2, c. 10; 3 Geo. 1, c. 20). And such are many corporations of trustees or governors of free schools (see 1 Kyd on Corporations, 25—27). All these *eleemosynary* corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons (1 Ld. Raym. 6), and although they, in some things, partake of the nature, privileges and restrictions of ecclesiastical bodies (1 Bl. Com. 471). Each university of Oxford and Cambridge is a *lay* corporation and not *eleemosynary*, as particular colleges are, although some salaries are attached to some of their officers (*R. v. Cambridge*, 3 Burr. 1652; see Tudor's Charitable Trusts, 4th ed.).

Corporations *aggregate* consist of many persons, of which kind are the mayor and commonalty of a city, the head and fellows of a college, the master and brethren of a hospital, the dean and chapter of a cathedral church (10 Rep. 29 b; 11 Rep. 69 b).

Corporations *sole* consist of one person only and his successors, in some particular station, who are incorporated by law, in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a corporation sole (Co. Litt. 43). So are archbishops, bishops, deans and prebendaries, distinct from their several chapters; and so is every parson and vicar (10 Rep. 29 b; Wood's Inst. 109; 1 Bl. Com. 470; 1 Kyd on Corporations, 20). Corporations are as liable to the operation of prescription as private persons (*Dundoe v. Dougall*, 1 Macq. H. L. C. 317).

Meaning of
the term
"freehold."

(e) The term *freehold*, as denoting an estate of a given *quantity*, or rather of a peculiar *quality*, is opposed to the term chattel (Co. Litt. 43 b; 1 Burr. 108). An estate of freehold may be defined to be "an estate in possession, remainder, or reversion, in corporeal or incorporeal hereditaments, held for life, or some uncertain interest, created by will, or some other mode of conveyance, capable of transferring an estate of freehold, which may last the life of the devisee or grantee, or of some other person" (Watk. Conv. 63; 1 Prest. on Estates, 200—203; see 2 Jur. 459). All interests in land for a shorter period than a life, or, more properly speaking, all interests for a *definite* space of time, measured by years, months, or days, are deemed *chattel* interests (1 Prest. Estates, 203), which may subsist in both corporeal and incorporeal hereditaments (Noy's Maxims, 142, 357; Bac. Abr. Executors (H. 3)).

By the common law no estate of inheritance or freehold is comprehended under the word chattels. Chattels real are so-called, not as being real estate,

but because they are extractions out of the real (*Ridout v. Pain*, 3 Atk. 492). **3 & 4 Will. 4, c. 27, s. 1.** They are real because they concern the realty, as terms for years of lands or tenements, wardships, the interest of tenant by statute-staple, by statute merchant, by elegit and such like (Co. Litt. 118 b). See as to estates by elegit, *Johns v. Pink*, 1900, 1 Ch. 296. So "chattels real" include the next presentation to a church (Dyer, 135 a), and a rent issuing out of land held for a term of years (*Re Fraser, Lowther v. Fraser*, 1904, 1 Ch. 115).

(f) The following have been held to fall within the definition of rent in "RENT,"⁽³⁾ sect. 1, viz.: Quit rents payable in respect of freeholds (*De Beauvoir v. Owen*, 5 Ex. 166), or in respect of copyholds (*Howitt v. Harrington*, 1893, 2 Ch. 497); rent-charges granted by deed (*Jones v. Withers*, 74 L. T. 572); the yearly sum payable under the Land Tax Act, 1802, s. 123, by way of interest on money paid for redeeming land tax (*Skene v. Cook*, 1901, 2 K. B. 7; 1902, 1 K. B. 682); annuities charged on land by will (*James v. Salter*, 3 Bing. N. C. 544), or by deed (*Hughes v. Coles*, 27 Ch. D. 231); annuities charged on real and personal estate by deed (*Re Nugent*, 19 L. R. Ir. 140); or by will (*Dower v. Dower*, 15 L. R. Ir. 275); payments for tithe imposed in London by 37 Hen. 8, c. 12 (*Payne v. Esdaile*, 13 App. Cas. 613); tithe rent-charge (*Irish Commission v. Grant*, 10 App. Cas. 31); certain services not involving pecuniary render (*Doe v. Benham*, 7 Q. B. 981). Rent in sect. 2 means rent of inheritance (*Ely v. Bliss*, 2 D. M. & G. 472). It was said in an early case that the word in sect. 2 was confined to rents existing as an inheritance distinct from the land, and for which before the statute the party entitled might have had an assize, such as ancient rent service, fee farm rents or the like (*Grant v. Ellis*, 9 M. & W. 122). In a later and wider interpretation, it was said that if by statute a periodical payment charged upon land is created, and is a property distinct from the land, though not real property, it is "rent" within sect. 2 (*Skene v. Cook*, 1901, 2 K. B. 14; 1902, 1 K. B. 682; a case where interest on money paid to redeem income tax had not been paid for twenty years). "Rent" in sect. 2 does not include ordinary interest upon a mortgage (*Skene v. Cook*, 1901, 2 K. B. 14) or a conventional rent reserved by a lease (*Irish Commission v. Grant*, 10 A. C. 26). But the words "arrears of rent" in sect. 42 do include such a reserved rent (*Archbold v. Scully*, 9 H. L. C. 375; see *Grant v. Ellis*, 9 M. & W. 120, 125). See generally as to the use of the word "rent" in the statute, *Doe v. Angell*, 9 Q. B. 328. And as to annuities see further, p. 121, *post*.

Heriots are usually divided into two sorts, heriot service and heriot custom. Heriot service consists in the lord's right to seize the best beast or chattel of a tenant upon the tenant's death. It may arise from a tenure created before the Statute Quia Emptores; in which case heriot service becomes due upon the death of a tenant in fee. But it may, it seems, also be reserved on a lease for lives, or years determinable on lives, if such heriot be reserved payable during the term (*Lanyon v. Carne*, 2 Wms. Saund. 485). A right to heriot service cannot, it seems, exist in the case of copyholds (*Western v. Bailey*, 1897, 1 Q. B. 86). Heriot service may be recovered either by seizure (Plowd. 96; Cro. Eliz. 589; 1 And. 298; Gouldsb. 191; 1 Salk. 356; 1 Show. 81; Willes, 192), or by distress within the manor (Plowd. 96 a; Cro. Car. 260; Bro. Har. 2; Kich. 133 b; 3 Bl. Comm. 15; Gilbert's Distresses, 10, 11). Any goods belonging to another, found upon the lands charged with heriot service, may be distrained (Bro. Har. 6; Cro. Car. 260; *Austin v. Bennet*, 1 Salk. 356).

Heriot custom depends on immemorial usage (Co. Cop. s. 24). It consists in the lord's right to seize a certain chattel belonging to a tenant upon his death or upon alienation by him of land held of the manor (2 Watk. Cop. c. 6). Heriot custom is usually an incident of copyholds, but it may exist in the case of customary freeholds (*Damarell v. Protheroe*, 10 Q. B. 20; *Copestake v. Hoper*, 1908, 2 Ch. 10). It may be payable on the death or alienation of a tenant of an estate of inheritance or for life or years (Keilway, 80), or at will (*Hix v. Gardiner*, 2 Bulstrode, 195). Where there was a custom of a manor giving right to a heriot upon the death of a tenant solely "seised" of

Payments within the definition of rent.

Heriots : heriot service ;

heriot custom ;

3 & 4 Will. 4, customary freeholds, and such a tenant executed a legal mortgage but remained in possession and died while in possession, he was not so "seised" c. 27, s. 1.

"RENT."

as to entitle the lord to a heriot (*Copestake v. Hoper, sup.*). The chattel which the lord can seize under heriot custom may consist of the best beast or the second best or other animal (Elton Cop. 200). Such beast may be seized outside the manor although it has never been within it (*Western v. Bailey*, 1897, 1 Q. B. 86). As the property of it vests immediately in the lord on the death or alienation of the tenant, the lord may seize the identical thing, though he cannot distrain any other chattel for it (Cro. Eliz. 590; Keilw. 82 a, 84 b, 167 a; Br. Har. 2, 6, 7; *Parker v. Gage*, 1 Show. 81). The property in any particular beast will not vest in the lord before selection of it (*Abington v. Lipscomb*, 1 Q. B. 776). See further, as to heriots, 2 Watk. Cop. c. 6; Cruise, Dig. tit. X., c. 4, ss. 49—63; Com. Dig. Copyhold (K. 18), (K. 27); Scriven, Cop. 244, 7th ed.; Elton, 198, 2nd ed.

In a case of heriot service, a manor had been settled on A. for life, remainder to B. In 1824 a heriot became due to A. which was not paid. In 1847, B.'s remainder having fallen into possession, it was held that his right to seize another heriot was not barred by sects. 2 and 3, owing to the non-payment of the heriot in 1824 (*Chichester v. Hall*, 17 L. T. (O. S.) 121). In *Zouch v. Dalbiac* (L. R. 10 Ex. 172), a case of heriot custom, where it was admitted that more than twenty years before the heriot in question became due, a previous heriot had become due which the lord had not seized, the lord's right of seizure was not barred under this statute. Opinions were expressed that neither heriot custom nor heriot service were within sects. 2 and 3 (*Ib.* 182); and that if rent did anywhere in the statute include heriots, it might be in sect. 42 (*Ib.* 179). *Bramwell*, B., doubted whether it was the general intention of the statute to bar not merely the right to a particular heriot, but the title generally (*Ib.* 180). See the relation of the statute to heriots discussed in *Owen v. De Beauvoir*, 16 M. & W. 566; *De Beauvoir v. Owen*, 5 Exch. 166; Darb. & Bos. Stat. Lim. 2nd ed. 280.

negligence
in exacting
fines and
quit rents.

In the absence of evidence adverse to the lord, the court will not presume enfranchisement of land shown to have been copyhold more than a century ago, from mere negligence by the lords in exacting small fines. It was said not to be a case to which any stat. lim. applies (*Turner v. West Bromwich*, 9 W. R. 155; *Chichester v. Hall*, 17 L. T. (O. S.) 121). See the enfranchisement presumed in *Re Lidiard*, 42 Ch. D. 254; *Ecc. Comm. v. Parr*, 1894, 2 Q. B. 432. The lord's right to a single fine was barred in six years (*Monckton v. Payne*, 1899, 2 Q. B. 63), and his right to a copyhold quit rent as a whole was barred in twelve years (*Howitt v. Harrington*, 1893, 2 Ch. 497).

"Services
and suits for
which dis-
tress may be
made."

Different
kinds of rents:
rent-service;

(h) A rent (*reditus*) is properly a sum of money, or other thing to be rendered periodically, in consequence of an express reservation in a grant or demise of lands or tenements, the reversion of which is in the grantor or person demising (2 Bl. Comm. 31; Gilb. on Rents, 9, &c.). There are at common law three sorts of rents: rent-service, rent-charge, and rent-seck (Litt. s. 213). *Rent-service* is so called because it hath some corporeal service incident to it, as at least fealty or the tenant's feudal oath of fidelity (Co. Litt. 142). And for these, in case they be in arrear, the lord may distrain of common right, without reserving any special power of distress; provided he hath in himself the reversion or future estate of the lands, after the lease or particular estate of the lessee or grantee is expired (Litt. s. 215). A *rent-charge* is where the owner of the rent hath no future interest or reversion expectant in the land; as where a man by deed maketh over to others his *whole* estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress if the rent be in arrear. In this case the land is liable to distress, not of common right, but by virtue of the clause in the deed, and therefore it is called a *rent-charge*, because in this manner the land is charged with a distress for the payment of it (Co. Litt. 143; see *Re Gerard and Beecham*, 1894, 3 Ch. 308). A rent for equality of partition is not a rent-service, but a rent-charge of common right, and may be distrained for (Litt. s. 253). *Rent-seck* (*reditus siccus*), or barren rent, is, in effect, nothing more than a rent reserved by

rent-charge;

rent-seck;

deed, but without any clause of distress (2 Bl. Comm. 42; see *Dodds v. Thompson*, L. R. 1 C. P. 133). Either a rent-service disconnected from the reversion (*Ards v. Watkin*, Cro. Eliz. 637, 691) or a rent-charge may be divided by will or by deed operating under the Statute of Uses, so as to make the tenant liable without attornment to several distresses by the devisees or *cestuis que use*. It seems that since the stat. 4 Anne, c. 16, s. 9, a rent-charge may be so divided by a conveyance of any kind (*Rivis v. Watson*, 5 M. & W. 255; see *Colborne v. Wright*, 2 Lev. 239).

There are also other species of rents, which are reducible to these three. Rents of *assize* are the certain established rents of the freeholders and ancient copyholders of a manor (2 Inst. 19), which cannot be departed from or varied. Those of the freeholders are frequently called *chief rents* (*reditus capitales*); and both sorts are indifferently denominated *quit-rents* (*quieti redditus*), because thereby the tenant goes quit and free of all other services. A *fee-farm* rent is a rent-charge issuing out of an estate in fee, of at least one-fourth of the value of the lands at the time of its reservation (Co. Litt. 143 b; see *Bradbury v. Wright*, Dougl. 627, n. 1).

The above are the general divisions of rent; but the difference between them (in respect of the remedy for recovering) is now abolished. By the Landlord and Tenant Act, 1730, sect. 5, the same remedy was given by distress, in cases of rents-seck, rents of assize, and chief-rents, as in case of rent reserved upon lease. Unless the case was brought within this section, a rent-seck could not formerly be recovered by distress (*Bradbury v. Wright*, Dougl. 627; *Musgrave v. Emerson*, 10 Q. B. 326). A rent-charge granted by deed containing no power of distress is within sect. 5 (*Dodds v. Thompson*, L. R. 1 C. P. 133). Whenever land is sold reserving a rent, that rent may properly be called a rent-charge, for under sect. 5 the right of distress is incident to it (*Re Gerard and Beecham*, 1894, 3 Ch. 311).

Now by Conv. Act, 1881, s. 44, *post*, where an annual sum is, by an instrument coming into operation after 1881, charged on land or the income thereof, whether by way of rent-charge or otherwise, and which annual sum is not a rent incident to a reversion, such annual sum can be recovered by means of (1) a distress, (2) an entry, (3) a demise of the land charged.

As a general rule, a person who has parted with the reversion cannot distrain (*Parmenter v. Webber*, 8 Taunt. 593; *Langford v. Selmes*, 3 K. & J. 226; *Lewis v. Baker*, 1905, 1 Ch. 46; see as to a mortgage, *Trent v. Hunt*, 9 Exch. 14). So a lessee who has parted with his whole term (which amounts to an assignment, *Beardman v. Wilson*, L. R. 4 C. P. 57; *Hyde v. Warden*, 3 Ex. D. 83; *Lewis v. Baker*, *sup.*), reserving a rent, cannot distrain (*— v. Cooper*, 2 Wils. 375). Under certain circumstances, however, the rent reserved may amount to a rent-charge (see *Williams v. Hayward*, 1 E. & E. 1040), to which, apparently, the Landlord and Tenant Act, 1730, s. 5, would apply.

It is laid down in Co. Litt. 142 a, that "rent may as well be in delivery of hens, capons, roses, spurs, bows, shafts, horses, hawks, pepper, comine, wheat, or other profit that lieth in render, office, attendance, and such like, as in payment of money;" and that for these things there may be a distress. So in Co. Litt. 96 a, it is said, "A man may hold of his lord to shear all the sheep depasturing within the lord's manor; and this is certain enough, albeit the lord hath sometime a greater number and sometime a lesser number there; and yet this uncertainty being referred to the manor, which is certain, the lord may distrain for this uncertainty." So in Litt. s. 137, it is laid down, that if land be holden by the service of singing a mass every Friday, the lord may distrain for not doing it (*Doe v. Benham*, 7 Q. B. 982). The keeping up of a grindstone upon land for the convenience of the parish, was held not rent, or "profits of land" within the third section of the act (*Doe v. Hinde*, 2 M. & Rob. 441; *Doe v. Benham*, 7 Q. B. 978).

By the Civil Procedure Act, 1833, the executors or administrators of any lessor may distrain in like manner as such lessor might have done in his lifetime (sect. 37). And such arrearages may be distrained for after the determination of the term, in the same manner as if such term had not been determined: provided such distress be made within six months after the

3 & 4 Will. 4,
c. 27, s. 1.

"RENT."

other rents.

Remedy by
distress for
recovering
rents-seck
given by
4 Geo. 2, c. 28,
s. 5.

Distress for
rents.

Right of
executors
to distrain.

Distress after
end of term.

3 & 4 Will. 4, determination of such term, and during the possession of the tenant from whom such arrears became due (sect. 38), as regards the lessor himself.

Since the Landlord and Tenant Act, 1709, s. 6, rent accruing before the expiration of a tenancy can be distrained for within six months after the tenancy expires, and while the tenant continues in occupation.

“RENT.”
Action of debt for rent-charge. Since the abolition of real actions, a rent-charge in fee may be recovered in an action of debt from the terre-tenant entitled to a freehold interest, either under a covenant binding him (*Varley v. Leigh*, 2 Exch. 446), or independently of one (*Thomas v. Sylvester*, L. R. 8 Q. B. 368; *Re Blackburn*, *Ex p. Graham*, 42 Ch. D. 343; *Searle v. Cooke*, 43 Ch. D. 519; *Swift v. Kelly*, 24 L. R. Ir. 107); and that, whether he has or has not received rents and profits equal to the amount of rent-charge claimed (*Pertwee v. Townsend*, 1896, 2 Q. B. 129). A road authority was liable in such an action (*Foley v. Dudley*, 1909, W. N. 250), but not a tenant for years (*Re Herbage Rents, Charity Commrs. v. Green*, 1896, 2 Ch. 811); nor a liquidator (*Graham v. Edge*, 20 Q. B. D. 683). The rule as to suing the freeholder does not apply when the land is situate out of England (*Whitaker v. Forbes*, 1 C. P. Div. 51). See as to the old law, *Webb v. Jiggs* (4 M. & S. 112).

Rents not in general issuable out of incorporeal hereditaments; Rent cannot as a general rule issue out of an incorporeal hereditament, so as to warrant a distress (*Gardiner v. Williamson*, 2 B. & Ad. 339). A rent cannot, strictly speaking, be reserved out of an advowson in gross, tithes, or any other incorporeal hereditament (Co. Litt. 47 a, 142 a; Gilb. on Rents, 20, 22; *Re Alms Corn Charity*, 1901, 2 Ch. 759). Nor can a rent be reserved out of a rent (2 Roll. Abr. 446; Keilw. 161); but part of a rent may be granted (2 Ves. sen. 178). Nor, at common law, can a rent be reserved by a subject out of a mere privilege or easement in land (*Buzzard v. Capel*, 8 B. & C. 141; *Re Gerard and Beecham*, 1894, 3 Ch. 315; see *Gardner v. Hodgson's Co.*, 1901, 2 Ch. 217; *Batten Pooll v. Kennedy*, 1907, 1 Ch. 268); but payment of money in respect of an easement may be secured by covenant (*Hastings v. N. E. Ry.*, 1898, 2 Ch. 674), and such a payment may sometimes be called rent (*A.-G. v. Emerson*, 1891, A. C. 659).

exceptions to the rule; The king, however, may reserve a rent out of an incorporeal hereditament, as well as out of lands, because by his prerogative he may distrain for such rent on all the lands of his tenant (Co. Litt. 47 a; 2 Inst. 132; 5 Rep. 4; Gilb. on Rents, 22). And the grantee of fee-farm rents from the Crown might exercise the same power (*A.-G. v. Coventry*, 1 P. Wms. 306). And a subject may, by statute, reserve a rent out of an easement (*Re Gerard and Beecham*, 1894, 3 Ch. 315). A rent may be reserved upon a grant of an estate in remainder or reversion, for the remedy by distress will arise when the lessee comes into possession (Co. Litt. 47 a) for all the arrears (2 Roll. Abr. 446).

lease of tithes. A lease by a bishop of tithes only, rendering the ancient rent, was void against the successor, because there was no remedy by distress or assize (*Tanlentine v. Denton*, Cro. Jac. 111; *Windsor v. Gover*, 2 Wms. Saund. 230). But by 5 Geo. 3, c. 17, all leases for one, two, or three lives, or for any term not exceeding twenty-one years, of any tithes, tolls, or other incorporeal hereditaments without any lands by any bishop, college or hall, dean and chapter, precentor, prebendary, hospital, or any other person who is enabled by statute to make such leases of any corporeal hereditaments, are as effectual against the lessors and their successors as any leases of corporeal hereditaments are by virtue of 32 Hen. 8, c. 28, and an action of debt against the lessee is given for the recovery of such rent. In point of law, tithes, being an incorporeal hereditament, cannot pass by parol, but by deed only (*Gardiner v. Williamson*, 2 B. & Ad. 336).

Old limitation act as to rents. By stat. 32 Hen. 8, c. 2, s. 4 (10 Car. 1, sess. 2, c. 6, Irish), no person should make any avowry or cognizance for any rent, suit, or service, and allege any seisin of any rent, suit, or service in the same avowry or cognizance, in the possession of his or their ancestors or predecessors, or in his own possession, or in the possession of any other whose estates he shall pretend or claim to have, above fifty years next before the making of the said avowry or cognizance. This provision was held to apply only where it was necessary to allege seisin, and not where rent was expressly created

by deed (Co. Litt. 115 a; 8 Rep. 64), or by act of parliament (*Faulkner v. Bellingham*, Cro. Car. 80), or by will (*Collins v. Goodall*, 2 Vern. 235). As to such rents there was no prescribed period of limitation, either at law or in equity (*Cupit v. Jackson*, McClel. 495; 13 Price, 721; see *White v. James*, 4 Jur. N. S. 1214; *Foster's case*, 8 Rep. 128; *De Beauvoir v. Owen*, 19 L. J. Exch. 182). So that arrears for any number of years might have been recovered unless there was evidence to raise a presumption of payment (*Stackhouse v. Barnston*, 10 Ves. 467). Mere length of time, short of the statutory period of fifty years, was not sufficient ground to presume a release of a quit rent (*Eldridge v. Knott*, Cowp. 214). A lost grant, however, was presumed when a quit rent had for 120 years been paid by a person not apparently liable (*Bomford v. Neville*, 1904, 1 I. R. 474; compare *Foley v. Dudley*, 1909, W. N. 250). And a release of rent secured by covenant in a long lease was presumed from non-payment for thirty-five years (*Tennent v. Neil*, 1 I. R. 5 C. L. 418; see *Lefroy v. Walsh*, 1 Ir. C. L. R. 311; *Gibson v. Doeg*, 2 H. & N. 615; *Gibbon v. Payne*, 23 T. L. R. 250).

(i) An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded; a rent-charge being a burthen imposed upon and issuing out of lands, whereas an annuity is a yearly sum chargeable only upon the person of the grantor (2 Bl. Comm. 40). The material distinction between an annuity and a rent is, that the former is a charge on the *personal* estate only, and the latter on the *real* (Co. Litt. 2 a; 114 b, 20 a). There may, however, be a personal annuity secured by a special charge on particular land (*Re Trenchard, T. v. T.*, 1905, 1 Ch. 82).

An annuity not charged upon land and given by will is a legacy (*Re Ashwell*, Johns. 112). Lord *St. Leonards* thought that such an annuity would be extinguished if no payment were made for twenty years (R. P. Stat. 138, 2nd ed., and see the opinion of Wood, V. C., in *Re Ashwell, sup.*). But the contrary view has been expressed in *Dower v. Dower* (15 L. R. Ir. 275; see Darb. & Bos. Stat. Lim. 171, 182, 2nd ed.). And it seems that twelve years' arrears can be recovered at any time; sect. 42 (*post*) not applying (*Roch v. Callen*, 6 Hare, 531). If such an annuity be secured by bond or covenant, time runs, under Civil Procedure Act, 1833, s. 3 (*post*), against each instalment as it becomes due (*Amctt v. Holden*, 18 Q. B. 593). Six years' arrears were recoverable of a pension given by a benefit society (*Edwards v. Warden*, 9 Ch. 505).

An annuity may be charged on land. If so charged, it is by sect. 1 included in the word "rent" in the act (*James v. Salter*, 3 Bing. N. C. 544), and may be extinguished as a whole by non-payment (*Ib.*; *Jones v. Withers*, 74 L. T. 572). So an annuity charged on both real and personal estate (*Dower v. Dower*, 15 L. R. Ir. 275; *Re Nugent*, 19 L. R. Ir. 140). Under sect. 42, six years' arrears only of such an annuity can be recovered in a proceeding against the land (*Francis v. Grover*, 5 Hare, 39; *Re Nugent*, 19 L. R. Ir. 140). Where such an annuity was secured by specialty, twenty years' arrears could be recovered under the Civil Procedure Act, 1833, s. 3, in an action on the specialty (*Strachan v. Thomas*, 12 Ad. & El. 536). For the present law on this point see pp. 198, 199, *post*. A gross sum of money charged upon land, to be paid by yearly instalments, and secured by power of distress, is within R. P. Lim. Act, 1833, ss. 40 and 42 (*Uppington v. Tarrant*, 12 Ir. Ch. R. 262).

It has been decided, that a distress may be taken for arrears of a rent-charge created by *will*, although the testator does not in terms give a power to distress, such power being a consequence drawn by law from the rent-charge (*Rodham v. Berry*, Watk. Conv. 243, n. (a)). So in the case of annuities charged on land by wills containing no power of distress, the annuitant can distress under 4 Geo. 2, c. 28, s. 5 (*Buttery v. Robinson*, 3 Bing. 392; *Roper v. Roper*, 3 Ch. D. 720); and a receiver will not be appointed (*Sollory v. Leaver*, 9 Eq. 22); except, perhaps, where the rents are not sufficient, or the annuity has been long in arrear (*Kelsey v. Kelsey*, 17 Eq. 500). In the case of an annuity created since 1881, see Conv. Act, 1881, s. 44, *post*. As to raising arrears by sale, see *Re Tucker, T. v. T.*,

3 & 4 Will. 4,
c. 27, s. 1.

"RENT."

Annuities :

Annuities
not charged
on land ;

charged on
land.

Raising
annuity by
distress or
sale.

3 & 4 Will. 4, 1893, 2 Ch. 323; *Hambro v. Hambro*, 1894*, 2 Ch. 564; *Blackburne v. Hope* c. 27, s. 1. *Edwards*, 1901, 1 Ch. 419.

Composi-
tions.

(k) The "compositions" excepted from the definition of rent were compositions real (*Irish Commission v. Grant*, 10 App. Cas. 31).

(4)
Person
through
whom
another
claims.
Appointee.
Escheat.

(l) As to the meaning and operation of the words "issue in tail" in this clause, see *Abergavenny v. Brace*, L. R. 7 Ex. 152, *post*, p. 127.

(m) Whether the word "appointee" (in the definition of person through whom another claims) includes the case where the power of appointment is not in substance created by the appointor himself, *quære* (*Re Devon Settled Estates*, 1896, 2 Ch. 572; where *Chitty, J.*, draws a further distinction between a general power and a special power).

(n) An *escheat* was in its nature feudal. A feud was the right which the tenant had to enjoy lands, rendering to the lord the duties and services reserved to him by contract. After a grant made, a right remained in the lords, called a seignior, consisting of services to be performed by the tenant, and a right to have the land returned on the expiration of the grant as a reversion, called an *escheat* (*Burgess v. Wheate*, 1 Eden, 191).

Escheat is founded on the principle that the blood of the person last seized in *fee* is by some means utterly extinct and gone; and since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence that the inheritance must fail (2 Inst. 64; Wright's Ten. 115). Escheat may happen from default of heirs, as where the tenant dies without any relations on the part of any of his ancestors, or where he dies without any relations on the part of those ancestors from whom the estate descended, or where, until the Inheritance Act, 1833, s. 9 (see *post*), he died without any relations of the whole blood. An *escheat* also arose from the corruption of the tenant's blood, consequent upon an attainder for treason or felony, by which he became incapable of inheriting, and of transmitting anything by heirship (see the Inheritance Act, 1833, s. 10, and note, *post*). On the subject of *escheat*, see 2 Bl. Comm. 241—257; Cruise's Dig. tit. XXX.; Harg. Co. Litt. 18 b, n. (2); *Henchman v. A.-G.* (2 Sim. & Stu. 498; 3 M. & K. 492); *Intestates' Estates Act*, 1884, s. 4; *Re Wood, A.-G. v. Anderson*, 1896, 2 Ch. 596; *Re Hartley*, 1899, P. 40; and the note to *A.-G. v. Sands*, Tudor, L. C. Conv., 4th ed. 211.

(5)
Persons.

(o) The poor of a parish are a class of persons within the meaning of the word "person" in this section, in a case where the rents of property are applicable for the benefit of such poor (*Magdalen College v. A.-G.*, 6 H. L. C. 189). The Att.-Gen., whether suing *ex officio*, or at the relation of others, is not a "person" having a right to bring an action or suit in equity to recover land within the meaning of this act; he is only part of the machinery by which the rights of others are sought to be enforced (*Ib.*; see *A.-G. v. Magdalen College*, 18 Beav. 223; sect. 24, *post*). A statutory corporation was held to fall within the definition of "person" (*Jones v. Withers*, 74 L. T. 572). Where tenants holding leases under a parish vestry had occupied and enjoyed the soil of a lane for more than a century, it was held that the above statute vested the title in the churchwardens and overseers under 59 Geo. 3, c. 12, s. 17 (*Haigh v. West*, 1893, 2 Q. B. 19).

(6)
Crown, when
bound by acts
of parlia-
ment.

Where an act of parliament is made for the public good, the advancement of religion and justice, and to prevent injury and wrong, the king is bound, though not particularly named (Plowd. 136, 137; 11 Rep. 68 b; 5 Rep. 14; 7 Rep. 32; see Bac. Abr. Prerogative (E.)). But where a statute is general, the king having the prerogative of not being included within the words "person or persons, bodies politic or corporate," used whether affirmatively or negatively in a statute (11 Rep. 68), is not bound in his public capacity by the general words of the statute, unless named (7 Rep. 32; 11 Rep. 68; Plowd. 240; 1 Str. 516; 1 Show. 464; Show. P. C. 185; *Hall v. Maule*, 4 Ad. & Ell. 284; *R. v. Wright*, 1 Ad. & Ell. 434; *Re Cuckfield Board*, 19 Beav. 153, and the cases cited in the note thereto; *Re Bevan*, 14 W. R. 147).

Thus the Crown is not bound by the R. P. Lim. Act, 1833 (*A.-G. v. Magdalen Coll.*, 18 Beav. 246), or by the Lim. Act, 1623 (*Rustomjee v. The Queen*, 1 Q. B. D. 491, 496; *Re J.* 1909, 1 Ch. 574), or by sect. 3 of the Prescription Act (*Perry v. Eames*, 1891, 1 Ch. 618), or by the Real Estate Charges Act, 1854 (*Dacre v. Patrickson*, 1 Dr. & Sm. 191), or by the Companies Act, 1862 (*Re Henley*, 9 Ch. Div. 481), or by the Locomotives Act, 1865 (*Cooper v. Hawkins*, 1904, 2 K. B. 164), or by the Apportionment Act, 1870 (*Rochester v. Lefanu*, 1906, 2 Ch. 518), or by sect. 150 of the P. H. Act, 1875 (*Hornsey v. Hennell*, 1902, 2 K. B. 73), or by sect. 35 of the Trustee Act, 1893 (*Re Taylor*, 1904, 2 Ch. 741; see *Re Pratt*, 55 L. T. 313), or by sect. 1 of the Land Transfer Act, 1897 (*Re Hartley*, 1899, P. 40). On the other hand, the Crown being named is within the Tithe Act, 1832, and also within sects. 1 and 2 of the Prescription Act, 1832 (*Wheaton v. Maple*, 1893, 3 Ch. 64).

By stat. 21 Jac. 1, c. 2, the king was disabled from claiming any manors, lands, or hereditaments, except liberties and franchises, under a title accrued sixty years before the then session of parliament, unless within that time there had been a possession under such title; but this provision becoming daily more ineffectual by lapse of time, a permanent limitation was introduced (see Co. Litt. 119 a, n. (1); 3 Inst. 188). And by the Crown Suits Act, 1769, it is provided that the king shall not sue, &c., any persons, &c., for any lands, &c. (except liberties and franchises) on any title which has not first accrued within sixty years before the commencement of such suit, unless he has been answered the rents within that time, or they have been in charge, or stood *insuper* of record; and the subject shall quietly enjoy against the king, and all claiming under him, by patent, &c. This statute was extended to Ireland by 48 Geo. 3, c. 47, as to which see *Tuthill v. Rogers*, 6 Ir. Eq. R. 429; 1 J. & Lat. 36. It applies to N. S. Wales (*A.-G. for N. S. Wales v. Love*, 1898, A. C. 679; where the provision as to rents being in charge is explained; and see 3 Inst. 189). In the case of tithes where none had been received, it was held, that the accounts of the auditors of the revenue, in which the tithes had been entered and returned *nil*, were sufficient proof that they had been "duly in charge" (*A.-G. v. Eardley*, 8 Price, 73). This was doubted (*Tuthill v. Rogers*, 1 J. & Lat. 82) and was corrected by the Crown Suits Act, 1861, s. 1, which provided that the Crown shall not sue for real property (other than liberties or franchises) of which the profits have been taken by the space of sixty years, by reason only that the rents have been in charge to the Crown, or stood *insuper* upon record within the said space of sixty years. The Crown shall not be deemed to have been answered the rents of real property by reason only of the same real property having been parcel of any manor of which the rents shall have been answered to the Crown, or of any manor which shall have been duly in charge to the Crown or stood *insuper* of record (s. 3). See as to Ireland, Nullum Tempus (Ireland) Act, 1876. The last-mentioned acts were said not to apply in case of a quit rent (*Re Maxwell*, 28 L. R. Ir. 356). But this has been altered as to Ireland (Crown Lands Act, 1906, s. 9).

Where a manor has been in charge to the Crown within sixty years, acts done in different parts of it by different persons, although continued for sixty years, do not displace the title of the Crown to the district (*Doe v. Roberts*, 13 M. & W. 520). Adverse possession was established against the Crown (*A.-G. British Honduras v. Bristowe*, 6 A. C. 143).

The Crown Suits Act, 1769, extinguishes the Crown's title and transfers it to the subject (*Tuthill v. Rogers*, 1 J. & Lat. 62). But possession of Crown lands for less than sixty years was not sufficient to support the plaintiff's title in ejectment (*Goodtitle v. Baldwin*, 11 East, 495; see *Riddiford v. R.*, 1905, A. C. 147).

By stat. 21 Jac. 1, c. 14, s. 1, it was in effect provided that a person who had been in adverse possession of Crown lands for twenty years might, on information of intrusion, plead the general issue, and might retain possession until trial. Although the king can never be put out of possession in point of law by the wrongful entry of a subject, yet there may be an adverse possession *in fact* against the Crown. After such an adverse possession for

3 & 4 Will. 4,
c. 27, s. 1.

Statutes of
limitation as
to rights of
Crown to
realty.

21 Jac. 1, c. 2.

9 Geo. 3,

c. 16.

Nullum

Tempus Act.

24 & 25 Vict.

c. 62.

Adverse

possession

against the

Crown.

3 & 4 Will. 4, c. 27, s. 1. twenty years, the Crown could only recover by information of intrusion, and ejectment would not lie at the suit of the grantee of the Crown (*Doe v. Morris*, 2 Bing. N. R. 189). See further as to intrusion, 28 & 29 Vict. c. 104, s. 31 *et seq.*; 2 Chitty's Statutes, 4th ed. 619 *et seq.*

Practice in Crown suits.

The title of the Crown may be tried in the information of intrusion itself, and need not be first found by inquest of office, the only effect of the statute 21 Jac. 1, c. 14, being to throw the *onus* of proving title in the first instance, in such a case, on the Crown (*A.-G. v. Parsons*, 2 M. & W. 23). As to inquests of office, see now 28 & 29 Vict. c. 104, s. 52. See, as to evidence in Crown suits, *Doe v. Roberts*, 13 M. & W. 520.

Chose in action vested in the Crown.

Although the Stat. Lim. does not bind the Crown, yet where the claim of the Crown is only a derivative right it must stand in the same situation as its principal. Therefore, the statute may be pleaded to a *scire facias* issued by the Crown against the drawer of a bill of exchange, which was barred in the hands of the Crown debtor (*R. v. Morrall*, 6 Price, 24). But where a right has vested in the Crown before the statute has run against the former owner, the rights of the Crown are not barred or affected by the statute, as the Crown is not within its operation (*Lambert v. Taylor*, 4 B. & C. 138). See *Taylor v. A.-G.*, 8 Sim. 413, as to course of proceeding by a subject to enforce a claim of property against the Crown; see also *Re Robson*, 2 Phil. 64; *Re De Bode*, *Ib.* 85. And as to petitions of right and the orders thereon, see Petition of Right Act, 1860; Seton, 6th ed. 397.

With respect to the personal estate of a deceased, proceedings on the part of the Crown cannot now be instituted, nor can a petition of right be presented, except within the same time, and subject to the same rules of law and equity, as in the case of an action by or against a subject (Intestates' Estates Act, 1884, s. 3).

Claim of Crown to duties.

Under the Customs Act, 1889, ss. 12 and 14, the claim of the Crown to legacy and succession duty in specified cases cannot be enforced after specified periods. These sections have been made applicable to estate duty by the Finance Act, 1894, s. 8 (2).

Statutes of Limitation as to rights of Duke of Cornwall.

The Stat. Lim. which affect the rights of the Duke of Cornwall are 7 & 8 Vict. c. 105, ss. 71—88; 23 & 24 Vict. c. 53; and Crown Suits Act, 1861; as to which, see Darb. & Bos. Stat. Lim. 523, 2nd ed.; Brown's Law of Limitation, 251, 415.

Presumption of grants from the Crown.

But though the Crown is not bound by the ordinary Stat. Lim., yet a grant from it may be presumed from great length of possession, not because the court really thinks a grant has been made, but it presumes the fact for the purpose and from a principle of quieting the possession (*Hull v. Horner*, Cowp. 102, 215). Thus grants of lands from the Crown have been presumed after an uninterrupted enjoyment of twenty years (*Goodtitle v. Baldwin*, 11 East, 490; *Holcroft v. Heel*, 1 Bos. & Pull. 400; *Campbell v. Wilson*, 3 East, 294). So a grant by the Crown of a several fishery in tidal waters was presumed (*Goodman v. Saltash*, 7 App. Cas. 633), and of a manor (*Merttens v. Hill*, 1901, 1 Ch. 851); and see *A.-G. v. Wright*, 1897, 2 Q. B. 318. The right of a corporation to discharge sewage into a tidal river was based by the H. L. on a lost grant by the Crown of a license exercisable over the foreshore (*Somersetshire v. Bridgwater*, 81 L. T. 732). It was said to be immaterial that the grant was not of record (*Ib.*). So an enfranchisement of a copyhold may be presumed against the Crown (*Roe v. Ireland*, 11 East, 280). So where the title of a family to an advowson was evidenced by deeds for nearly 140 years, and there had been three presentations by them and none by the Crown, a grant from the Crown might be presumed (*Gibson v. Clark*, 1 Jac. & W. 159; see 3 T. R. 158). Letters patent from the Crown have been presumed (*Picking v. Stamford*, 2 Ves. jun. 282). A grant from the Crown of undefined shares in land will not be held void for uncertainty after long modern possession, for a supplementary grant may be presumed (*Des Barres v. Shey*, 29 L. T. 592). Enjoyment of property for 110 years by a parish, although no conveyance appeared in evidence, was held conclusive proof of ownership against the Crown (*A.-G. v. Hotham*, 1 T. & R. 210; see *Haigh v. West*, 1893, 2 Q. B. 19). An objection to a title that two fee-farm

rents, created by letters patent by James I., were not shown to have been extinguished, was overruled, it being proved that no claim had been made by the Crown of the rent from the year 1706, and no proof of any previous claim (*Simpson v. Gutteridge*, 1 Madd. 609; see *Flower v. Hartopp*, 12 L. J. Ch. 507). A lost surrender to the Crown of one of two differing charters was presumed in *A.-G. v. Simpson*, 1901, 2 Ch. 716. In a case where Charles I. had granted the soil between high and low-water marks, but the Crown remained in possession for 150 years after the grant, this created a presumption against the grant (*Parmeter v. A.-G.*, 1 Dow. 316). A grant from the Crown will not be presumed where it would have been against a statutory provision of a public nature (*Goodtitle v. Baldwin*, 11 East, 495). Nor where the enjoyment has been, not against the Crown itself, but against a lessee from the Crown (*Wheaton v. Maple*, 1893, 3 Ch. 62; see *Ib.* 56 as to modern enjoyment against the Crown). It would seem that a Crown grant to an intruder will not be presumed where he has only been in possession long enough to bar a private owner (*Riddiford v. Rex*, 1905, A. C. 159).

Where port duties are claimed under a Crown grant alleged to have been inrolled, but not produced, such grant ought not to be presumed upon mere evidence of usage (*Brune v. Thompson*, 4 Q. B. 543; as to the presumption that a claim for port duties had a legal origin, see *Foreman v. Whitstable*, L. R. 4 H. L. 266, and cases there cited). There seems to be no instance of presuming inrolment of a deed which was made essential by statute (*Doe v. Waterton*, 3 B. & Ald. 149, 151; *Wright v. Smythies*, 10 East, 409). It might be otherwise if foundation were laid for raising a presumption by showing that there was a chasm in the records (*Allen v. Walker*, 1 Jac. & W. 619). The registry of a deed of lands in a register county will not be presumed (*Doe v. Hirst*, 11 Price, 475). However, where the usage of paying tithe was shown, an inrolment of a decree directing such payment was presumed (*Macdougall v. Purrier*, 4 Bligh, N. S. 433; see *R. v. Buckby*, 7 East, 45; *Hebbert v. Purchas*, L. R. 3 P. C. 643; *A.-G. v. Moor*, 20 Beav. 119; *Haigh v. West*, 1893, 2 Q. B. 31). As to presuming the inrolment at Quarter Sessions of a certificate of justices, see *Leigh Council v. R.*, 1901, 1 Q. B. 755.

Presumption of inrolments and registration.

After long possession the court will even presume an act of parliament in order to protect a right (*A.-G. v. Ewelme Hospital*, 17 Beav. 366), but not the passing of an act of parliament within the last 250 years, on an important subject of the most general interest, of which no vestige can be found (*R. v. Exeter*, 12 Ad. & Ell. 532, 533). *Jessel*, M. R., refused to presume an act of parliament as an origin for an alleged right (*Chilton v. London*, 7 Ch. D. 735). See *Neaverson v. Peterborough Council*, 1902, 1 Ch. 574; *Lopez v. Andrew*, 3 M. & R. 329.

Presumption of an act of parliament.

2. Period of Limitation fixed, and when Right first accrues.

[Sect. 2 of R. P. Lim. Act, 1833, has been repealed and the following substituted, viz. :]

[R. P. Lim. Act, 1874, sect. 1.] After the commencement of this act [1 Jan. 1879] no person shall make an entry or distress, or bring an action or suit, to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same.

No land or rent to be recovered but within twelve years after the right of action accrued.

By sect. 9 of the R. P. Lim. Act, 1874 (*post*), sect. 1 of the last-mentioned act has been substituted for sect. 2 of R. P. Lim. Act, 1833; and under the

37 & 38 Vict.
c. 57, s. 1.

same 9th sect. the provisions of R. P. Lim. Act, 1833 (except the repealed sections, but including the provisions substituted for such repealed sections), are to be construed together with R. P. Lim. Act, 1874. Sect. 1 of R. P. Lim. Act, 1874, fixes the period of limitation at twelve instead of twenty years, and expressly includes "suits," but in other respects is identical with sect. 2 of the Act of 1833, which has accordingly been omitted.

The following note embodies the decisions under both sections.

- (1) *Effect of the section*...126.
- (2) *Old law and adverse possession*...128.
- (3) *Nature of possession necessary to give title under the section*...130.

(1)
Effect of
section.

The words "to recover any land" mean "to obtain any land by judgment of the court." They are not limited to obtaining possession (*Williams v. Thomas*, 1909, 1 Ch. 730). The words apply accordingly not only to ejectment, but to an action for foreclosure (*Ib.*; *Harlock v. Ashberry*, 19 Ch. D. 539; *Hugill v. Wilkinson*, 38 Ch. D. 480; compare *Re Stead*, 2 Ch. D. 718). But the words do not apply to actions for the assignment of dower or to an action for partition where plaintiff is in possession; such actions being proceedings to obtain a delimitation of parcels under which for the first time a title to specific land will be obtained (*Williams v. Thomas*, 1909, 1 Ch. 726, 722). The words do include a partition action where plaintiff is out of possession for twelve years (*Ib.* 731; *Thornton v. France*, 1897, 2 Q. B. 143; see sects. 1 and 12).

Where the claim is to the possession of land, the real right is the right of entry, and the right of action is only given to enforce this (*Magdalen Hospital v. Knotts*, 8 Ch. Div. 727). Speaking generally, time does not commence to run against a man until he is put to his right of entry (*Re Nisbet and Potts*, 1906, 1 Ch. 401). But, unless an entry be made within the statutory period, from then this right is taken away (*Holmes v. Newlands*, 11 Ad. & El. 44; 8 Q. B. 679).

This section
governs cases
not included
among the
instances in
sect. 3.

*James v.
Salter.*

Sect. 2 of R. P. Lim. Act, 1833, was held to govern cases which fell within its general words, even though not included among the instances given in sect. 3 (*James v. Salter*, 3 Bing. N. C. 553; *Pugh v. Heath*, 7 App. Cas. 235). A testator charged a life annuity on land, with a power of distress. The testator died in 1804, and in 1835 the annuitant distrained for twenty-nine years' arrears, the right to make a distress having first accrued in April, 1805. The claim was held barred. *Tindal, C. J.*, said "that the case must have been governed by the second section, if that section had stood alone, cannot be doubted; and upon a more close examination of the third section, the object and intent of it seems to us to be no more than this: to explain and give a construction to the enactment contained in the second clause, as to 'the time at which the right to make a distress for any rent shall be deemed to have first accrued,' in those cases only in which doubt or difficulty might occur; leaving every case which plainly falls within the general words of the second section, but is not included amongst the instances given by the third, to be governed by the operation of the second" (*James v. Salter*, 3 Bing. N. C. 553; approved, *Irish Commission v. Grant*, 10 App. Cas. 27; see *Magdalen Hospital v. Knotts*, 8 Ch. Div. 727). In such a case it was not merely the right of the annuitant to arrears that was barred. His title to the annuity as a whole was extinguished (see 3 Bing. N. C. 555; *Jones v. Withers*, 74 L. T. 572; *Langton v. L.*, 18 Jur. 928).

Landlord and
tenant;
void lease;

Where a lessee entered under a lease granted by a charitable corporation in 1783 (held to have been void), and in 1876 the corporation sued for possession, the lessees were taken to have been in possession from 1783 without any title whatever, and the rights of the corporation were barred by sect. 2 of the R. P. Lim. Act, 1833 (*Magdalen Hospital v. Knotts*, 4 App. Cas. 324; see *Webster v. Southey*, 36 Ch. D. 9). In the courts below, the same lease was treated as voidable only; and according to the C. A. time ran from the granting of the lease (8 Ch. Div. 709).

A person must have an effective right to enter in order that time may run against him, and an intended lessor had not such a right where the intended lessee entered under a valid agreement for a lease (*Warren v. Murray*, 1894, 2 Q. B. 658). 37 & 38 Vict.
c. 57, s. 1.
—
valid lease ;

Where a lessor permitted his lessee during the lease to pay no rent for the statutory period, time ran against the lessor's right to recover the land from the determination of the lease, his right of action accruing under the fourth branch of the third section (*Doe v. Oxenham*, 7 M. & W. 131). As to a lessor being barred through a stranger wrongfully receiving the reserved rent, see sect. 9, *post*. The case of a lease being surrendered and renewed is discussed in the note to sect. 2 of R. P. Lim. Act, 1874, *post*, p. 140.

As regards the landlord's right to recover rent reserved, the right to recover proper arrears is not barred by non-payment for however long a time, so long as the relation of landlord and tenant subsists as a legal relation (*Archbold v. Scully*, 9 H. L. C. 360; *Grant v. Ellis*, 9 M. & W. 113; *Re Turner*, 11 Ir. Ch. R. N. S. 304; *Irish Commission v. Grant*, 10 App. Cas. 26; see *Blairberg v. Keeves*, 1906, 2 Ch. 182). But where a tenant from year to year holds for twelve years without paying rent the landlord loses not only the land, but also any right to recover past rent (*Re Jolly; Gathercole v. Norfolk*, 1900, 2 Ch. 616).

The word "rent" in the above section is confined to rents existing as an inheritance distinct from the land, and for which before 1833 the party entitled might have had an assize, such as ancient rents service, fee-farm rents, or the like (*Grant v. Ellis*, 9 M. & W. 113; *Irish Commission v. Grant*, 10 A. C. 26; *Jones v. Withers*, 74 L. T. 572). The word means in the section rent which is a charge on land (*Paget v. Foley*, 2 Bing. N. C. 688). It includes an annuity charged on land by deed (*Hughes v. Coles*, 27 Ch. D. 231), and interest on land tax redemption money, charged by statute on land, and being distinct from the land, though not itself real property (*Skene v. Cook*, 1902, 1 K. B. 682). The word in the section does not include rents reserved on leases for years (*Grant v. Ellis*, *sup.*), or an additional penal rent payable by a tenant (*Daly v. Bloomfield*, 5 Ir. L. R. 65).

The various cases in which the provisions of this section as to rent (as interpreted by sect. 1) have been held to apply are given *ante*, p. 117. As to the use of the word "rent" in the statute generally, see *ib.*, and *post*, p. 147.

The first section interpreting the person through whom another person is said to claim as meaning any person by, through, or under, or by the act of whom the person so claiming became entitled to the estate or interest claimed "as issue in tail," an ordinary tenant in tail would lose his right after want of possession for the statutory period in the time of his ancestor (*Abergavenny v. Brace*, L. R. 7 Ex. 152, 172). But a statutory entail (as that of the Abergavenny estates) is not within these words (*Ib.* 155, 172).

An action by a lord of a manor to enforce his right to seize *quousque* is within this section (*Eccl. Commrs. v. Parr*, 1894, 2 Q. B. 420; *Re Lidiard*, 42 Ch. D. 254; *Beighton v. Beighton*, 64 L. J. Ch. 796). So also a suit by a copyhold tenant to compel admittance by the lord (*Walters v. Webb*, 5 Ch. 531). The lord's right to enter for forfeiture is within sects. 3 and 4 (see note to sect. 4, *post*, p. 138). Copyhold fines are dealt with by the Civil Procedure Act, 1833, sect. 3 (see *Monckton v. Payne*, 1899, 2 Q. B. 603).

As regards a possessory title to land forming part of a manor, a squatter on copyhold land who had acquired a good title under the statute against the copyholder was held to have no title to the freehold against the lord; but time began to run against the lord only from the date at which after proclamation or notice the squatter failed to come in and be admitted (*Eccl. Commrs. v. Parr*, 1894, 2 Q. B. 420; see *Re Nisbet & Potts*, 1905, 1 Ch. 400). On the other hand, where A. under license from the lord enclosed waste, and after the expiration of his license had adverse possession thereof for forty years, the effect of the license was to give A. not a copyhold, but a common law holding, the lord having the freehold reversion; and by adverse possession A. acquired a freehold title (*A.-G. v. Tomline*, 15 Ch. D. 157).

37 & 38 Vict.
c. 57, s. 1.

(2)
Old law.
32 Hen. 8,
c. 2.

By common law there was no fixed period within which it was necessary to commence actions. Afterwards certain events were from time to time selected, as the return of King John from Ireland, and the coronation of Henry the Third. A certain period was limited by stat. 32 Hen. 8, c. 2, which enacted that no person should maintain any writ of right, or make any prescription, title or claim of, to or for any *manors, lands, tenements, rents, annuities, commons, pensions, portions, corodies, or other hereditaments* of the possession of his or their ancestor or predecessor, and declare and allege any further seisin or possession of his or their ancestor or predecessor, but within sixty years next before the teste of the said writ, or next before the said prescription, title or claim so made. Actions upon the *possession* of the ancestor of the party claiming were limited to fifty years; and those upon the seisin or possession of the party himself to thirty years; and formedons in remainder or reverter were required to be sued within fifty years. The writ of intrusion came within the stat. 32 Hen. 8, c. 2, and not within the Limitation Act, 1623, and the limitation of time for suing out such writ was fifty years (see *Peircey v. Gardner*, 3 Bing. N. C. 748). Dignities were not within the Stat. Lim. (*Re Willoughby of Paiham*, Lords' Journ. vol. 31, p. 350; see 3 Cru. Dig. 202). But offices with fees and profits were within them (Lords' Journ. vol. 36, p. 295). An annuity was not within the stat. 32 Hen. 8, c. 2, for the plaintiff did not declare upon a seisin, but upon his grant (Bro. St. Lim. 26; see *ante*, p. 120). So that statute did not extend to a corporation aggregate, as mayor and commonalty, nor to a dean and chapter. But it was otherwise as to a corporation sole; for if a bishop or other sole corporation sued upon a seisin of his predecessor, he was barred if the seisin was not within sixty years (Bro. St. Lim. 33; Bac. Abr. Limitation of Actions (B)).

Limitation of
right of entry.
21 Jac. 1,
c. 16.

The Limitation Act, 1623, sects. 1 and 2 (repealed by 26 & 27 Vict. c. 125), limited the period for all writs of formedon to twenty years, and enacted that no persons should make any entry into any lands, tenements, or hereditaments, but within twenty years next after his title should *first descend* or accrue to the same. [The provisions of the statutes 32 Hen. 8, c. 2, and the Lim. Act, 1623, were extended to Ireland by the Irish stat. 10 Car. 1, sess. 2, c. 6.]

As to the rights of issues in tail under the Lim. Act, 1623, see *Tolson v. Kaye*, 3 Brod. & B. 217; 3 B. & A. 738; 6 M. & G. 536; *Doe v. Woodroffe*, 16 M. & W. 769.

Under the Lim. Act, 1623, the period of twenty years ran against the rights of persons entitled in possession from the time when the *wrongdoer* acquired possession *adversely* to the owner; and in many cases it was very difficult to ascertain what would constitute such possession.

Adverse
possession
necessary
under above
statutes.

To constitute adverse possession, it was formerly necessary that there should be an ouster of the seisin in one of five modes, called disseisin, abatement, intrusion, discontinuance, and forfeiture. Disseisin is where the person in possession of the freehold is evicted. Abatement is where a wrongdoer enters on the vacant possession, after the death of the owner, instead of the heir or devisee. Intrusion is where a wrongdoer enters on the vacant possession, after the death of the tenant for life, instead of the remainderman or reversioner. Discontinuance was where a tenant in tail in *possession* aliened by a tortious conveyance, as feoffment or fine, which did not bar the entail. Forfeiture was considered to include the other four terms, and any holding over after the determination of an estate, or other wrongful withholding of the freehold from the right owner (see 1 Real Prop. Rep. 494; 3 Bl. Comm. 167—173). When a party entered by colour of a *void* grant, he was a *disseisor* (*Buckler's case*, 2 Rep. 55 b; Cro. Eliz. 451; Cro. Car. 306, 388; Litt. Rep. 298, 373; Cro. Jac. 660; 1 Jones, 316). But where a grant was according to the rules of law, but required to be perfected by a subsequent ceremony, as if a feoffee entered before livery of seisin, he was not a disseisor (2 Rep. 55). Wherever there was a disseisin, the possession of the disseisor was considered *adverse*, and the party was bound to pursue his remedy within twenty years from the act constituting the

Disseisin.

disseisin (Butl. Co. Litt. 330 b, n). There might be an unlawful possession which did not amount to a disseisin (*Doe v. Gregory*, 9 Ad. & Ell. 14; 4 Nev. & M. 308; see 2 M. & W. 904). As to disseisin, see *Taylor v. Horde*, 1 Burr. 108; *Doe v. Lynes*, 3 B. & C. 388; *Williams v. Thomas*, 12 East, 141; Roscoe on Real Actions, 61—63; 2 Prest. Abst. 284 *et seq.* 37 & 38 Vict.
c. 57, s. 1.

At the passing of R. P. Lim. Act, 1833, the question whether possession was or was not adverse, was to be decided by inquiry whether the circumstances of that possession were sufficient to evince its incompatibility with a freehold in the claimant (note to *Nepean v. Doe*, 2 Smith's L. C.; see *Des Barres v. Shey*, 22 W. R. 273). If they were, the claimant's interest was reduced to a right of entry; and the Lim. Act, 1623, applied so as to bar such interest in twenty years, the possession being considered adverse. If they were not, the act did not apply, the possession being considered as non-adverse. Question of
adverse
possession
before 3 & 4
Will. 4, c. 17.

The possession of a lessee could not be adverse (1 Wils. 176; 3 Wils. 521; *Roe v. Ferrars*, 2 Bos. & P. 542; 2 D. & R. 38), until the end of the tenancy (*Fishar v. Prosser*, Cowp. 218). So in the case of a husband of a tenant for life holding on after her death (*Doe v. Gregory*, 4 Nev. & M. 308; see *Doe v. Blakeway*, 5 C. & P. 563). Joint possession with the real owner was held not adverse (*Reading v. Rawsterne*, 2 Ld. Raym. 829; 1 Salk. 242).

Possession was not adverse in some cases if there was a possible explanation consistent with the plaintiff's title; as when possession might have been, under a custom, for a husband to hold for life his deceased wife's copyhold (*Doe v. Brightwen*, 10 East, 583); or might have been in respect of dower (*Doe v. Haslewood*, 6 Ad. & Ell. 167; see *Doe v. Pettet*, 5 B. & Ald. 223; *Doe v. Harbrow*, 1 Ad. & Ell. 67, n.; *Doe v. Langfield*, 16 M. & W. 497); or might have been under an agreement for partition by deed, which was never executed (*Doe v. Millett*, 11 Q. B. 1036). Where a person held land, intended to be but not in fact, conveyed to him on trust, his possession was not adverse while in accordance with the trust (*Doe v. Hulse*, 3 B. & C. 757). But where copyholds had been granted to A. for the lives of herself and B., and in reversion to C. for other lives, and A. died, having devised to B., who entered and kept possession for more than twenty years, C. could not, after B.'s death, maintain ejectment, as C.'s right of possession accrued on the death of A., when his interest terminated, inasmuch as there could be no general occupant of copyhold land (*Doe v. Scott*, 4 B. & C. 706). Possession by a woman was held adverse to her brother, who was entitled as heir (*Doe v. Lawley*, 13 Q. B. 954). So possession by the mother of the heir was adverse unless it was by his permission (*Doe v. Jaruncey*, 8 C. & P. 99). Where a party was let into possession with the consent of the owner, and did acts importing that he continued in possession only with the owner's permission, such acts prevented the possession being adverse (see Litt. s. 70). So where a person was let into possession under a contract for purchase, and for some years paid interest on the purchase-money, but never completed, his possession was not adverse (*Doe v. Edgar*, 2 Bing. N. C. 498). A woman, living apart from her husband, obtained a demise of property for a term: possession, if adverse to the wife, was adverse to the husband, and not otherwise (*Roe v. Wilkins*, 4 Ad. & Ell. 86). The solitary act of entry and attornment, followed by no assertion of right for upwards of thirty years, was no evidence of a possession not being adverse (*Doe v. Edwards*, 5 Ad. & Ell. 95).

If a cottage was built upon waste in defiance of a lord of a manor, and quiet possession had been had of it for twenty years, it was within the Lim. Act, 1623; but if it were built at first by the lord's permission, or any acknowledgment had been since made (though it were 100 years since), that statute would not run against the lord (*Doe v. Wilkinson*, 3 B. & C. 414; *Doe v. Clarke*, 8 B. & C. 717; *R. v. Cuddington*, 2 New Sess. C. 10; 14 L. J., M. C. 182; *R. v. Woburn*, 10 B. & C. 846). A mere licensee is in this respect on the same footing as a tenant (*Doe v. Baytup*, 3 Ad. & Ell. 188). As to licence for an encroachment on a common given by a commoner, see *Harvey v. Reynolds*, 1 C. & P. 141; or by the lord, see *Doe v. Williams*, 7 C. & P. 332; *Doe v. Wilson*, 11 East, 56; *Doe v. Heakin*, 6 Ad. & Ell. 495. Adverse
possession
before 3 & 4
Will. 4, c. 27,
in the case of
encroachments from
waste.

37 & 38 Vict. c. 57, s. 1. Before R. P. Lim. Act, 1833, if no other title appeared, possession for twenty years was strong presumptive evidence of a fee (*Denn v. Barnard*, Cowp. 595); and though gained by manifest wrong, and though liable to be defeated by the entry of the rightful owner, was a title as against strangers (*Doe v. Webber*, 1 Ad. & Ell. 119; *Doe v. Parke*, 4 Ad. & Ell. 816); and conferred on the possessor, on ouster or trespass by a stranger, the ordinary remedies for such injuries (see 3 Man. & Ry. 112, n.). Where a plaintiff in ejectment proved twenty years' possession immediately preceding possession for ten years by defendant, the former was entitled to recover, his earlier possession prevailing (*Doe v. Cooke*, 7 Bing. 346; see *Stokes v. Berry*, 2 Salk. 421). Possession of land for any term less than twenty years by a feoffee was not presumptive evidence of livery of seisin (*Doe v. Cleveland*, 9 B. & C. 864; *Doe v. Davies*, 2 M. & W. 503).

Non-claim on fines. By stat. 4 Hen. 7, c. 24, a fine with proclamations was made a bar to all persons if they did not claim within five years after the proclamations made, or after their rights of entry accrued, or after the removal of their disabilities (see *Davies v. Lowndes*, 5 Bing. N. C. 177, 178; *Runcorn v. Doe*, 5 B. & C. 701; *Doe v. Perkins*, 3 M. & S. 271; *Doe v. Gregory*, 2 Ad. & Ell. 14). For the case of married women, see *Doe v. Pett*, 11 Ad. & Ell. 853; *Doe v. Plumtre*, 3 B. & Ald. 474. It seems that the adverse possession necessary to make a fine with proclamations operate by way of bar, was the same as the adverse possession necessary for the purpose of barring a right of entry (note to *Nepean v. Doe*, 2 Smith's L. C., 10th ed. 636).

(3)
Nature of
possession
requisite
under 3 & 4
Will. 4, c. 27,
s. 2.

Shortly after the passing of the R. P. Lim. Act, 1833, the change in the law was thus described by Lord *St. Leonards*: "Adverse possession is no longer necessary in the sense in which it was formerly used; mere possession may be and is sufficient under many circumstances to give a title adversely; although perhaps now no better expression than adverse possession can be used, yet it is not adverse in the sense in which that phrase was used before this act was passed" (*Ely v. Bliss*, 2 D. M. & G. 476, 477; see *Nepean v. Doe*, 2 M. & W. 911; *Culley v. Doe*, 11 Ad. & Ell. 1008; *Doe v. Barton*, 3 P. & Dav. 198; *Jack v. Walsh*, 4 Ir. L. R. 254). It has been said that under the present statute all possession is adverse. Thus at the end of the statutory period the possession of a tenant from year to year who pays no rent becomes adverse during the whole time. The landlord retains no right to recover any rent (*Re Jolly, Gathercole v. Norfolk*, 1900, 2 Ch. 619).

Some of the principles, however, laid down in the old cases on adverse possession have been acted on in cases since this act (see *Scott v. Scott*, 4 H. L. C. 1085). Thus, in *Thomas v. Thomas* (2 K. & J. 83), where a father, entering on the estate of his infant children, was held to have been in possession as a bailiff for them, *Wood, V.-C.*, applied the principle (*Doe v. Brightwen*, 10 East, 583) that possession is never considered adverse if it can be referred to a lawful title (see *Wall v. Stanwick*, 34 Ch. D. 763; *Re Hobbs, Hobbs v. Wade*, 36 Ch. D. 553; *Bolling v. Hobday*, 31 W. R. 9). Where a purchaser entered into possession of land, an undivided share in which was vested in a trustee for an infant who did not join in the conveyance, the purchaser, having notice of the infant's rights, was treated as a bailiff for the infant (*Young v. Harris*, 65 L. T. 45; see *Quinton v. Frith*, 2 Ir. Eq. 396; *Allen v. Sayer*, 2 Vernon, 368). *Secus* where a stranger entered who had no notice (*Lambert v. Browne*, Ir. R. 5 C. L. 218). Where a father seized of land made a will invalid as to real estate whereby he appointed his brother, to whom he was indebted, executor, and died leaving two infant daughters, and the uncle entered upon the land and paid interest on a mortgage, and laid out sums on improvements, his possession was not adverse to his nieces (*Pelly v. Bascombe*, 4 Giff. 394; 13 W. R. 306). As to a person entering on an infant's land being a bailiff for him, see *Crowther v. Crowther*, 23 Beav. 305; *Howard v. Shrewsbury*, 17 Eq. 398; even after the infant has attained his majority, *Tinker v. Rodwell*, 69 L. T. 591. But as against children who had attained majority and left the land time was held to run (*Re Maguire*, 1907, 1 I. R. 383). See, further, the note on account of rents in equity, *post*, p. 201.

Possession obtained by a person as trustee cannot be set up as adverse to the *cestui que trust* (*Stone v. Godfrey*, 5 D. M. & G. 76). Before the R. P. Lim. Act, 1833, the possession of a *cestui que trust* was not at law adverse to the title of the trustee (*Smith v. King*, 16 East, 283); and the same has been held since the act (*Drummond v. Sant*, L. R. 6 Q. B. 763; see *Warren v. Murray*, 1894, 2 Q. B. 648). It was said that in the case of a mortgagee the doctrine of adverse possession had been revived by the R. P. Lim. Act, 1837 (*Doe v. Eyre*, 17 Q. B. 366). The occupation of a school by a schoolmaster for more than the statutory period did not give him an adverse right against the owner; for his occupation was the occupation of the owner, he being in the situation of a servant (*Moore v. Doherty*, 5 Ir. L. R. 449; see *Ellis v. Crawford*, 5 Ir. L. R. 404; *Montmorency v. Walsh*, 4 Ir. L. R. 254; *Gibson v. Wise*, 35 W. R. 409). Charitable trustees, however, acquired title by possession under a void grant, although one of their number was the person entitled to dispute the grant (*Churcher v. Martin*, 42 Ch. D. 312; see *Re Lacy*, 1899, 2 Ch. 149). As to the result where possession of leaseholds was taken by the next-of-kin of a deceased leaseholder, see *McCormack v. Courtney*, 1895, 2 Ir. 97; *Rankin v. McMurtry*, 24 L. R. Ir. 297; *Coyle v. McFadden*, 1901, 1 I. R. 298; *Smith v. Savage*, 1906, 1 I. R. 469; by his representative, *Reed v. Fenn*, 35 L. J. Ch. 464; *Re Lacy*, *Royal Association v. Kydd*, 1899, 2 Ch. 149; and by a stranger, *Tichborne v. Weir*, 67 L. T. 735; *Doe v. Evans*, 1 C. B. 717. See further the note as to possession, p. 134, *post*.

Where a husband was in possession of land which really belonged to his wife but was erroneously supposed to belong to the heir of a deceased person, and he accounted for the rents to such heir, the possession was held to be the possession of the heir (*Hounsell v. Dunning*, 1902, 1 Ch. 512).

A principal may acquire a possessory title to real estate by receiving the rents through an agent, although that agent is the person really entitled to rents by the estate (*Williams v. Pott*, 12 Eq. 149). And see as to receipt of rents by an agent, *Smith v. Bennett*, 30 L. T. 100. An owner in fee who had received rents through an agent died intestate. The agent, who continued to receive, stating at first that he was receiving for the heir, did not dispossess the heir who subsequently ratified (*Lyell v. Kennedy*, 14 App. Cas. 437). Where a solicitor received the rents of a mortgaged property, his possession was that of the client, and time did not run against the client (*Ward v. Carttar*, 1 Eq. 29).

If a tenant encroaches on land not originally part of his holding, the presumption is, that the encroachment must be considered as annexed to the holding, unless it clearly appears that the tenant made it for his own benefit (*Kingsmill v. Millard*, 11 Ex. 318; *Doe v. Rees*, 6 C. & P. 610). The presumption applied where the encroachment was made with the verbal assent of the landlord (*Whitmore v. Humphries*, L. R. 7 C. P. 1); and where the land encroached upon did not belong to the landlord (*Andrews v. Hailles*, 2 E. & B. 349; 22 L. J. Q. B. 409—the presumption in that case applying only as between landlord and tenant). It was said that the presumption only applies where the land encroached upon is waste, and is adjacent to the original holding (*Hastings v. Saddler*, 79 L. T. 355), and accordingly did not apply where the encroachment was upon enclosed land half a mile distant (*Ib.*). It applied, however, where the encroachment was separated from the original holding by a small river (*Lisburne v. Davies*, L. R. 1 C. P. 265), or by a road (*Doe v. Jones*, 15 M. & W. 580). The presumption may be rebutted (*Berney v. Bickmore*, 8 L. T. 353), *e.g.* by acts done at the time (*Doe v. Rees*, 6 C. & P. 610), or by subsequent acts either of the landlord: *e.g.* if there be a subsequent grant by the landlord to the tenant of the original holding which does not include the encroachment (*A.-G. v. Tomline*, 15 Ch. Div. 160), or of the tenant: *e.g.* if the tenant conveys the encroachment to another person and the conveyance is communicated to the landlord (*Kingsmill v. Millard*, 11 Ex. 318). The presumption was applied to the case where two adjoining leasehold properties held under the same landlord were settled on different trusts, and the *c. q. t.* of one property encroached on the other (*East Stonehouse Council v. Willoughby*, 1902, 2 K. B. 318).

37 & 38 Vict.
c. 57, s. 1.

Encroach-
ments by
tenant
presumed to
be annexed
to holding.

37 & 38 Vict.
c. 57, s. 1.

Where a tenant occupied adjoining land belonging to his landlord for twelve years, he was entitled to retain it as part of the holding during the remainder of the term (*Tabor v. Godfrey*, 64 L. J. Q. B. 245). See, further, as to the above presumption between landlord and tenant, *Doe v. Davies*, 1 Esp. 461; *Brian v. Winwood*, 1 Taunt. 208; *Doe v. Morris*, 2 Bing. N. C. 189; *Doe v. Williams*, 7 C. & P. 332; *Doe v. Murrell*, 8 C. & P. 134; and the cases quoted *ante*, pp. 48, 129.

The owner of A. and B., adjacent closes, demised A. to a tenant who built upon B. without leave of the landlord. The tenant having occupied both A. and B. for twenty years, paying rent to the landlord under the demise of A., but not expressly in respect of B., could insist, as against the landlord, on a sufficient possession of B. within the statute (*Doe v. Massey*, 17 Q. B. 373). One who occupies as his own land belonging to another, and afterwards becomes tenant to the latter of land adjacent to the land so occupied, does not thereby change the character of his possession, but can, whilst he remains tenant, acquire as against his landlord a possessory title to the land first occupied (*Dixon v. Baty*, L. R. 1 Ex. 259; compare *Smith v. Stocks*, 10 B. & S. 701).

Tenant for life when estopped from disputing his grant or devise.

Where A., who has no title, purports by deed to grant land to B. for life with remainder over, and B. enters under the deed, and afterwards acquires title by possession against the true owner, B. and his privies are estopped as against the remainderman from disputing the validity of the deed (*Dalton v. Fitzgerald*, 1897, 2 Ch. 86). The same principle applies where B. enters under a devise by a testator who had a defective title (*Board v. Board*, L. R. 9 Q. B. 48; *Hawksbee v. Hawksbee*, 11 Hare 230; *Calder v. Alexander*, 16 T. L. R. 294; compare *Asher v. Whitlock*, L. R. 1 Q. B. 1; *Yem v. Edwards*, 1 De G. & J. 598; *Molony v. Molony*, 1894, 2 I. R. 1).

The Courts have refused to apply estoppel to the cases where B. entered under a devise which was invalid (*Re Stringer*, 6 Ch. D. 10; *Re Anderson*, *Pegler v. Gillatt*, 1905, 2 Ch. 77); or which did not comprise the particular land (*Paine v. Jones*, 18 Eq. 320; *contra*, *Anstee v. Nelms*, 1 H. & N. 225; 26 L. J. Ex. 5; *Kernaghan v. M'Nally*, 12 Ir. Ch. Rep. 89). The last case was considered inconsistent with *Scott v. Nixon* (3 Dr. & W. 388) by the C. A. in *Dalton v. Fitzgerald*, *sup.*; where see also remarks on *Paine v. Jones*, *sup.*

Rights of claimant to take possession.

Every claimant who has such a right of possession as would entitle him to maintain ejectment against a wrongdoer is still competent to take possession, of his own authority, if he can do so without committing a breach of the peace (*Taylor v. Cole*, 3 T. R. 292; *Taunton v. Costar*, 7 T. R. 431; *R. v. Wilson*, 8 T. R. 357; *Rogers v. Pitcher*, 6 Taunt. 202; *Turner v. Meymott*, 1 Bing. 158; Co. Litt. 245 b; 1 M. & R. 221, n. (c); 5 Nev. & M. 164; *R. v. Newlands*, 4 Jurist, 322; *Perry v. Fitzhowe*, 8 Q. B. 757); but he cannot turn out the wrongdoer with violence (*Edwick v. Hawkes*, 18 Ch. D. 199). As to damages in case of a forcible entry by the rightful owner, see *Beddall v. Maitland*, 17 Ch. D. 174.

A landlord cannot lawfully acquire possession by a forcible entry after the expiration of the term (*Newton v. Harland*, 1 M. & G. 644; *Jones v. Foley*, 1891, 1 Q. B. 732); even under a licence from the tenant to that effect (*Edwick v. Hawkes*, 18 Ch. D. 199).

Cross references.

As to what acts amount to possession, see the note to sect. 3, *post*; as to the effect of certain acts in creating or determining a tenancy at will, see the note to sect. 7, *post*, p. 143; and as to possessory titles under the R. P. Lim. Act, 1833, see the note to sect. 34, *post*, p. 178.

When the right shall be deemed to have first accrued:

3. In the construction of this act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as hereinafter is mentioned; (that is to say,) when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession

or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dis-
 possessed, or have discontinued such possession or receipt, then
 such right shall be deemed to have first accrued at the time of
 such dispossession or discontinuance of possession, or at the
 last time at which any such profits or rent were or was so
 received (*p*); and when the person claiming such land or rent
 shall claim the estate or interest of some deceased person who
 shall have continued in such possession or receipt in respect of
 the same estate or interest until the time of his death, and
 shall have been the last person entitled to such estate or
 interest who shall have been in such possession or receipt, then
 such right shall be deemed to have first accrued at the time of
 such death (*q*); and when the person claiming such land or
 rent shall claim in respect of an estate or interest in possession
 granted, appointed or otherwise assured by any instrument
 (other than a will) to him, or some person through whom he
 claims, by a person being, in respect of the same estate or
 interest, in the possession or receipt of the profits of the land,
 or in the receipt of the rent, and no person entitled under such
 instrument shall have been in such possession or receipt, then
 such right shall be deemed to have first accrued at the time at
 which the person, claiming as aforesaid, or the person through
 whom he claims, became entitled to such possession or receipt
 by virtue of such instrument (*r*); and when the estate or
 interest claimed shall have been an estate or interest in rever-
 sion or remainder, or other future estate or interest, and no
 person shall have obtained the possession or receipt of the
 profits of such land, or the receipt of such rent in respect of
 such estate or interest, then such right shall be deemed to have
 first accrued at the time at which such estate or interest became
 an estate or interest in possession (*s*); and when the person
 claiming such land or rent, or the person through whom he
 claims, shall have become entitled by reason of any forfeiture
 or breach of condition, then such right shall be deemed to have
 first accrued when such forfeiture was incurred, or such con-
 dition was broken (*t*).

3 & 4 Will. 4,
c. 27, s. 3.

in case of an
estate in
possession,
on disposses-
sion,
on abatement
or death,

on alienation :

in case of
future
estates :

in case of
forfeiture or
breach of
condition.

- (1) *Dispossession and Discontinuance of Possession*...133.
- (2) *Wrongful Possession Commencing on Death*...136.
- (3) *Wrongful Possession Commencing on Alienation by Rightful Owner*...137.
- (4) *Future Interests*...137, 138.
- (5) *Forfeitures and Breaches of Condition*...137.

(1)

(*p*) The first branch of sect. 3 deals with cases of dispossession and
 discontinuance of possession of land and discontinuance of receipt of rent. Dispossession is where a person comes in and drives out the others from possession : discontinuance of possession is where the person in possession goes out and is followed into possession by other persons (*Per Fry, J., Rains v. Buxton*, 14 Ch. D. 539). To dispossess a former owner, acts must be done which are inconsistent with his enjoyment of the soil for the purposes

Dispossession
and discon-
tinuance of
possession of
land.

3 & 4 Will. 4, for which he intended to use it (*Leigh v. Jack*, 5 Ex. Div. 264, 273). As regards equivocal acts the intention is all-important (*Littledale v. Liverpool College*, 1900, 1 Ch. 19; *Philpot v. Bath*, 1905, W. N. 114). In cases of discontinuance and also of dispossession regard must be had to the nature of the property (*Leigh v. Jack*, 5 Ex. Div. 274; *Marshall v. Taylor*, 1895, 1 Ch. 645). Small acts are sufficient to show there is no discontinuance (*Leigh v. Jack*, 5 Ex. Div. 272; see *Solling v. Broughton*, 1893, A. C. 556; *Re Vernon*, 1901, 1 Ir. R. 1). There must be both absence of possession by the person who has the right and actual possession by another, whether adverse or not, to be protected, to bring the case within the statute (*Smith v. Lloyd*, 9 Exch. 562; *Kingston v. Kingston*, 1897, A. C. 515; *McDonnell v. McKinty*, 10 Ir. L. R. 514; see *Rimington v. Cannon*, 12 C. B. 1). And if, before the statutory period has expired, the intruder abandons possession and the possession is vacant, the rightful owner is in the same position in all respects as before the intrusion (*Trustees' Co. v. Short*, 13 App. Cas. 793; *Willis v. Howe*, 1893, 2 Ch. 554). To bring a case within the statute, possession must be by the person wishing to assert the statute, and not by third persons, or by the custody of the law (*Howlin v. Sheppard*, 19 W. R. 253). As to possession by a series of independent trespassers, see the note to sect. 34, *post*, p. 180. And as to the party upon whom the onus lies of proving the commencement of the wrongful possession, see *Poole v. Griffith*, 15 Ir. C. L. R. 239, 277.

What possession is sufficient.

Where the soil of a road was vested in A., user of the road by the public on foot was held sufficient enjoyment to preserve A.'s title to the soil as against acts of ownership committed by B. (*Reilly v. Thompson*, 11 I. R. Ch. 238). From the last-mentioned case it appears that the Irish decision to the contrary effect in *Tottenham v. Byrne* (12 Ir. C. L. R. 376) was reversed on appeal (11 I. R. C. L. 247). The erection and locking of gates was not alone sufficient to show dispossession (*Littledale v. Liverpool College*, 1900, 1 Ch. 19). As to possession by the erection of a fence, see *Worssam v. Vandenbrande*, 17 W. R. 53.

As to acts constituting possession of a ditch, see *Searby v. Tottenham R. Co.*, L. R. 5 Eq. 409; *Norton v. L. & N. W. R. Co.*, 13 Ch. Div. 268; *Marshall v. Taylor*, 1895, 1 Ch. 645. Of a boundary wall, *Phillipson v. Gibbon*, 6 Ch. 428; *Waddington v. Naylor*, 60 L. T. 480; *Stedman v. Smith*, 8 El. & B. 1. Of a gravel-pit and road, *Smith v. Stocks*, 17 W. R. 1135; 10 B. & S. 701. Of the soil under a highway by means of a tunnel, *Bevun v. London Cement Co.*, 67 L. T. 615. Of land over a railway tunnel, *Midland R. Co. v. Wright*, 1901, 1 Ch. 738. Of a dry river-bed, *Hindson v. Ashby*, 1896, 1 Ch. 87; 1896, 2 Ch. 1. Of oyster beds on the foreshore, *Foster v. Warblington*, 1906, 1 K. B. 671. Acts constituting possession of the foreshore were considered in *Lord Advoc. v. Young*, 12 A. C. 553; *Lord Advoc. v. Blantyre*, 4 A. C. 791; *Re Vernon*, 1901, 1 I. R. 10; *e.g.* by granting a lease, *Van Diemen's Co. v. Table Board*, 1906, A. C. 92; or by placing piles on the foreshore (*Beaufort v. Aird*, 20 T. L. R. 602; *Philpot v. Bath*, 1905, W. N. 114). As to possession by overhanging trees, see *Lemon v. Webb*, 1895, A. C. 6. Title to the soil of a lane was acquired by letting the grazing (*Haigh v. West*, 1893, 2 Q. B. 31). Acts of the other party which are relied on as negating possession may be attributed to an easement (*Norton v. L. & N. W. R. Co.*, *sup.*; *Marshall v. Taylor*, *sup.*; see *Grose v. West*, 7 Taunt. 42; *Philpot v. Bath*, 1905, W. N. 114). Acts done on part of the land may be evidence of possession of the whole where there is a common character of locality (*Jones v. Williams*, 2 M. & W. 326; *Bristow v. Cormican*, 3 App. Cas. 641; *Lord Advoc. v. Blantyre*, 4 App. Cas. 791; *Clark v. Elphinstone*, 6 App. Cas. 164; *Lord Advoc. v. Wemyss*, 1900, A. C. 68). See further as to acts of ownership, *A.-G. v. Chambers*, 4 De G. & J. 65, and the cases quoted *ante*, p. 94; also sect. 10, *post*, p. 148.

A title to an underground cellar may be acquired by possession, of which the owner of the surface is ignorant (*Rains v. Buxton*, 14 Ch. D. 537). Where a rector built on a piece of land a school, which was placed under a committee of which he was a member, the possession was not such as to

give the rector a statutory title to the land as glebe (*Gibson v. Wise*, 35 W. R. 409; see *Churcher v. Martin*, 42 Ch. D. 312; and compare the title acquired by churchwardens and overseers as trustees for a parish, *Haigh v. West*, 1893, 2 Q. B. 31). A stranger may acquire by possession a title to land of a railway company, whether superfluous (*Norton v. L. & N. W. R. Co.*, 13 Ch. Div. 268) or not superfluous (*Bobbett v. S. E. R.*, 9 Q. B. D. 424), and to the surface of land situate vertically over a tunnel used by the company (*Midland R. Co. v. Wright*, 1901, 1 Ch. 738; see *Rosenberg v. Cook*, 8 Q. B. Div. 166). In the last cases the title was acquired not to the surface only, but also *usque ad cælum*. And a possessory title may be acquired, even though the true owner is under a statutory prohibition against letting or selling (*Brighton v. Brighton Guardians*, 5 C. P. D. 368). No actual possession was acquired of a disused railway (*Re Duffy*, 1897, 1 I. R. 307).

In order to prove possession in an ejectment for mines, it is not sufficient to show that the plaintiff was lord of the manor (*Rich v. Johnson*, Str. 1142) or to show a verdict for the plaintiff in trover for lead dug out of a mine (Bull. N. P. 102; Adams on Ejectment, 263, 4th ed.). Where title to mines is founded on adverse possession, the title will be limited to the area of which actual possession has been enjoyed (*Glyn v. Howell*, 1909, 1 Ch. 678; a case in which the working and possession of mines under a small area did not give a statutory title to the mines under a larger area; *Lord Advoc. v. Wemyss*, 1900, A. C. 68). So where a man has taken possession of one seam of coal and by lapse of time has acquired title, the law will not assume that his possession extends to other seams lying under that seam (*Loumoor Co. v. Stanley Coal Co.*, 34 L. T. 186). So possession of a portion of minerals did not justify a presumption of possession of the whole (*M'Donnell v. M'Kinty*, 10 Ir. L. R. 514). On the other hand, constructive possession of a wider area may in some cases be inferred from actual possession of a limited area (see *Taylor v. Parry*, 1 M. & Gr. 615; *Wild v. Holt*, 9 M. & W. 675). Thus where a lessor allows his intended lessee to take possession, the latter must be considered as constructively in possession of all which the lessor has bound himself to demise (*Davis v. Shepherd*, 1 Ch. 415). So a man who had entered and worked two seams of coal was held to have taken possession of seven seams under the same lands (*Loumoor Co. v. Stanley Coal Co.*, *sup.*). But as a general rule, the inference will only be made where it is necessary to give effect to contractual obligations or to preserve the good faith and honesty of a bargain (*Glyn v. Howell*, 1909, 1 Ch. 678).

No statutory title arose from the mere wrongful getting of neighbouring coal by a mine owner who worked such neighbouring coal in the *bonâ fide* belief that he had a title thereto (*Thompson v. Hickman*, 1907, 1 Ch. 562; *Ashton v. Stock*, 6 Ch. D. 726); nor from acts of working coal of which the owner of the coal mine was ignorant (*Dartmouth v. Spittle*, 24 L. T. R. 67; compare *Rains v. Buxton*, 14 Ch. D. 537).

When the defendant, being entitled to a right of way over land which adjoined his farm, used for more than twenty years such adjoining land as part of his farm, he acquired by possession of the surface a good title to the subjacent minerals (*Seddon v. Smith*, 36 L. T. 168). A lessee, under a lease in which mines were not reserved, who was in possession of the surface, was held to be in possession of the mines (*Keyse v. Powell*, 2 Ell. & Bl. 132). But where an owner in fee conveyed the surface to A., excepting the minerals, and reserving liberty to enter and work, and such right of entering had not been exercised for forty years, but no other person had worked the mines, the owner was not barred (*Smith v. Lloyd*, 9 Exch. 562; see *M'Donnell v. M'Kinty*, 10 Ir. L. R. 514; *Seaman v. Vawdrey*, 16 Ves. 390).

Lord St. Leonards was of opinion that the expression "in receipt of the profits of any land," is used in the act, in conjunction with the words "in possession of the land," to denote not the receipt of rent from a tenant, but the receipt of the actual proceeds of the land (R. P. Stat. 47). By sect. 35 (*post*), the receipt of the rent payable by any tenant from year to year, or other lessee, is, against such lessee or any person claiming under him (but subject to the lease), the receipt of the profits of the land for the purposes

3 & 4 Will. 4,
c. 27, s. 3.

Possession
of mines and
minerals:

of surface;
where title
to surface and
minerals is
not severed;
is severed.

3 & 4 Will. 4, of this act. Compare S. L. Act, 1882, sect. 2, sub-sect. 10 (i), *post*; where c. 27, s. 3. "possession" includes receipt of rents and profits. As to receipt of rents by agent, see note, *ante*, p. 181.

Discontinu-
ance of
receipt of
rent:
point from
which time
runs.

The statutory provisions divesting the rights of an owner of a rent who has discontinued the receipt thereof only apply where such owner, while knowing that payment has not been made, omits to enforce his remedies, and may accordingly be held guilty of some neglect or default (*Adnam v. Sandwich*, 2 Q. B. D. 490). Where accordingly land belonging to A. which was subject to a fee farm rent in favour of B. was, without B.'s knowledge, conveyed by A. to C.; and for sixty years A. and his successors paid the rent, B.'s rights as against C. to distrain on the land was not barred (*Ib.*; *Irish Commission v. White*, 1896, 2 I. R. 410; see *Bomford v. Neville*, 1904, 1 I. R. 474). A rent-charge is entire and issues out of every portion of the premises charged. Where accordingly an old rent-charge charged on Blackacre and Whiteacre had always been paid by the occupier of Blackacre, and Whiteacre had for more than the statutory period belonged to a separate owner who had never paid the rent, the right to distrain on Whiteacre was not barred (*Woodcock v. Titterton*, 12 W. R. 865; *Dublin v. Trimleston*, 12 Ir. Eq. R. 251; see *Laybourn v. Gridley*, 61 L. J. Ch. 353; *Conolly v. Gorman*, 1898, 1 I. R. 20).

Where a party has been in receipt of rent and afterwards discontinues such receipt, the statute fixes the point from which time is to run at the day on which the last payment of rent was made, and such party has not the option of calculating from the time when he discontinued the receipt of rent (*Owen v. De Beauvoir*, 16 M. & W. 547; 5 Exch. 166; see *Irish Commission v. Grant*, 10 App. Cas. 27). Under R. P. Lim. Acts, a person dis- seised of rent has only twelve years from the last payment; and so, if an annual rent has been paid on the day on which it became due, and afterwards unjustly withheld, the party aggrieved has only eleven years during which he can bring his action or distrain; for during the first year he has no right of distress or action at all (16 M. & W. 565). The case where judgment has been recovered for arrears is dealt with, *Irish Commission v. Junkin*, 24 L. R. Ir. 40; *Irish Commission v. Ryan*, 1900, 2 I. R. 565.

Where the rents of mines are reserved by means of payment of produce in specie, time will run under the statute from the receipt and not from the sale of such produce by the lessor (*Denys v. Shuckburgh*, 4 Y. & Coll. 42; see *M'Donnell v. M'Kinty*, 10 Ir. L. R. 514).

Seizure
quousque.

Where a copyhold tenant had not paid his fine, and the lord seized *quousque*, time ran against the tenant from the seizure (*Walters v. Webb*, 5 Ch. 531). The statute does not run against the lord's right to seize *quousque* until the time at which, after proclamation and notice, the tenant has failed to come in and be admitted (*Eccl. Commrs. v. Parr*, 1894, 2 Q. B. 420; *Beighton v. Beighton*, 64 L. J. Ch. 796). As to negligence in exacting fines and quit rents see *ante*, p. 118.

(2)
Wrongful
possession
commencing
on death.

(q) The second branch of sect. 3 deals with cases where wrongful possession commenced on the death of a rightful owner. "Thus where A., seised in fee in possession dies either intestate, leaving B. his heir, or having devised to B. in fee or for a less estate (*sed qu.*, *James v. Salter*, 3 Bing. N. C. 544), and C., a stranger, first obtains possession after the death of A., the time runs against B. from A.'s death, and not from C.'s entry" (1 Hayes, Conv. 248).

Lord *St. Leonards* seems to be of opinion that a rent newly created by will (as in *James v. Salter*, 3 Bing. N. C. 544) would fall within this second branch of sect. 3 (R. P. Stat. 22). But this opinion is questioned (*Darb. & Bos. Stat. Lim.* 2nd ed. 308).

A. let land to B. by parol from year to year, reserving rent payable in March and November. The last payment of rent was in March, 1846: A. died in December, 1846; time ran, under sect. 8, from the last payment of rent, and not from A.'s death, under sect. 3 (*Baines v. Lumley*, 16 W. R. 674).

(3)
Wrongful
possession
commencing

(r) The third branch of sect. 3 deals with cases where wrongful possession commenced on alienation in favour of the claimant by a rightful owner. On

the construction of the words "other than a will" in this branch, see *James v. Salter*, 3 Bing. N. C. 544. 3 & 4 Will. 4, c. 27, s. 3.

It was held in the Common Pleas (differing from *Doe v. Phillips*, 10 Q. B. 130) that the case of a *cestui que trust* holding land under a trustee does not fall within this clause (*Garrard v. Tuck*, 8 C. B. 231). on alienation by rightful owner.

(s) The fourth branch of sect. 3, together with sect. 20, and sect. 2 of R. P. Lim. Act, 1874 (*post*, p. 138), which has been substituted for sect. 5 of R. P. Lim. Act, 1833, deal with future interests. As to these see the note to sect. 2 of R. P. Lim. Act, 1874 (*post*, p. 139). (4) Future interests.

(t) The fifth branch of sect. 3 and sect. 4 deal with rights arising on forfeitures and breaches of conditions, as to which see note to sect. 4. (5) Forfeiture or breach of condition.

As to the rule that where when once time has commenced to run against the owner of land the running cannot be suspended, see *Garner v. Wingrove*, 1905, 2 Ch. 233; *Johnson v. Brock*, 1907, 2 Ch. 533; *Re Bermingham*, 5 Ir. R. Eq. 147, and *post*, p. 154. The rule as regards this in the case of time. personal estate is stated in the note to sect. 3 of the Lim. Act, 1623, *post*.

4. Provided always, that when any right to make an entry or distress, or to bring an action to recover any land or rent by reason of any forfeiture or breach of condition, shall have first accrued in respect of any estate or interest, in reversion or remainder, and the land or rent shall not have been recovered by virtue of such right, the right to make an entry or distress, or bring an action to recover such land or rent shall be deemed to have first accrued, in respect of such estate or interest, at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened. forfeiture is not taken by remainderman, he shall have a new right when his estate comes into possession.

The fifth branch of sect. 3 lays down a rule as to forfeitures or breaches of condition which was applied in *Re Orchard St. Schools*, 1878, W. N. 211. (1) Meaning of section.

Sect. 4 is a proviso upon the fifth branch. So if a lessee for years subject to a condition of re-entry breaks the condition, time runs against the reversioner in respect of his right of re-entry from the breach; but a bar to this right of re-entry will not affect the reversioner's right to enter on the expiration of the term (1 Hayes Conv. 252). The words "forfeiture" and "breach of condition" are to be read in their largest sense, and include forfeitures which give a right to land under a conditional limitation. So where land was limited to A. in tail with remainder to B., and there was a name and arms clause providing that in the event of a breach (which happened) A.'s estate should cease, B.'s right accrued upon A.'s death without issue, notwithstanding that more than the statutory period had elapsed since the breach (*Astley v. Essex*, 18 Eq. 290). Where land was given over to B. upon A. remarrying and receiving £50, B.'s right only accrued upon A. who had remarried receiving the money (*Connolly v. Leahy*, 1898, 2 I. R. 344). Sect. 4 preserves the old law under which a remainderman was not bound to enforce a forfeiture, and his right to enter upon the expiration of the particular estate was not affected by his having failed to do so (*Kemp v. Westbrook*, 1 Ves. sen. 278; *Doe v. Danvers*, 7 East, 759; *Doe v. Blakeway*, 5 Car. & P. 563).

On the question whether notice must be proved of a condition alleged to work a forfeiture, it has been laid down that a person who under a will takes a gift to which a condition is attached cannot plead want of knowledge of the contents of a will as an excuse for not complying with its provisions. A forfeiture will occur whether he has notice or not (*Astley v. Essex*, 18 Eq. 299; *Porter v. Fry*, 1 Vent. 199; 1 Mod. 86). It was held in early cases that the rule did not apply to a devisee who was the testator's heir and so

3 & 4 Will. 4,
c. 27, s. 4.

could have entered under another title; and that in such a case there must have been notice of the condition before there could be a forfeiture (*Fraunce's case*, 8 Rep. 89 A; Shepp. Touch. 148; *Mallon v. Fitzgerald*, 3 Mod. 29; *Skin. 125*; *Doe v. Beauclerk*, 11 East, 657; *Doe v. Crisp*, 8 Ad. & El. 779; *Murphy v. Broder*, Ir. Rep. 9 Ch. 123). But the rule has been recently applied where the devisee was the heir (*Horrigan v. H.*, 1904, 1 I. R. 271); and see sect. 3 of the Inheritance Act, 1833, *post*, providing that an heir shall take as devisee.

Clause of
re-entry for
non-payment
of rent.

With regard to express clauses of re-entry for non-payment of rent, it is settled that in Ireland a landlord is not barred from recovering rent by non-payment for the statutory period (*Cosbie v. Sugrue*, 9 Ir. L. R. 17; *Parke v. McLoughlin*, 1 Ir. C. L. R. 186; *Spratt v. Sherlock*, 3 Ir. C. L. R. 69; overruling *Doe v. Bingham*, 3 Ir. L. R. 456). In the case of an English lease containing such a clause, it has been suggested that (so far as the recovery of the land is concerned) a fresh right to re-enter accrues every time a fresh default in payment of rent is made (Darb. & Bos. Stat. Lim. 2nd ed. 338; see *Doe v. Bliss*, 4 Taunt. 725; *Macher v. Foundling Hospital*, 1 Ves. & B. 191). As to recovering arrears of rent, see sect. 42, *post*.

As regards the construction of clauses of forfeiture in leases, it is settled that even where a clause declares the lease shall be void on breach of condition by lessee, the lease is voidable only at the option of the lessor (*Davenport v. R.*, 3 App. Cas. 128). See further the notes to *Dumpor's case*, 1 Smith, L. C.

Entry for
forfeiture of
copyholds.

In the case of copyholds, the fifth branch of sect. 3 applies to forfeitures, and the lord's right of entry is barred where the statutory period has elapsed since the forfeiture (*Whitton v. Peacock*, 3 M. & K. 325). As regards forfeiture of copyholds generally the rule was that where the lord died before entry or seizure for forfeiture, the reversioner or remainderman could never take advantage of the forfeiture done or committed before their time (*Montagu's case*, Cro. Jac. 301; Co. Cop. s. 60; *Doe v. Hellier*, 3 T. R. 162; see *Doe v. Trueman*, 1 B. & Ad. 744; *Doe v. Bousfield*, 6 Q. B. 492); unless the act of forfeiture destroyed the estate (3 T. R. 173). As to seizure *quousque*, see *ante*, p. 136; as to fines and quit rents see p. 118; and generally as to the forfeiture of copyholds, see Scriven, 208 *et seq.*, 7th ed., Elton 223.

[Sect. 5 of the *R. P. Lim. Act*, 1833, has been repealed and the following substituted, *viz.*]

Provision for
case of future
estates (*i*).

[*R. P. Lim. Act*, 1874, sect. 2.] A right to make any entry or distress, or to bring an action (*a*) or suit to recover any land or rent, shall be deemed to have first accrued in respect of an estate or interest in reversion (*β*) or remainder, or other future estate or interest, at the time at which the same shall have become an estate or interest in possession, by the determination of any estate or estates in respect of which such land shall have been held, or the profits thereof or such rent shall have been received, notwithstanding the person claiming such land (*γ*) or rent, or some person through whom he claims, shall at any time previously to the creation of the estate or estates which shall have determined, have been in the possession or receipt of the profits of such lands, or in receipt of such rent (*δ*): But if the person last entitled to any particular estate on which any future estate or interest was expectant shall not have been in the possession or receipt of the profits of such land, or in receipt of such rent, at the time when his interest determined, no such entry or distress

Time limited
to six years
when person
entitled to the
particular
estate out of
possession,
&c.

shall be made, and no such action or suit shall be brought, by any person becoming entitled in possession to a future estate or interest, but within twelve years next after the time when the right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the person whose interest shall have so determined, or within six years next after the time when the estate of the person becoming entitled in possession shall have become vested in possession, whichever of those two periods shall be the longer, and if the right of any such person (*l*) to make such entry or distress, or to bring any such action or suit, shall have been barred under this act, no person (*m*) afterwards claiming to be entitled to the same land or rent in respect of any subsequent estate or interest under any deed, will, or settlement, executed or taking effect after the time when a right to make an entry or distress, or to bring an action or suit, for the recovery of such land or rent, shall have first accrued to the owner of the particular estate whose interest shall have so determined as aforesaid, shall make any such entry or distress, or bring any such action or suit, to recover such land or rent.

37 & 38 Vict.
c. 57, s. 2.

(*i*) By sect. 9 of the R. P. Lim. Act, 1874, the above section has been substituted for sect. 5 of R. P. Lim. Act, 1833; and the case of future estates and interests now depends upon the above section construed together with the fourth branch of sect. 3 and sect. 20 of R. P. Lim. Act, 1833, *ante*, p. 133, *post*, p. 158 (*Re Devon Settled Estates*, 1896, 2 Ch. 567).

The fourth branch of sect. 3 of the R. P. Lim. Act, 1833, must be read with sect. 2 of the R. P. Lim. Act, 1874; as to which see *Johnson v. Brock*, 1907, 2 Ch. 538, quoted below. The words of the fourth branch "or other future estate or interest" were said to comprehend all executory devises (*James v. Salter*, 3 Bing. M. 554; see *Doe v. Liversedge*, 11 M. & W. 517, for a "future estate"). Thus where land is limited to A. for life with remainder to B., or to A. in fee with an executory limitation in the event of A. dying under twenty-one to B., and A. dies or dies under twenty-one, time runs against B. from A.'s death (1 Hayes Conv. 251).

If husband and wife, being seised in fee in right of the wife, convey to a purchaser by a conveyance not operative to bind her, the wife, if she survives, and if not, her heir, may, on the husband's death, recover the land, notwithstanding the purchaser may have been in possession for forty years. The right of the wife in such a case is within the fourth branch of sect. 3, as being a future estate or interest (*Jumpsen v. Pitchers*, 13 Sim. 327; see *Hounsell v. Dunning*, 1902, 1 Ch. 512; *Price v. Copner*, 1 Sim. & Stu. 347). The case would be different if the husband and wife simply discontinued possession (*Sugden*, R. P. Stat. 83; see also *Cannon v. Rimington*, 12 C. B. 1).

Where a mortgagee had an equitable charge on a contingent reversionary interest in land, time ran against his right to foreclose from the date when the interest fell into possession (*Hugill v. Wilkinson*, 38 Ch. D. 482; see *Re Owen*, 1894, 3 Ch. 220; *Re Conlan*, 29 L. R. Ir. 199). In a case relating to a second mortgage of land the existence of the first mortgage did not make the mortgagee's interest a "future interest" so that time should run against him only from the satisfaction of the first mortgage (*Johnson v. Brock*, 1907, 2 Ch. 537). Even where the first mortgagee took possession (*ib.*; but see *Re Birmingham*, 5 Ir. R. Eq. 147).

In the case of leaseholds where a lessee retains possession but pays no rent for the statutory period, the landlord's right to recover the land accrues under the fourth branch of the third section upon the expiration of the term

Cases within the fourth branch of sect. 3. Executory limitations.

Husband and wife.

Mortgages. Second mortgagee.

Landlord and tenant.

37 & 38 Vict.
c. 57, s. 2.

Effect of
surrenders.
Possession at
the time by
trespasser.

No possession
at the time
by trespasser.

Tenant for
life and
remainder-
man.

Sect. 2 of R. P.
Lim. Act,
1874.

Proviso in
sect. 2.

(*Doe v. Oxenham*, 7 M. & W. 131). Where a trespasser has obtained possession of demised land, the landlord's right accrues upon the expiration of the term; and if a new lease be subsequently granted to the old lessee, this will not, as between the landlord and the trespasser, affect the running of time in any case where possession is not taken under the new lease (*Kennedy v. Woods*, 1 R. 1 C. L. 76; 2 C. L. 436). Where during the term a trespasser has obtained possession of demised land, and the lessee surrenders his lease while time is running in favour of the trespasser (as between him and the lessee), the right to recover the land accrues to the landlord upon the surrender (*Eccl. Comrs. v. Rowe*, 5 A. C. 741). But where at the date of the surrender, time had run in favour of the trespasser (as between him and the lessee), the right to recover the land did not accrue to the landlord on the surrender, but only on the expiration of the term (*Walter v. Yalden*, 1902, 2 K. B. 304). Where the same trustee held leases of Blackacre and Whiteacre (adjoining properties) on different trusts, and a person entitled as *c. q. t.* to possession of Whiteacre and by reason of such possession obtained possession of Blackacre, and during such possession the trustee surrendered the lease of Blackacre and obtained a new lease, it was held that the possession in law of Blackacre at the date of the surrender was in the trustee, and that the surrender and new lease being accordingly valid, the landlord's right to recover only accrued on the expiration of the new lease (*East Stonehouse Council v. Willoughby*, 1902, 2 K. B. 318). So where during the existence of a sub-lease (under which the sub-lessee was in possession) the head lease was surrendered and a new head lease was granted (which was valid under sect. 6 of the Landlord and Tenant Act, 1730), the landlord's right to recover the land did not accrue until the expiration of the new head lease (*Eccl. Comrs. v. Treemer*, 1893, 1 Ch. 166).

The provision contained in the fourth branch of sect. 3 of the R. P. Lim. Act, 1833, was applied where there was a tenancy for life during which time did not run against the remainderman (*Gery v. Redman*, 1 Q. B. D. 161). So where A., a tenant for life alienated in fee, time did not run against the remainderman until the death of A. (*Doe v. Rolfe*, 8 Ad. & El. 850; see *Scott v. Scott*, 4 H. L. C. 1084). In one case the effect of a resettlement was considered, and the owner of a new future estate was held to have the same time for suing as the owner of the old estate (out of which the new future estate had been carved) would himself have had (*Doe v. Edmonds*, 6 M. & W. 295).

Sect. 5 of the R. P. Lim. Act, 1833, has been replaced by sect. 2 of the R. P. Lim. Act, 1874. The language of the former section has been repeated in the part of the latter section (above) which precedes (k), with the addition, however, of the following words in the following places, viz. at (a) "or suit"; at (b) "or remainder or other future estate or interest"; at (γ) "or rent."

Sect. 2 of the R. P. Lim. Act, 1874, deals with the case where the persons interested in the right of action for the recovery of land are more than one; for example, a tenant for life and remainderman. For the purpose of ascertaining in such a case the statutory periods necessary to extinguish the right, the section gives the remainderman or reversioner a separate and distinct right of action. This view is indicated by the marginal note to sect. 5 (repealed), "reversioner to have a new right" (*Johnson v. Brock*, 1907, 2 Ch. 538).

Sect. 5 of R. P. Lim. Act, 1833, was held to apply only to cases where a person other than the reversioner was entitled to the particular estate (*Doe v. Mouldsdales*, 16 M. & W. 689, see p. 698). The saving of the section was applied to a term to secure an annuity (*Re Bermingham*, 1 R. 5 Eq. 147).

(k) The proviso which follows here did not occur in R. P. Lim. Act, 1833, s. 5. The reversion in fee expectant on a term of years has been held not to be a "future estate or interest expectant on a particular estate" within the meaning of the proviso (*Walter v. Yalden*, 1902, 2 K. B. 304). Where A., tenant for life, aliened, and the alienee entered, and seventeen years afterwards A. died, and the remainderman brought ejectment more than six but less than twelve years after A.'s death, the action was not

barred. The proviso did not apply, inasmuch as the alienee and not A. was held to be "the person last entitled to the particular estate." And under the earlier part of the section the plaintiff had twelve years from A.'s death (*Pedder v. Hunt*, 18 Q. B. Div. 565). Land was limited to A. for life, remainder to B. for life, remainder in fee to C., whose estate arose under the exercise of a general power of appointment vested in A. by the settlement. Possession by a stranger had barred A.'s title at his death in 1888. B. died in 1891 without having recovered possession. In 1896 it was held that C.'s title was not then barred, the case falling within the above proviso. The court declined to hold that sect. 1 of the Act of 1874 barred C. as being a person claiming under A., or to hold that the general power of appointment was another "right" of A. so as to bring the case within sect. 20 of the Act of 1833 (*Re Devon Settled Estates*, 1896, 2 Ch. 562).

(l) This seems to mean the person becoming entitled in possession to a future estate or interest.

(m) This provision seems intended to apply only to persons claiming under the person barred under the earlier part of the section.

The various cases (1) where the owner of an estate in possession grants out of it a particular estate with reversion or remainders following, after time has commenced to run against him; (2) where the owner of an estate in remainder deals with it after time has commenced to run against the first particular estate; and (3) where a tenant for life and remainderman deal with the estate while time is running against the tenant for life, are discussed in relation to these sections in *Darb. & Bos. Stat. Lim.* 318 *et seq.*

6. For the purposes of this act an administrator claiming the estate or interest of the deceased person of whose chattels he shall be appointed administrator, shall be deemed to claim as if there had been no interval of time between the death of such deceased person and the grant of the letters of administration.

An administrator to claim as if he had obtained the estate without interval after death of deceased.

(1) *Old Rule...*141.

(2) *Cases on the Section...*141.

(3) *Distinction between Executor and Administrator and Administrator's Rights...*141.

Under the law before this act time only ran from the grant of administration. Hence a right to a chattel interest in lands might, notwithstanding adverse possession, have been kept alive to the expiration of the term, however long (see *Stanford's case*, Cro. Jac. 61; cited in *Cary v. Stephenson*, 2 Salk. 421; *S. C.*, Carth. 335; Skinn. 555; 4 Mod. 376; *Fairclaim v. Little*, cited in 5 B. & Ald. 214). The object of this section was to make time with respect to chattels real run from the time when the right of entry arose (see 1st Real Prop. Rep. p. 48).

As regards leaseholds time runs under this section against the administrator from the death of the intestate (*Davies v. Williams*, 34 Ch. D. 558). As regards freeholds vested in an administrator by the Land Transfer Act, 1897, it seems that the same rule will apply (L. T. Act, 1897, s. 1, sub-s. 1; s. 2, sub-s. 2, *post.*) The above section of the R. P. Lim. Act, 1833, applies to cases arising in respect of charges on land, as well as to cases arising under the earlier part of the Act (*Re Bonsor and Smith*, 34 Ch. D. 560, n.).

The distinction between an administrator and an executor is, that an administrator derives his title wholly from the probate court, and has none until administration is granted, and the property and rights of the deceased vest in him only upon the grant (*Woolley v. Clark*, 5 B. & Ald. 744; *Pratt v. Swain*, 8 B. & C. 287). The title of an administrator, however, though it

(1) Old rule that time ran from grant of administration.

(2) Cases on the section.

(3) Distinction between administrator and executor.

3 & 4 Will. 4, does not exist until the grant, relates back to the time of the death of the intestate (*Re Pryse*, 1904, P. 305); so as to entitle him to recover against a wrongdoer who has seized or converted the goods of the intestate after his death in an action of trespass or trover (*Tharpe v. Stallwood*, 5 M. & G. 760; *Foster v. Bates*, 12 M. & W. 233; *Welshman v. Sturgess*, 13 Q. B. 522; see *Hill v. Curtis*, 1 Eq. 100). The grant has the effect of vesting leaseholds in the administrator by relation, so as to enable him to sue for all matters affecting such leaseholds subsequent to the death, and to render him liable to account for rent and profits from the death (*R. v. Horsley*, 8 East, 410). But this doctrine of relation exists only in cases where the administrator's act is for the benefit of the estate (*Morgan v. Thomas*, 8 Exch. 302; see *Re Watson*, 19 Q. B. Div. 234). Nor does relation back divest any right legally vested in another between the death and the grant, so as to enable an administrator, who had obtained administration after an execution issued against the intestate's tenant, to call on the sheriff to pay one year's rent, pursuant to 8 Anne, c. 17 (*Waring v. Dewberry*, Gilb. Eq. Rep. 223, cited in 1 Str. 97; Fortesc. 360; *S. C.*, Vin. Abr. Executors (Q)).

Where a grant of administration was obtained by suppressing a will containing no appointment of executors and the grant was subsequently revoked, a previous sale of leaseholds by the administratrix was upheld (*Boxall v. Boxall*, 27 Ch. D. 220). But where the suppressed will appointed an executor, a grant of administration was wholly void and dispositions of the assets by the supposed administrator were treated as void also, with the exception of acts which the administrator was compellable to do (*Ellis v. Ellis*, 1905, 1 Ch. 613; compare *Craster v. Thomas*, 1909, 2 Ch. 348, a decision under the Indian Succession Act, 1865; *Re West, West v. Roberts*, 1909, 2 Ch. 180).

An executor. On the other hand an executor derives his title from the will itself, the property vesting in him from the testator's death (*Hickman v. Walker*, Willes, 27). An executor before probate can do almost anything incident to his office. But if the legal validity of acts done before probate is challenged, probate must be produced (*A.-G. v. New York Co.*, 1898, 1 Q. B. 216; *Re Stevens, Cook v. Stevens*, 1897, 1 Ch. 429). Probate is only evidence, not the source of an executor's title. Before probate he can even sell property (*Sykes v. Sykes*, L. R. 5 C. P. 118). He can give a good receipt for money (*Re Masonic Co.*, 32 Ch. D. 374; *Re Stevens, sup.*). He can assign leaseholds (*Re Pawley and London Bank*, 1900, 1 Ch. 64), and can enter on land demised (*R. v. Stone*, 6 T. R. 298; see *Fenton v. Clegg*, 9 Ex. 680). The power, rights and duties of representatives in respect of chattels real are further stated in the note to L. T. Act, 1897, s. 2, sub-s. 2 (*post*).

An executor or administrator is not deemed to be in possession of things immoveable, as leases for years or houses, before entry (*Went. Off. Ex.* 228, 14th ed.); although a reversion of a term, which the testator granted for part of the term, is in the executor immediately on the testator's death (*Trattle v. King*, T. Jones, 170).

Cross references. As to the running of time under Lim. Act, 1623, in the case of executors and administrators, see *post*, p. 227.

In the case of a tenant at will, the right shall be deemed to have accrued at the end of one year.

7. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant at will, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: provided always, that no mortgagor or cestui

que trust shall be deemed to be a tenant at will, within the 3 & 4 Will. 4, meaning of this clause, to his mortgagee or trustee. c. 27, s. 7.

(1) Operation of Sect. 7...143.

(2) Proviso as to Mortgagors and cestui que trusts...144.

(1)

This section did not apply to cases where the tenancy at will had been determined before the passing of the act (*Doe v. Page*, 5 Q. B. 767, see p. 772; *Doe v. Thompson*, 6 Ad. & Ell. 721; *Doe v. Bold*, 11 Q. B. 127). But where the tenancy was subsisting at the passing of the act, time ran from the expiration of one year after the expiration of the tenancy (*Doe v. Moore*, 9 Q. B. 555). Tenancies within the section;

Where a bargainee took possession of land included in an indenture of bargain and sale which was not enrolled, this operated to make the bargainee a tenant at will, and time began to run in his favour from the end of the first year (*Low Moor Co. v. Stanley Co.*, 34 L. T. 186). The occupation for twenty-six years by guardians of public offices belonging to a corporation without payment of rent was held to be a tenancy at will, the guardians acquiring a title under this section (*Brighton v. Brighton Guardians*, 5 C. P. D. 368; compare *Kingston v. Kingston*, 1897, A. C. 507). Persons were held to occupy as guests of the true owner, not tenants at will within this section (*Peakin v. Peakin*, 1895, 2 I. R. 359).

A tenancy at will of the waste of a manor was held to be created by a licence from the lord (*A.-G. v. Tomline*, 15 Ch. Div. 150, 157), even where a yearly rent was reserved (*Hodgson v. Hooper*, 3 Ell. Ell. 149, 29 L. J. Q. B. 222); in which last case it was said that each successive payment of rent was a fresh acknowledgment that the land was held by permission of the lord. As to the effect of such a payment consider also sect. 35, *post*. Where a lessee, with the verbal consent of the lessor, enclosed land adjoining his holding (which land was in fact waste belonging to the lessor as lord of a manor), this did not create such a tenancy as is referred to in sect. 7 (*Whitmore v. Humphries*, L. R. 7 C. P. 1).

Where, after the expiration of one year from the commencement of a tenancy at will, the tenancy has been determined, and no new tenancy has been created, time runs not from the determination, but from the expiration of the year (*Doe v. Carter*, 9 Q. B. 863; *Doe v. Turner*, 7 M. & W. 226). But where a new tenancy has been created time runs from the determination of such new tenancy, or from the expiration of one year after the commencement thereof, without regard to the original tenancy (*Locke v. Matthews*, 13 C. B. N. S. 753; 11 W. R. 343; *Turner v. Doe*, 9 M. & W. 643; see *Doe v. Rock*, 4 M. & Gr. 30; *Thorp v. Facey*, 35 L. J. C. P. 349). New tenancies were held to have been created in *Locke v. Matthews* and *Turner v. Doe*, *sup.*; and see *Jarman v. Hale*, 1899, 1 Q. B. 994. Where time has begun to run after the expiration of one year from the commencement of a tenancy at will, the question of a subsequent determination of the original tenancy is only relevant so far as it may be preliminary to the creation of a fresh tenancy at will after the determination of the first, and within the period of limitation (*Day v. Day*, L. R. 3 P. C. 761; *Wimbledon v. Nicol*, 10 T. L. R. 247). Tenancy determined after expiration of one year; no new tenancy created; new tenancy created;

Where parish overseers determined a pauper's tenancy at will by turning him out, and he subsequently resumed possession, no new tenancy at will being created, time ran against the overseers from the pauper's subsequent resumption of possession without any regard to the original tenancy (*Randal v. Stevens*, 2 E. & B. 641). And where B.'s occupation of land began by the permission of the owner A., and A. from time to time came on the land and gave B. directions as to cutting trees and repairs, it was said that every time A. came on the land, time commenced afresh to run against him (*Allen v. England*, 3 F. & F. 49; see *Doe v. Groves*, 10 Q. B. 486). On the other hand see *Lynes v. Snaitth*, 1899, 1 Q. B. 486, where the landlord entered to do repairs, but it was not shown that the repairs were done against the tenant's will and the result was different. Resumption of possession.

3 & 4 Will. 4, c. 27, s. 7. See, as to the creation and determination of tenancies at will, the notes to *Richardson v. Langridge* (Tudor, L. C. Conv. 11, 4th ed.); and *Clayton v. Blakey* (2 Smith, L. C. 124, 10th ed.); Woodfall, 16th ed., 238; Foa. 2, 596.

(2)

Proviso as to mortgagors and *cestui que trusts*.

Relation between mortgagee and mortgagor in possession.

The proviso as to mortgagors and *cestui que trusts* was introduced to prevent the title of the mortgagee or trustee from being barred in twenty-one years in those cases in which a mortgagor or *c. q. t.* in possession was held to be tenant at will to the mortgagee or trustee.

The relation between mortgagee and mortgagor in possession is perfectly anomalous and *sui generis* (*Cholmondeley v. Clinton*, 2 Jac. & W. 183). The mortgagor is only like a tenant at will to the mortgagee, his legal interest being inferior to that of a strict tenant at will (Doug. 22, 282, 283). The mortgagor is not entitled to the growing crops after the will is determined, as in the case of a tenant at will (*Birch v. Wright*, 1 T. R. 383; see Coote on Mortgages, 7th ed., 679; *Walmsley v. Milne*, 7 C. B. N. S. 133). "It is now established, that a mortgagor only holds the possession of the land, and receives the rent of it, by the will or permission of the mortgagee, who may by ejectment, *without giving notice*, recover against him or his tenant. In this respect, the estate of a mortgagor after default is not more than that of a tenant by sufferance, and he may be treated as such or as a trespasser, at the election of a mortgagee (*Doe v. Maisey*, 8 B. & C. 767; see *Wheeler v. Montefiore*, 1 Gale & D. 493). And this is so, even where by the mortgage deed the mortgagor attorned to the mortgagee as tenant at a quarterly rent, which was stated to be done for the purpose of securing the principal and interest, and in contemplation and part discharge thereof (*Doe v. Tom*, 4 Q. B. 615). A mortgagor may be tenant at will to the mortgagee notwithstanding the reservation of a yearly rent by the mortgage deed (*Doe v. Davies*, 7 Exch. 89; *Doe v. Cox*, 11 Q. B. 122; *Walker v. Giles*, 6 C. B. 662; see the *Metropolitan Co. v. Brown*, 4 H. & N. 428). The receipt of rent may prevent the mortgagee from treating the mortgagor as a trespasser (*Doe v. Hales*, 7 Bing. 322). The mere receipt, however, of interest from the mortgagor is not a recognition by the mortgagee that the mortgagor is in lawful possession (*Scobie v. Collins*, 1895, 1 Q. B. 375; see *Doe v. Cadwallader*, 2 B. & Ad. 473). In *Doe v. Barton* (11 Ad. & Ell. 314), *Denman, C. J.*, said, "It is very dangerous to attempt to define the precise relation in which mortgagor and mortgagee stand to each other in any other terms than those very words; but thus much is established by the cases of *Partridge v. Bere* (5 B. & Ald. 604), and *Hitchman v. Walton* (4 M. & W. 409), that the mortgagee may treat the mortgagor as being rightfully in possession, and himself as reversioner; so that, as long as he be not treated as a trespasser, his possession is not hostile to, nor inconsistent with, the mortgagee's right."

A mortgagor in possession may, as against a mortgagee, grant leases in certain cases (Conv. Act, 1881, s. 18, *post*); and where the mortgagee has not given notice of his intention to take possession or enter into receipts of rents, the mortgagor may sue for rent or possession (Jud. Act, 1873, s. 25 (5)).

See further, as to the relation between a mortgagee and a mortgagor in possession, the note to *Keech v. Hall* (1 Smith, L. C.), and Tudor, L. C. Conv. 13, 4th ed. Laws of England, vol. 10, p. 375, note.

Where a mortgagor in possession fails to pay principal or interest, the rule of limitation is laid down by R. P. Lim. Act, 1837 (*post*), read in connection with the R. P. Lim. Act, 1874, sect. 9 (*post*). Under these provisions a mortgagee may bring an action to recover the land within twelve years after the last payment of principal or interest.

Meaning of the proviso as to *cestui que trusts*.

The proviso as to *cestui que trusts* is equivalent to saying, that the right of entry of a trustee against his *cestui que trust* shall not be deemed to have first accrued at the expiration of one year next after the commencement of

the tenancy; and the exception seems to be introduced in order to prevent the necessity of any active steps being taken by the trustee to preserve his estate from being destroyed, as in the case of an ordinary tenancy at will, by mere lapse of time (*Garrard v. Tuck*, 8 C. B. 231). 3 & 4 Will. 4, c. 27, s. 7.

According to the decisions before the R. P. Lim. Act, 1833, the possession of the *c. q. t.* was not adverse to the trustee, if such possession was consistent with the deed and the object of the trust (*Keene v. Deardon*, 8 East, 248; *tee and cestui Smith v. King*, 16 East, 283). And a *c. q. t.* in possession with the acquiescence of the trustee was treated as his tenant at will (4 Bac. Abr. 198; *Smith v. Pierce*, 3 Mod. 195; *Focus v. Salisbury*, Hard. 400; *Freeman v. Barnes*, 1 Vent. 55, 80; 1 Lev. 270; *Pomfret v. Windsor*, 2 Ves. sen. 472, 481; *Gree v. Rolle*, 1 Ld. Raymond, 716). In a case since this act, a *c. q. t.* let into possession by the trustee became a tenant at will, and while the estate at will remained, time did not run against the trustee (*Garrard v. Tuck*, *sup.*; see *Jones v. Phipps*, L. R. 3 Q. B. 567). Again the proviso applied so as to preserve a trustee's estate in a case where a *c. q. t.* was in possession (*East Stonehouse Council v. Willoughby*, 1902, 2 K. B. 318, 334). On the other hand, in *Re Cussons*, 73 L. J. Ch. 296, the legal estate of a bare trustee holding upon an express trust was held to have been destroyed by the possession of the *c. q. t.* for twelve years.

As to the question whether the proviso includes implied trusts, the word "express" which occurs in sect. 25 (*post*) does not occur in the proviso. It was the opinion of *Kay*, L. J., that the proviso includes implied trusts (*Warren v. Murray*, 1894, 2 Q. B. 657). And the proviso was extended to an intended lessee who entered and remained in possession under an agreement for lease, no lease being granted (*Ib.*; *Drummond v. Sant*, L. R. 6 Q. B. 763). The contrary opinion has been held by other Judges (*Doe v. Rock*, 4 M. & Gr. 32; *Sands to Thompson*, 22 Ch. D. 618). Thus, where a mortgage was paid off, but no re-conveyance was executed, and the mortgagor remained in possession for thirteen years, it was held that the legal estate in the mortgagee had been extinguished (*Sands to Thompson*, 22 Ch. D. 614). *Fry*, J., said that the relation of mortgagor and mortgagee no longer subsisted; and further that the mortgagee was not a trustee, and the mortgagor was not a *c. q. t.* within the proviso (*Sands to Thompson*, 22 Ch. D. 618; see *Teevan v. Smith*, 20 Ch. D. 730).

The doctrine that a *c. q. t.* in possession by the acquiescence of the trustee must be regarded as tenant at will, only applies where the *c. q. t.* is the actual occupant. If he is only allowed to receive the rents of land occupied by a tenant he is merely a bailiff of the trustees. And if the actual occupier holds for the statutory period without paying rent, the trustees lose their title (*Melling v. Leak*, 16 C. B. 652). Again where some *c. q. t.* in spite of the trustees and to the exclusion of the other *c. q. t.* received the whole rents the others were barred (*Burroughs v. M'Creight*, 1 J. & Lat. 290). So where some beneficiaries held for the statutory period a wrongful possession of the land, the trustees' legal estate was extinguished, and thereby the trusts affecting that estate were also extinguished (*Bolling v. Hobday*, 31 W. R. 9).

8. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent, as tenant from year to year or other period, without any lease in writing, the right of the person entitled subject thereto, or of the person through whom he claims, to make an entry or distress, or to bring an action to recover such land or rent, shall be deemed to have first accrued at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall last happen).

3 & 4 Will. 4,
c. 27, s. 8.

Cases under
this section ;
lease in
writing ;
payment of
rent ;

date from
which time
runs.

The 8th section applied to tenancies from year to year, created before and existing at the passing of the act (*Doe v. Sumner*, 14 M. & W. 39).

The lease in writing referred to in this section by which a case would be taken out of its operation, must be not merely an instrument which was evidence of the conditions of holding but one passing an interest (*Doe v. Gower*, 17 Q. B. 599).

The reservation and receipt of any rent, however small, will create the legal relation of tenancy from year to year for the purposes of the act (*Magdalen Hospital v. Knotts*, 4 App. Cas. 324). The rent may be any service for which distress may be made (sect. 1, *ante*), and accordingly includes cleaning the parish church and ringing the bell (*Doe v. Benham*, 7 Q. B. 976). Where the tenancy is disputed, the circumstances connected with the annual payments are very important, for if the person paying makes the payment expressly or impliedly on account of something else than rent of land of which he is tenant, that would not be a payment of rent within this section (*A.-G. v. Stephens*, 6 D. M. & G. 146). Payment of rent within this section may be proved by parol admission (*Doe v. Beckett*, 4 Q. B. 601).

Where after the expiration of twenty years during which no rent had been paid, the tenant within five years before action paid some arrears, time ran under this section from the last payment of rent; and sect. 34 did not extinguish the title of the reversioner (*Bunting v. Sargent*, 13 Ch. D. 330; see, however, as to this last point, *Sanders v. S.*, 19 Ch. Div. 373, and cases quoted *post*, p. 180). Where A. let land to B. by parol from year to year, reserving rent payable in March and November, the last payment of rent was in March, 1846. A. died in December of the same year, and B. retained possession. Time ran from the last payment of rent, and not from the death of A. (*Baines v. Lumley*, 16 W. R. 674).

Where a tenant from year to year remains in possession without paying rent, on the expiration of the statutory period the right of the landlord is barred not only to the land but also to any arrears of rent (*Re Jolly, Gathercole v. Norfolk*, 1900, 2 Ch. 618).

As to the creation and determination of a tenancy from year to year, see Foa, "Landlord and Tenant," 2, 606, 4th ed.

Where rent
amounting to
20s. reserved
by a lease in
writing shall
have been
wrongfully
received, no
right to
accrue on the
determina-
tion of the
lease.

9. When any person shall be in possession or in receipt of the profits of any land, or in receipt of any rent (*charge*), by virtue of a lease in writing, by which a rent amounting to the yearly sum of twenty shillings or upwards shall be reserved, and the rent reserved by such lease shall have been received by some person wrongfully claiming to be entitled to such land or rent (*charge*) in reversion immediately expectant on the determination of such lease, and no payment in respect of the rent reserved by such lease shall afterwards have been made to the person rightfully entitled thereto, the right of the person entitled to such land or rent (*charge*), subject to such lease, or of the person through whom he claims to make an entry or distress, or to bring an action after the determination of such lease, shall be deemed to have first accrued at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming as aforesaid; and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled.

(1) *Cases under sect. 9...*147.

(2) *Old Law...*147.

According to the judgment of Lord Denman, C.J., in *Doe v. Angell* 3 & 4 Will. 4, (9 Q. B. 356), this section is to be read as if the word "charge" in italics c. 27, s. 9. had been interposed as above (see *Baines v. Lumley*, 16 W. R. 675).

In *Doe v. Angell* (9 Q. B. 328) there was an adverse receipt of rent which would have barred an action under this section. In that case Lord Denman discussed the meaning of the word "rent" in the R. P. Lim. Act, 1833, pointing out that it meant rent-charge in sections 2, 3, 4, 5, 7, 8 and 9 (see *Baines v. Lumley*, 16 W. R. 675).

The right to recover land subject to a lease is to be considered under this section as having accrued from the time when the person claiming under a lease pays rent to a party claiming wrongfully in reversion immediately expectant on such lease (*Chadwick v. Broadwood*, 3 Beav. 316; see *Cholmondeley v. Clinton*, T. & R. 107). There must be payment to a third party (1) Cases under sect. 9. *Doe v. Angell*. described as claiming the reversion wrongfully (*Sloane v. Flood*, 5 Ir. C. L. 75). The true owner is excluded by wrongful receipt of rent; which does not occur where rent is received by a person claiming to receive on behalf of the true owner (*Lyell v. Kennedy*, 14 App. Cas. 460). There was no wrongful claim of the reversion either in the case of a widow who was presumed to have received on behalf of her children the rent of settled land (*Shaw v. Keighron*, I. R. 3 Eq. 574); or where Blackacre and Whiteacre were leased at one rent, and subsequently Blackacre was sold and conveyed without apportionment of the rent, and the whole rent continued to be paid to the owner of Whiteacre (*Laybourn v. Gridley*, 61 L. J. Ch. 353). A person claiming without any real title to be entitled to land is a person "wrongfully" claiming within this section, although the claim may be put forward under a mistake, and without improper intention to deprive others of their property (*Williams v. Pott*, 12 Eq. 149). For the bearing of this section on the case where there is a lease and a sub-lease, and the parties claiming under the sub-lease pay their rent directly to the head landlord, see *Drew v. Lord Norbury* (3 J. & Lat. 306; *Hayes v. Woodley*, 3 Ir. Ch. R. 142; *Twiss v. Noblett*, I. R. 4 Eq. 60). (2) Wrongful receipt of rent within this section.

The rule of law before this statute was, that where there was a subsisting lease, the right of entry was preserved until the determination of the lease although no rent had been received (*Orrell v. Maddox*, Runn. Eject. App. No. 1). And the adverse receipt of rent for more than twenty years did not deprive the party of such right of entry (*Doe v. Danvers*, 7 East, 299; see *Bushby v. Dixon*, 3 B. & C. 304). But in such a case a bill in equity for discovery was dismissed (*Cholmondeley v. Clinton*, T. & R. 107). A void lease or an attendant term did not prevent time running (*Taylor v. Horde*, 1 Burr. 60). Law before the statute.

The mere receipt of rent by a stranger was not evidence of adverse possession, even although the stranger made a lease by indenture, reserving rent, unless he made an actual entry (Bull. N. P. 104; 1 Roll. Abr. 659; and see *Smith v. Parkhurst*, Andr. 324; *Jayne v. Price*, 5 Taunt. 326). So if a tenant at will made a lease for years, and the lessee entered, though the estate at will did not warrant the lease, it was only a disseisin at election (*Blunden v. Baugh*, Cro. Car. 302). For where a person gains a possession under a title consistent with that of the person having right, it is but a disseisin at election (see *Hovenden v. Annesley*, 2 Sch. & Lef. 622; 1 Taunt. 599).

The real property commissioners observed, "Where rent is reserved on a lease, we consider it more reasonable that the limitation should run from the time when the rent began to be received by a person claiming adversely, so that there shall not be a new period of limitation from the expiration of the lease. The receipt of rents and profits is equivalent to the occupation of the soil: the person who is in the receipt of them can do nothing more to establish his right, and the person to whom they are demised is virtually dispossessed. Where no rent or only a nominal rent is reserved, very slight negligence can be imputed to the reversioner in merely not requiring a recognition of his title from the tenant, and, in such cases, till the expiration

3 & 4 Will. 4, of the lease, we think there should not be a commencement of adverse possession to bar the landlord. Any rent less than 20s. a year may for this purpose be considered nominal" (1 Real Prop. Rep. 47).

On disclaimer of the landlord's title, see Woodfall's L. & T. 387 *et seq.*, 16th ed.

A mere entry not to be deemed possession. 10. No person shall be deemed to have been in possession of any land within the meaning of this act merely by reason of having made an entry thereon.

Old law.

By the Limitation Act, 1623, it was enacted, that no entry should be made by any man upon lands, unless within twenty years after his right should accrue. By the stat. 4 & 5 Ann. c. 16, s. 14, it was enacted, that no entry upon lands should be of force to satisfy the Limitation Act, 1623, or to avoid a fine levied of lands, unless an action were thereupon commenced within one year after, and prosecuted with effect (see 1 Wms. Saund. 319, n. (1); 10 B. & C. 848).

Cases on section.

The section applies to a mere entry, as for the purpose of avoiding a fine, which may be made by stepping on any corner of the land in the night-time and pronouncing a few words, without any attempt or intention or wish to take possession (*Randall v. Stevens*, 2 E. & B. 652; compare *Solling v. Broughton*, 1893, A. C. 556, where the entries were made *animo possidendi*).

Acts sufficient to interrupt adverse possession.

The defendant being in adverse possession of a hut and land, the lord of the manor entered, in the absence of the defendant but in the presence of his family, and said he took possession in his own right, and he caused a stone to be taken from the hut, and a portion of the fence to be removed. These acts were not sufficient to disturb the defendant's possession (*Doe v. Combes*, 9 C. B. 714). But where the only adverse possession taken by the defendant consisted in the erection of a fence, and the plaintiff entered and wholly destroyed the fence, the defendant's possession was disturbed (*Worssam v. Vandenbrande*, 17 W. R. 53).

No right to be preserved by continual claim.

11. No continual or other claim upon or near any land shall preserve any right of making an entry or distress or of bringing an action.

Previously to the enactment in this and the preceding section an actual entry made by one who had a legal right to enter on an estate, or by his agent duly authorized by power of attorney, if made peaceably and repeated once in the space of every year and a day (which was called *continual claim*), was deemed sufficient to prevent the right of entry from being tolled by a descent cast or discontinuance, or barred by the Statute of Limitations (Litt. ss. 414, 415; Runn. Eject. 51, 52, 2nd ed.; Ad. Eject. 101, 3rd ed.; *Ford v. Grey*, 1 Salk. 285). Actual entry was sufficient to keep alive the right of a person disseised; but a mere demand, without process or acknowledgment, was not sufficient against the Statute of Limitations (*Hodley v. Healey*, 1 Ves. & B. 540).

Possession of one coparcener, &c., not to be the possession of the others.

12. When any one or more of several persons entitled to any land or rent as coparceners, joint tenants, or tenants in common, shall have been in possession or receipt of the entirety, or more than his or their undivided share or shares of such land, or of the profits thereof, or of such rent, for his or their own benefit, or for the benefit of any person or persons other than the person or persons entitled to the other share or shares of the same land or rent, such possession or receipt shall not be deemed to have been the possession or receipt of or by such last-mentioned person or persons, or any of them.

- (1) *Old Law as to Coparceners*...149.
- (2) *Cases under sect. 12*...149.
- (3) *Occupation by Co-owners*...149.

3 & 4 Will. 4,
c. 27, s. 12.

Coparceners, joint tenants, and tenants in common, having a joint possession and occupation of the whole estate, it was a settled rule of law that the possession of any one of them was the possession of the others or other of them, so as to prevent the statutes of limitation from affecting them; nor did the bare receipt of all the rents and profits by one operate as an ouster of the other (Co. Litt. 243 b, n. (1), 373 b; *Ford v. Grey*, 1 Salk. 285; 6 Mod. 44; Br. Coparceners; 1 Moore, 868; Burton's Compendium, 395 *et seq.*; see *Doe v. Keen*, 7 T. R. 386; *Doe v. Pearson*, 6 East, 173; *O'Sullivan v. M'Swiney*, 1 Long. & T. 111; *Denys v. Shuckburgh*, 4 Y. & C. Ex. 42). But the possession of one heir in gavelkind was held not to be that of the other, where he entered with an adverse intent to oust the other (*Davenport v. Tyrrel*, 1 Bl. R. 675).

This section makes the possession of one coparcener, joint tenant, or tenant in common, who has been in possession of the entirety, separate from the time of his coming into possession (*Culley v. Doe*, 11 Ad. & Ell. 1008; *O'Sullivan v. M'Swiney*, 1 Long. & T. 118, 119; *Doe v. Horrocks*, 1 Car. & K. 566). Consequently, the entry of one coparcener cannot have the effect of vesting the possession in the other (*Woodroffe v. Doe*, 15 M. & W. 792; 2 H. L. C. 833). One coparcener was held barred by the receipt of the whole rents by another coparcener and his widow for more than the statutory period, although an estoppel enabled him to succeed in another right (*Weeks v. Birch*, 69 L. T. 759). Where there was a parol partition and separate possession for more than twenty years it could not be questioned (*Paine v. Ryder*, 24 Beav. 151).

Lands were conveyed in trust for five tenants in common. For more than twenty years four had been in the exclusive receipt of the rents, the trustee never having interfered. The title of the fifth was barred; the case not being within the saving of the 25th section (*Burroughs v. M'Creight*, 1 J. & Lat. 290; *Bolling v. Hobday*, 31 W. R. 9). And where a father was in receipt of the whole rents of a property one undivided share of which belonged to an infant child, and another to an adult child, the adult was barred after the statutory period, although, as regards the infant's share, the father was considered as the infant's bailiff (*Re Hobbs, Hobbs v. Wade*, 36 Ch. D. 553). A presumption that one tenant in common had accounted to his co-tenant for a share of the rents was raised in *Sanders v. Sanders* (19 Ch. Div. 373). This section applies, not only where one of several joint tenants has been in possession of the entirety of the whole of the lands held jointly, but also where such tenant has been in possession of the entirety of any portion of such lands (*Murphy v. Murphy*, 11 Ir. C. L. R. 205, where *Tidball v. James*, 29 L. J. Ex. 91, is explained). The owner of one undivided moiety of land was barred by the sole possession of the owners of the other (*Thornton v. France*, 1897, 2 Q. B. 143). Similarly one tenant in common of minerals was barred by the possession of another to the extent to which such possession had been actual (*Glyn v. Howell*, 1909, 1 Ch. 666).

Where two persons were in lawful possession of a copyhold, and the title under which they held came to an end, but they continued in possession for twenty-one years, it was decided that they held on as joint tenants; and inasmuch as they had done nothing to sever their tenancy, the interest of the one who died first determined on his death (*Ward v. Ward*, 6 Ch. 789; *Bolling v. Hobday*, 31 W. R. 9; see *Williams v. Williams*, 2 Ch. 294; *Smith v. Savage*, 1906, 1 I. R. 469).

Where one tenant in common as tenant at sufferance occupies the whole property after the expiration of a lease granted to him by his co-tenant, he will be liable for rent to his co-tenant in an action for use and occupation (*Leigh v. Dickeson*, 15 Q. B. Div. 60). In partition actions tenants in common have been charged with an occupation rent (*Pascoe v. Swan*,

(1)
How coparceners, &c., were affected by old statutes of limitation.

(2)
Effect of sect. 12.

(3)
Occupation by co-owners.

3 & 4 Will. 4,
c. 27, s. 12.

27 Beav. 508; *Teasdale v. Sanderson*, 33 Beav. 534; *Hill v. Hickin*, 1897, 2 Ch. 579). In general, however, independently of a lease, mere occupation by one of several tenants in common, if unaccompanied by exclusion, does not make him liable for rent (*M'Mahon v. Burchell*, 2 Phil. 127; 1 Coop. 457). Nor can an action for money had and received be maintained, the remedy being an action of account under 4 Anne, c. 16, s. 27 (*Thomas v. T.*, 5 Exch. 28; *Henderson v. Eason*, 2 Phil. 308; 17 Q. B. 701; *Shirton v. Richardson*, 13 M. & W. 17; *Gorley v. G.*, 1 H. & N. 144; *Murray v. Hall*, 7 C. B. 441; *Birkin v. Smith*, 1909, 2 K. B. 120; nor in the absence of ouster can trespass be maintained (*Jacobs v. Seward*, L. R. 5 H. L. 464). As to the working of minerals by tenants in common, see *Job v. Potton*, 20 Eq. 84; *Hexter v. Pearce*, 1900, 1 Ch. 341. Where one tenant in common of a wall excludes the other by means of an obstruction, the remedy is to remove the obstruction (*Watson v. Gray*, 14 Ch. D. 192).

One tenant in common of a house who spends money in ordinary repairs has no right of action against his co-tenant for contribution (*Leigh v. Dickeson*, 15 Q. B. Div. 60; *Johnson v. Wild*, 44 Ch. D. 146; and see as to the relation between tenants in common, *Kennedy v. De Trafford*, 1897, A. C. 180). But on a sale in a partition action the expenses of permanent repairs were borne rateably by tenants in common (*Re Jones, Farrington v. Forrester*, 1893, 2 Ch. 461; *Re Cooke, Lawledge v. Tyndall*, 1896, 1 Ch. 923).

Possession of
a younger
brother not to
be the posses-
sion of the
heir.

13. When a younger brother or other relation of the person entitled as heir to the possession or receipt of the profits of any land, or to the receipt of any rent, shall enter into the possession or receipt thereof, such possession or receipt shall not be deemed to be the possession or receipt of or by the person entitled as heir.

The effect of this section is illustrated in the judgment of the court in *Jones v. Jones*, 16 M. & W. 712.

Prior state
of the law.

If a man, seised of certain lands in fee, had issue two sons, and died seised of such land, and the younger son entered by abatement into the land, the Statute of Limitations did not operate against the elder son (*Litt. s. 396*; *Sharington v. Shroton*, Plowd. 306). So where a sister entered (*Page v. Seiby*, Bull. N. P. 102; 2 Stark. on Ev. 220, 2nd ed.; Co. Litt. 242; Plowd. 298, 306; see *Dowdall v. Bryne*, Batty's Ir. R. 373).

A. was possessed of lands for more than twenty years, and died in 1817. His widow had possession from that time until her death in 1838. B. was the eldest son of A. and his wife. It was held, that although B. could not recover in ejectment as the heir of his father, because more than twenty years had elapsed from the death of his father, yet that the jury might infer that the property belonged to B.'s mother, and survived to her on the death of his father, and descended to B. as heir on her death in 1838 (*Doe v. Long*, 9 C. & P. 773; see *Doe v. Lawley*, 13 Q. B. 954).

Acknowledg-
ment in
writing given
to the person
entitled, or
his agent, to
be equivalent
to possession
or receipt of
rent.

14. Provided always, and be it further enacted, that when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent, in writing, signed by the person in possession, or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt, of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this act, to have been the possession or receipt of or by the person to whom, or to whose agent such acknowledgment shall have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress, or bring an

action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given.

3 & 4 Will. 4,
c. 27, s. 14.

(1) *Different sections as to acknowledgments in the Limitation Acts...*151.

(2) *Cases under sect. 14...*151.

The requiring an acknowledgment in writing to take a case out of the R. P. Lim. Act, 1833, was by analogy to the Statute of Frauds Amdt. Act, 1828, adopted in this section, in the 42nd section of this act, in the 5th section of the Civil Proc. Act, 1833, and in sects. 7 & 8 of the R. P. Lim. Act, 1874. A difference occurs in the language of these sections. Thus, under the 14th section, the acknowledgment is to be given to the party entitled to land or rent, or *his agent*, signed by the person in possession. By sect. 7 of R. P. Lim. Act, 1874, twelve years' possession by a mortgagee will bar the right of redemption, unless an acknowledgment in writing of such right shall have been given to the mortgagor or some person claiming his estate, or to the *agent* of such mortgagor or person, signed by the mortgagee, or the person claiming through him. By sect. 8 of the R. P. Lim. Act, 1874, money charged upon land and legacies cannot be recovered after the end of twelve years, unless in the meantime some part of the principal, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person by whom the same shall be payable, or his *agent*, to the person entitled thereto, or his *agent*. By the 42nd section, no arrears of rent or interest are to be recovered, but within six years after the same shall have become due, or next after an acknowledgment of the same shall have been given to the person entitled thereto, or his *agent*, signed by the person by whom the same was payable, or his *agent*. In the four cases above mentioned, therefore, the acknowledgment is binding if given to the party entitled or *his agent*; but an acknowledgment of title under the 14th section, or of a right to redeem under sect. 7 of the R. P. Lim. Act, 1874, cannot be given *by an agent*; whilst, in the case of money charges, and of arrears of rent or interest, an acknowledgment by an agent will be effectual. The cases as to acknowledgments under the above-mentioned sections, and under Statute of Frauds Amdt. Act, 1828, are collected in the subsequent notes. By the 5th section of the Civil Proc. Act, 1833 (limiting the time within which actions on specialties are to be brought), any acknowledgment either by writing signed by the party liable by virtue of a specialty, or his *agent*, or part payment or part satisfaction on account of any principal or interest due thereon, will take a case out of that act.

(1)
Different sections as to acknowledgments in the statutes of limitation.

Sect. 14 of the R. P. Lim. Act, 1833, provides that the acknowledgment must be signed by the person in possession: therefore, an acknowledgment signed by an agent will be insufficient (*Ley v. Peter*, 3 H. & N. 101; 27 L. J. Ex. 234). An unaccepted proposal for a lease made by A., who was unable from illness to write, was evidence of an acknowledgment by A. (*Dublin v. Judge*, 11 Ir. L. R. 9).

(2)
By whom acknowledgment must be made under sect. 14.

The acknowledgment must be given to the person entitled or his agent (see *Fursden v. Clegg*, 10 M. & W. 572; *Goode v. Job*, 28 L. J. Q. B. 1).

To whom.

Whether a writing amounts to an acknowledgment of title within this section is a question for the judge, and not for the jury to decide (*Doe v. Edmonds*, 6 M. & W. 295; *Morrell v. Frith*, 3 M. & W. 402; but see *Incorp. Soc. v. Richards*, 1 D. & War. 290; Sugd. R. P. Stat. 67).

What is an acknowledgment.

A deed which purported to bear date more than twenty years before action, but which was in fact executed by the defendant within twenty years, and which contained a recital of the plaintiff's title, was a sufficient

3 & 4 Will. 4, c. 27, s. 14. acknowledgment (*Jayne v. Hughes*, 10 Exch. 430). A correspondence by a party in possession of property, by which he professed to hold the estates until an account on the foot of charges, to which he was entitled, should be closed, was a sufficient acknowledgment (*Incorp. Soc. v. Richards*, 1 D. & War. 258). So a proposal to purchase (*Johnston v. Smith*, 1896, 2 I. R. 82). A letter was a sufficient acknowledgment in *Fursden v. Clegg*, 10 M. & W. 572, but not in *Doe v. Edmonds*, 6 M. & W. 295. An acknowledgment in an answer sworn to a bill in Chancery filed by the plaintiff in reference to the same property was sufficient (*Goode v. Job*, 28 L. J. Q. B. 1). The acknowledgment must be in writing; but where the contents of the written document can properly be proved by parol such parol evidence would not be excluded (*Haydon v. Williams*, 7 Bing. 168; *Read v. Price*, 1909, 2 K. B. 724).

When time runs after an acknowledgment. Where a statutory title has accrued by the expiration of the requisite period it cannot be defeated or the extinguished title revived by a subsequent acknowledgment. See note to sect. 34, *post*.

The moment after an acknowledgment of title, within the meaning of the 14th section, is made, the time begins to run against the person to whom it is made (*Burroughs v. M'Creight*, 1 J. & L. 304; *Scott v. Nixon*, 3 D. & War. 404). See, however, *Darb. & Bos. Stat. Lim.* 381, 2nd ed.

Where possession is not adverse at the time of passing the act, the right shall not be barred until the end of five years afterwards.

15. Provided also, and be it further enacted, that when no such acknowledgment as aforesaid shall have been given before the passing of this act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years, hereinbefore limited, shall have expired, make an entry or distress, or bring an action to recover such land or interest (*u*), at any time within five years next after the passing of this act (*x*).

(*u*) The word "interest," which is in the parliament roll, appears to be a mistake for "rent" (*per Lord Denman, C. J., Doe v. Angell*, 9 Q. B. 360).

(*x*) For cases on this section, see *Holmes v. Newlands*, 11 Ad. & Ell. 44; *Culley v. Doe*, 11 Ad. & Ell. 1008; *O'Sullivan v. M'Sweeny*, 2 Ir. L. R. 95, 96; *Doe v. Williams*, 5 Ad. & Ell. 296; *Scott v. Nixon*, 3 D. & War. 388; *Incorporated Society v. Richards*, 1 D. & War. 289; *Doe v. Thompson*, 5 Ad. & Ell. 532; *Ex p. Hasell*, 3 Y. & Coll. 617.

3. Savings in Case of Disabilities.

Persons under disability of infancy, lunacy, coverture, or beyond seas, and their representatives, to be allowed ten years from the determination of their disability or death.

16. Provided always, and be it further enacted, that if at the time at which the right of any person to make an entry or distress, or bring an action to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say,) infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress, or bring an action to recover such land or rent, at any time within ten years next after the time at which the person to whom such right shall have first accrued as aforesaid shall have ceased to be under any such disability, or shall have died (which shall have first happened).

[Sect. 16 of R. P. Lim. Act, 1833, has been repealed and the following substituted, viz.:] 37 & 38 Vict.
c. 57, s. 3.

[R. P. Lim. Act, 1874, s. 3.] If at the time at which the right of any person to make an entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to say), infancy, coverture, idiotey, lunacy, or unsoundness of mind, then such person, or the person claiming through him, may, notwithstanding the period of twelve years, or six years, (as the case may be,) hereinbefore limited shall have expired, make an entry or distress, or bring an action or suit, to recover such land or rent, at any time within six years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under any such disability, or shall have died (whichever of those two events shall have first happened).

In cases of infancy, coverture, or lunacy at the time when the right of action accrues, then six years to be allowed from the termination of the disability or previous death.

[R. P. Lim. Act, s. 4.] The time within which any such entry may be made, or any such action or suit may be brought as aforesaid, shall not in any case after the commencement of this act be extended or enlarged by reason of the absence beyond seas during all or any part of that time of the person having the right to make such entry, or to bring such action or suit, or of any person through whom he claims.

No time to be allowed for absence beyond seas.

By sect. 9 of R. P. Lim. Act, 1874, *post*, sects. 3 and 4 of the last-mentioned act have been substituted for sect. 16 of R. P. Lim. Act, 1833. And under the same 9th sect. the provisions of R. P. Lim. Act, 1833 (except the repealed sections, but including the provisions substituted for such repealed sections) are to be construed together with R. P. Lim. Act, 1874. Sect. 3 of R. P. Lim. Act, 1874, substitutes the period of six years for the period of ten years mentioned in sect. 16 of R. P. Lim. Act, 1833, and does not provide for absence beyond seas, but in other respects is similar to the last-mentioned section. The disability of absence beyond seas is abolished by sect. 4 of R. P. Lim. Act, 1874.

Legislation.

- (1) Cases under the above sections...153.
- (2) Presumption of death...154.

Sect. 16 of R. P. Lim. Act, 1833, did not apply to a mortgagor redeeming, such an action not being an action to recover land (*Kinsman v. Rouse*, 17 Ch. D. 104; see *Forster v. Patterson*, *ib.* 132).

(1)

As regards infancy, where an infant's property has been in the possession of his parent, such parent has been treated as a bailiff, and time has not run (*Thomas v. Thomas*, 2 K. & J. 79; *Wall v. Stanwick*, 34 Ch. D. 763; *Re Hobbs*, *Hobbs v. Wade*, 36 Ch. D. 553). Similarly where an uncle has been in possession (*Pelly v. Bascombe*, 4 Giff. 390; on appeal, 13 W. R. 306). Where a father remained in possession after the infant attained twenty-one, time did not run against the infant until the father's death (*Tinker v. Rodwell*, 69 L. T. 591).

Disability of infancy.

As regards coverture. This disability has been abolished in the case of actions falling within M. W. P. Act, 1882, s. 1, sub-s. 2 (see *Lowe v. Fox*, 15 Q. B. Div. 667; *Weldon v. Neal*, 51 L. T. 289, cases decided under Lim. Act, 1823, s. 7). For cases where such disability depending on the old law

Coverture.

37 & 38 Vict. was alleged, see *Kennedy v. Lyell*, 15 Q. B. D. 498; *Hounsell v. Dunning*, c. 57, s. 3. 1902, 1 Ch. 517.

As regards lunacy, see *Fulton v. Creagh*, 3 J. & Lat. 329.

Lunacy.

Successive disabilities in the same person,

As regards successive disabilities in the same person, it was held under R. P. Lim. Act, 1833, s. 16, that when the person to whom the right to bring an action for the recovery of land accrued was under a disability, and before the removal of that disability the same person fell under another disability, his right to bring an action was preserved until ten years after the removal of the latter disability (*Borrows v. Ellison*, L. R. 6 Ex. 128; see *Supple v. Raymond*, 1 Hayes, Ir. Rep. 6; 2 Prest. Abstr. 340; Blansh. Lim. 21, 22). But where time had once begun to run no subsequent disability on the part of the person to whom the right first accrued, or of any one claiming under him, would stop the running of time (see *Doe v. Jones*, 4 T. R. 310; *Sturt v. Mellish*, 2 Atk. 610—614; Str. 556; 1 Wils. 134; *Cotterell v. Dutton*, 4 Taunt. 826; *Doe v. Jesson*, 6 East, 80; decided under Lim. Act, 1623, s. 2, the wording of which was very similar; and see *Goodall v. Skerratt*, 3 Drew. 216). So where time once begins to run against a tenant in tail, and there is not then any disability on his part, it does not cease to run by reason of subsequent disability on his part or on the part of issue in tail claiming under him (*Murray v. Watkin*, 62 L. T. 796; *Garner v. Wingrove*, 1905, 2 Ch. 233). It was also decided under Lim. Act, 1623, s. 2, that where an estate descended to parceners, one of whom was under a disability, the disability of the one did not preserve the title of the other (*Doe v. Rowleston*, 2 Taunt. 441).

For the bearing of the above sections upon the construction of the first branch of sect. 3, see *Owen v. De Beauvoir* (16 M. & W. 567); *De Beauvoir v. Owen* (5 Exch. 166).

As to successive disabilities in different persons, see sect. 18, *post*, p. 157.

(2)

Presumption of death where person has not been heard of for seven years:

Where a person has not been heard of for many years, the presumption of the duration of life ceases at the end of seven years, a period which has been fixed from analogy to the statute of bigamy (1 Jac. 1, c. 11, s. 2; see now 24 & 25 Vict. c. 100, s. 57; *Reg. v. Tolson*, 23 Q. B. D. 168), and the statute concerning leases determinable on lives (19 Car. 2, c. 6). Compare the statutory rule in Scotland (44 & 45 Vict. c. 47). Thus, upon a plea of coverture, where the husband had gone abroad twelve years before, the defendant was called upon to prove that he was alive within the last seven years (*Hopewell v. De Pinna*, 2 Campb. 113). Where a tenant for life had not been heard of for fourteen years by a person residing on the estate, it was held to be presumptive evidence of his death (*Doe v. Deakin*, 4 B. & Ald. 433; see 2 *Id.* 386). It was held, that where no account could be given of a person within the exception of the Lim. Act, 1623, s. 2, he would be presumed to be dead at the expiration of seven years from the last account of him (*Doe v. Jesson*, 6 East, 84). It is now settled that if a person has not been heard of for seven years, there is a presumption of law that he is dead (*Re Phene*, 5 Ch. 139; *Nepean v. Doe*, 2 M. & W. 894; see *Re Winstone*, 1898, P. 143; *Re Hurlston*, *Id.* 27). The presumption of death, however, does not arise where the other circumstances of the case render it probable that he would not be heard of though alive (*Watson v. England*, 14 Sim. 28; *Bowden v. Henderson*, 2 Sm. & G. 360; *M'Mahon v. M'Elroy*, L. R. 5 Eq. 1). Further, in order to raise the presumption, there must have been an inquiry and search made for the man amongst those who if he were alive would be likely to hear of him (*Prudential Co. v. Edmonds*, 2 App. Cas. 509; *Doe v. Andrew*, 15 Q. B. 751; *Re Creed*, 1 Drew. 235). See, as to the presumption being made after a less period, *Re Matthews*, 1898, P. 17.

no presumption as to time of death;

But although, if a person has not been heard of for seven years, there is a presumption of law that he is dead; at what time within that period he died is not a matter of presumption but of evidence. And the onus of proving that the person survived any particular period within the seven years lies upon those who claim a right, to the establishment of which that

fact is essential (*Re Phene*, 5 Ch. 139, where the cases are collected; see *Nepean v. Doe*, 2 M. & W. 894; *Doe v. Nepean*, 5 B. & Ad. 86; *R. v. Harbourne*, 2 Ad. & Ell. 540; *R. v. Twynning*, 2 B. & Ald. 386). Where, accordingly, a legatee has not been heard of for seven years, his death will be presumed. The onus of proving that he survived the testator lies upon those who claim under him. In the absence of such proof the legacy will be paid to the residuary legatee, or the next of kin of the testator (*Re Lewes*, 6 Ch. 356; *Re Walker*, 7 Ch. 120). See form of order in *Re Benjamin, Neville v. Benjamin*, 1902, 1 Ch. 726. See also *Re Green*, 1 Eq. 288, a case of next of kin; and *Rhodes v. R.*, 36 Ch. D. 586, where the court remained in doubt whether a fund should be paid to the next of kin ascertained at the beginning or the next of kin ascertained at the end of the period. A legatee for life who survived the testator was held (in the absence of contrary evidence) to have died at the date when he was last heard of (*Re Aldersey, Gibson v. Hall*, 1905, 2 Ch. 181).

After seven years, having got the fact of death, you have a right to look back and inquire into all the circumstances and ascertain when the man died (*Hickman v. Upsall*, 4 Ch. Div. 149; *Re Beasney*, 7 Eq. 498; and see the judgment of *Lush, J.*, in *R. v. Lumley*, L. R. 1 C. C. 196; *R. v. Willshire*, 6 Q. B. D. 366).

In *Sillick v. Booth* (1 Y. & Coll. C. C. 117), the court concluded that a party died at a particular time within the seven years after he had been last heard of, the particular time being the hurricane months, and the party having sailed from Demerara before the expiration of such hurricane months (see also *Webster v. Birchmore*, 13 Ves. 362). The court concluded that a young sailor, who was last seen in the summer of 1840 going to Portsmouth to embark, survived his grandmother, who died in March, 1841 (*Re Tindall*, 30 Beav. 151). A son, first tenant in tail in remainder, left this country on the 11th April, 1858, and was never afterwards heard of. His father, tenant for life, died on the 30th May, 1858. The court concluded, in 1872, that the son survived the father (*Fennefather v. P.*, I. R. 6 Eq. 171; see *Lakin v. L.*, 34 Beav. 443). Where a testator died in 1829, leaving a will in favour of his children, one of whom went abroad in 1809, and had not been heard of since 1815; both before and after the testator's death unsuccessful attempts to procure information were made, by inquiries and advertisements. He was presumed to have died before the date of the will (*Rust v. Baker*, 8 Sim. 443). The certificate of a master, stating that a legatee had been abroad twenty-eight years, and not been heard of for twenty-seven years, and his opinion that he died in the lifetime of the testator, was the foundation of a decree (*Lee v. Willock*, 6 Ves. 606; Reg. lib. 1791, fol. 315; see also 13 Ves. 362). Where a trust was declared by deed in favour of A., although he had not been heard of for five years before the date of the deed, was presumed to have been then in existence (*Re Corbishley*, 14 Ch. D. 846). In some doubtful cases the court has handed over property on security to security to refund being given (*Dowling v. Winfield*, 14 Sim. 277; *Cuthbert v. Purrier*, 2 Phil. 199; *Re Mileham*, 15 Beav. 507).

Before granting probate or administration, the Probate Division requires evidence of the date of the death. And where no direct proof is forthcoming, the practice is to lay the available evidence before the court on motion, and take its directions. In such cases the rule as to seven years' absence is applied (*Re Howe*, 1 Sw. & Tr. 54; 27 L. J. Prob. 37); but as a rule advertisements are directed (*Re Robertson*, 1896, P. 8; see *Re Saul*, 1896, P. 151). As to the grounds on which the Probate Court will presume the death of parties who embarked in vessels lost at sea or not afterwards heard of, see *Re Norris* (1 Sw. & T. 6); *Re Main* (1 Sw. & T. 11); *Re Smyth* (28 L. J. Prob. 1).

The testator and his wife were shipwrecked and drowned at sea, one wave sweeping both of them together into the water, after which they were never seen again. In such cases the question of survivorship is matter of evidence, and not of positive regulation and enactment (varying according to the ages and sex of the persons dying in the same shipwreck), as it is in the French

37 & 38 Vict.
c. 57, s. 3.

effect of cir-
cumstances;

practice in
Probate
Court;

commo-
rentes;

37 & 38 Vict.
c. 57, s. 3.

Code, and in the absence of evidence there is no conclusion of law on the subject (*Wing v. Angrave*, 8 H. L. C. 183; see, further, *Gen. Stanwix's case*, Fearn's Post. Works, 38; *R. v. D. Hay*, 1 Wm. Bl. 640; Swinburn, part 7, s. 33; *Wright v. Netherwood*, 2 Salk. 593, n.; *Hitchcock v. Beardsley*, West's Rep. t. Hardwicke, 445; *Bradshaw v. Toulmin*, 2 Dick. 633; *Mason v. Mason*, 1 Mer. 308; *Taylor v. Diplock*, 2 Phill. Ecc. C. 261; *Re Selwyn*, 3 Hagg. Ecc. R. 741; *Colwin v. King's Proctor*, 1 Hagg. Ecc. 92; *Re Alston*, 1892, P. 142; *Re Beynon*, 1901, P. 141; *Re Good*, 24 Times L. R. 493).

As to reduction into possession in cases of this kind, see *Scrutton v. Pattillo* (23 W. R. 379); *Wollaston v. Berkeley* (2 Ch. D. 213).

In establishing a title upon a pedigree, it is sufficient to show that the person has not been heard of for many years, to put the opposite party upon proof that he still exists (*Rowe v. Hasland*, 1 W. Bl. 404; see Fitz. N. B. 196, A. L.).

presumption
of death
without issue.

Where a man died long ago and there is nothing to show whether he died with issue or without issue, there is no presumption either way (*Greaves v. Greenwood*, 2 Exch. Div. 295). Proof by one of a family, that many years before a younger brother of the person last seised had gone abroad, and that the repute of the family was that he had died there, and that the witness had never heard in the family of his having been married, is *prima facie* evidence of his death without issue to entitle the next claimant by descent to recover in ejectment (*Doe v. Griffin*, 15 East, 293). The court concluded that a man had died without issue (*Rawlinson v. Miller*, 1 Ch. D. 52; see *Re Pople*, 40 Ch. D. 589; *Re Hanby*, 25 W. R. 427); and without leaving a widow (*Re Westbrook*, 1873, W. N. 167; see *Re Benjamin, Neville v. Benjamin*, 1902, 1 Ch. 726). Letters written from Australia by a son of the testator were held sufficient evidence that the son had predeceased the testator without issue (*Re Jackson, Jackson v. Ward*, 1907, 2 Ch. 354).

But no action,
&c., shall be
brought
beyond forty
years after
the right of
action ac-
crued.

17. *Provided nevertheless, and be it further enacted, that no entry, distress or action shall be made or brought by any person who, at the time at which his right to make an entry or distress, or to bring an action to recover any land or rent shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within forty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such forty years, or although the term of ten years, from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired.*

[Sect. 17 of R. P. Lim. Act, 1833, has been repealed and the following has been substituted, viz. :]

Thirty years
utmost allow-
ance for disa-
bilities.

[R. P. Lim. Act, 1874, s. 5.] No entry, distress, action, or suit shall be made or brought by any person who at the time at which his right to make any entry or distress, or to bring an action or suit, to recover any land or rent, shall have first accrued, shall be under any of the disabilities hereinbefore mentioned, or by any person claiming through him, but within thirty years next after the time at which such right shall have first accrued, although the person under disability at such time may have remained under one or more of such disabilities during the whole of such thirty years, or although the term of

six years from the time at which he shall have ceased to be under any such disability, or have died, shall not have expired. 37 & 38 Vict. c. 57, s. 5.

By sect. 9 of R. P. Lim. Act, 1874, *post*, sect. 5 of the last-mentioned act has been substituted for sect. 17 of R. P. Lim. Act, 1833. And under the same 9th section the provisions of R. P. Lim. Act, 1833 (except the repealed sections, but including the provisions substituted for such repealed sections), are to be construed together with R. P. Lim. Act, 1874. Sect. 5 of R. P. Lim. Act, 1874, substituted the respective periods of thirty years and six years for the periods of forty years and ten years mentioned in sect. 17 of R. P. Lim. Act, 1833, but in other respects is similar to the last-mentioned section. Legislation.

Before R. P. Lim. Act, 1833, the period during which a vendor of land on an open contract was bound to show title was sixty years, and sect. 17 of the act did not alter this rule (*Cooper v. Emery*, 1 Ph. 388; *Moulton v. Edmonds*, 1 D. F. & J. 250). Now by V. & P. Act, 1874, s. 1, *post*, the period is forty years. And this is the period required where the title is a possessory one (*Jacobs v. Revell*, 1900, 2 Ch. 858).

Where a *feme sole* seised in fee married, and she and her husband dis- continued possession of land, and more than forty years later the wife's heir brought ejectment, the heir was barred by the 17th section (*Doe v. Bramston*, 3 Ad. & Ell. 63). Compare the case of a conveyance by the husband alone (*Jumpsen v. Pitchers*, 13 Sim. 327; see *Hounsell v. Dunning*, 1902, 1 Ch. 512, quoted in note to sect. 2 of R. P. Lim. Act, 1874, *ante*, p. 139). Husband and wife.

Where a lease was made by a lunatic for lives renewable for ever, the lessee for more than forty years held part of the land, paying the entire reserved rent, and died in possession, being himself the last life in the lease, it was held, that he had not acquired either the fee-simple, subject to a perpetual rent equal to the rent reserved, or a right to a renewal (*Fulton v. Creagh*, 3 J. & Lat. 329). Lease by a lunatic.

As to the application of the section to money paid into court under the Lands Clauses Act, 1845, s. 79, see *Ex p. Chamberlain* (14 Ch. D. 323).

18. Provided always, and be it further enacted, that when any person shall be under any of the disabilities hereinbefore mentioned at the time at which his right to make an entry or distress or to bring an action to recover any land or rent shall have first accrued, and shall depart this life without having ceased to be under any such disability, no time to make an entry or distress, or to bring an action to recover such land or rent beyond the said period of twenty years next after the right of such person to make an entry or distress, or to bring an action to recover such land or rent shall have first accrued, or the said period of ten years next after the time at which such person shall have died, shall be allowed by reason of any disability of any other person. No further time to be allowed for a succession of disabilities.

Since 1878 this section is to be read substituting the periods of twelve years and six years respectively for the periods of twenty years and ten years mentioned in the section (R. P. Lim. Act, 1874, s. 9, *post*, p. 184). 37 & 38 Vict. c. 57.

As to how far sect. 18 was retrospective, see *Devine v. Holloway*, 14 Sect. 18. Moore, P. C. C. 290. As to successive disabilities in the same person, see note to sect. 16, *ante*, p. 154.

19. No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney or Sark, nor any islands adjacent to any of them (being part of the dominions of his Majesty), shall be deemed to be beyond seas within the meaning of this act. Scotland, Ireland, and the adjacent islands not to be deemed beyond seas.

3 & 4 Will. 4, c. 27, s. 19. See sect. 16, *ante*, p. 152, and Mercantile Law Amdt. Act, 1856, s. 12, *post*, p. 241; *Ex p. Hasell*, 3 Y. & Coll. 617; *Battersby v. Kirk*, 2 Bing. N. C. 603; *Lane v. Bennett*, 1 M. & W. 70; *Ruckmaboye v. Mottichund*, 8 Moore, P. C. C. 4. No time is now allowed for absence beyond seas (R. P. Lim. Act, 1874, s. 4, *ante*, p. 153).

4. Concurrent Rights.

When the right to an estate in possession is barred, the right of the same person to future estates shall also be barred.

20. When the right of any person to make an entry or distress, or bring an action to recover any land or rent to which he may have been entitled for an estate or interest in possession, shall have been barred by the determination of the period hereinbefore limited, which shall be applicable in such case, and such person shall, at any time during the said period, have been entitled to any other estate, interest, right or possibility, in reversion, remainder or otherwise, in or to the same land or rent, no entry, distress or action shall be made or brought by such person, or any person claiming through him, to recover such land or rent, in respect of such other estate, interest, right or possibility, unless in the meantime such land or rent shall have been recovered by some person entitled to an estate, interest or right which shall have been limited or taken effect after or in defeasance of such estate or interest in possession.

Cases on the construction of this section. This section, so far as applicable to future estates and interests, must be read in connection with the fourth branch of sect. 3 (*ante*, p. 133) and sect. 2 of R. P. Lim. Act, 1874 (*ante*, p. 138, where see note).

This section is in derogation of the old maxim, borrowed from the civil law, "*quando duo jura concurrunt in una personâ equum est ac si essent in diversis*" (4 Rep. 118; 7 Rep. 2 b, 14 b; Plowd. 368). Under the Lim. Act, 1623, s. 1, a party might have pursued his right of entry twenty years after it attached, although in the meantime the party might have had a different right, of which he was barred by more than twenty years' adverse enjoyment (*Hunt v. Bourne*, 1 Salk. 339; 2 *Id.* 421; 4 Br. P. C. 66).

Where A. was entitled to a leasehold interest in land for lives as heir of B., and to the reversion fee as heir of C., adverse possession during the lease barred his original right of entry, and he had no new right of entry on the determination of the lease (*Doe v. Mouldsdale*, 16 M. & W. 689). A testator devised lands to A., with a gift over to B. in case either of two events should happen. Both events having happened, sect. 20 deprived the plaintiff of the benefit of the new right of action which accrued on the happening of the second event (*Clarke v. Clarke*, 1 R. 2 C. L. 395). A general power vested in a tenant for life of appointing the fee in remainder did not fall within the words "other estate, interest, right, or possibility"; so that a barring of the life estate did not affect the claim of the appointee (*Re Devon Settled Estates*, 1896, 2 Ch. 562). Where a mortgagee was also entitled to a beneficial interest in the equity of redemption which gave no right of entry, the barring of the latter interest did not affect her title as mortgagee (*Ludbrook v. L.*, 1901, 2 K. B. 100). For a case where the final proviso as to a recovery "in the meantime" was applied, see *Doe v. Liversedge*, 11 M. W. 517.

The above section deals with the case of the same person being entitled to successive interests in real estate. Where a person was entitled to successive life interests in personal estate, and she sued for a breach of trust as regards the *corpus* of the estate, it was held, under sect. 8 of the Trustee Act, 1888 (*post*, p. 243), that she could, in respect of her second interest, maintain the action, although an action in respect of the first would have been barred (*Mara v. Brown*, 1895, 2 Ch. 69, 96).

5. *Operation of the Statute in Cases of Estates Tail.*

3 & 4 Will. 4,
c. 27, s. 21.

21. When the right of a tenant in tail of any land or rent to make an entry or distress, or to bring an action to recover the same, shall have been barred by reason of the same not having been made or brought within the period hereinbefore limited, which shall be applicable in such case, no such entry, distress or action shall be made or brought by any person claiming any estate, interest or right, which such tenant in tail might lawfully have barred.

Where tenant in tail is barred, remainderman whom he might have barred shall not recover.

Land was devised to the father of the plaintiff in tail general. The plaintiff's father received the rents and profits from 1799 to 1807, at which time he was succeeded by a person through whom the defendant claimed. Held, in an action of ejectment brought in 1853, that under this section, since the tenant in tail was barred, the issue in tail were also barred (*Austin v. Llewellyn*, 9 Exch. 276). An estate tail was limited to A., remainder in tail to B., remainder to C. A. dies, then B. dies within twenty years, and C. becomes entitled in possession, being at the time under disability. Under the 21st and 22nd sections of this act time commenced running against C. from the death of A.; and, having commenced to run, C. was not saved from its operation under the 16th section by being under disability (*Goodall v. Skerratt*, 3 Drew. 216). The 21st section does not apply to the case where the tenant in tail has conveyed away his own right to another and put it out of his power to enter (*Cannon*, dem., *Rimington*, ten., 12 C. B. 1, 18). In this last case the estate of a tenant in tail in possession is considered as coming within this section (12 C. B. 34). But it has been said by *Bramwell*, B., that the sects. 21 and 22 refer only to estates in remainder and reversion, the estate of the tenant in tail which descends to his issue being provided for by sect. 2 (*Abergavenny v. Brace*, L. R. 7 Ex. 149, 173). See further, pp. 127, 128, *ante*.

22. When a tenant in tail of any land or rent, entitled to recover the same, shall have died before the expiration of the period hereinbefore limited, which shall be applicable in such case, for making an entry or distress, or bringing an action to recover such land or rent, no person claiming any estate, interest or right which such tenant in tail might lawfully have barred shall make an entry or distress, or bring an action to recover such land or rent but within the period during which, if such tenant in tail had so long continued to live, he might have made such entry or distress or brought such action.

Possession adverse to a tenant in tail shall run on against the remainderman whom he might have barred.

Under the Lim. Act, 1623, where an estate was limited to one in tail, with remainder to another in fee, the remainderman might, at any time within twenty years after the failure of the issue in tail, have recovered the estate (*Taylor v. Horde*, 1 Burr. 60).

[Sect. 23 of the R. P. Lim. Act, 1833, has been repealed and the following substituted, viz.]

[R. P. Lim. Act, 1874, s. 6.] When a tenant in tail of any land or rent shall have made an assurance thereof which shall not operate to bar the estate or estates to take effect after or in

R. P. Lim. Act, 1874, sect. 6.

37 & 38 Vict.
c. 57, s. 6.

In case of possession under an assurance by a tenant in tail which shall not bar the remainders, they shall be barred at the end of twelve years after that period at which the assurance, if then executed, would have barred them.

defeasance of his estate tail, and any person shall by virtue of such assurance at the time of the execution thereof, or at any time afterwards, be in possession or receipt of the profits of such land, or in the receipt of such rent, and the same person or any other person whosoever (other than some person entitled to such possession or receipt in respect of an estate which shall have taken effect after or in defeasance of the estate tail) shall continue or be in such possession or receipt for the period of twelve years next after the commencement of the time at which such assurance, if it had then been executed by such tenant in tail, or the person who would have been entitled to his estate tail if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twelve years, such assurance shall be, and be deemed to have been, effectual as against any person claiming any estate, interest, or right to take effect after or in defeasance of such estate tail.

Sect. 6 of R. P. Lim. Act, 1874, has by sect. 9 of the same act been substituted for sect. 23 of R. P. Lim. Act, 1833. Sect. 6 of R. P. Lim. Act, 1874, fixes the period of limitation at twelve years, but is in other respects substantially similar to sect. 23 of R. P. Lim. Act, 1833, which has accordingly been omitted.

Old law.

As to the law before R. P. Lim. Act, 1833, see *Doe v. Pike* (3 B. & Ad. 742); *Woodroffe v. Doe* (15 M. & W. 769; 2 H. L. C. 811); *Doe v. Woodroffe* (10 M. & W. 608).

Remarks of
Real Property
Commissioners.

The proposition of the R. P. Commrs. was, "That on any alienation by tenant in tail, by an assurance not operating as a complete bar to the estate tail, and all estates, rights and interests limited to take effect on the determination or in derogation of the estate tail, possession under such assurance shall have the same effect in barring the estate tail, and all estates, rights and interests limited to take effect on the determination or in derogation of the estate tail, as if such possession had been adverse to the said estate tail, or to the said estates, rights or interests" (1 Real Prop. Rep. 79, pl. 15; and see *Ib.* p. 46).

The section applies to cases where (1) a tenant in tail executes a deed enrolled under the Fines and Recoveries Act, 1833, which, for want of the consent of the protector, operates only to create a base fee, and (2) possession is obtained under the deed, and (3) the tenant in tail subsequently acquires the right to bar without any consent. See sect. 1 of the Fines and Recov. Act, 1833, *post*, pp. 263, 264; note on statutory base fees. The "possession by virtue of such assurance," mentioned in the section, must be a possession by virtue of an assurance which turns an estate tail into a base fee. And where a conveyance comprised a base fee and also a preceding life estate, time did not commence to run in favour of the possession taken under such conveyance until the determination of the life estate (*Mills v. Capel*, 20 Eq. 692). In the last-mentioned case, *Hall*, V. C., referred to the remark of Sugd. R. P. Stat., 2nd ed. 86, that the 23rd sect. carried into effect the above proposition of the R. P. Commissioners. It was intended, said the V. C., to legislate for the case of possession under a base fee. "The assurance referred to is the one made by the tenant in tail. The operation of the clause therefore is not strictly to make time a bar but to make time give a full operation to the assurance executed by the tenant in tail" (Sugd. R. P. Stat. 86).

Cases under
the above
sections.

The object of this section was to give effect to acts of a tenant in tail against remainderman and reversioners, and to give effect to assurances, which, although they were effectual to bar the issue, were ineffectual to bar those entitled in remainder. There are prior clauses in the statute which

show what the operation is as to the issue, and those clauses [*qu. this clause*] **3 & 4 Will. 4, c. 27, s. 23.** seem to be studiously worded so as to be confined only to the case of persons entitled after the expiration of the estate tail (*Penny v. Allen*, 7 D. M. & G. 426; *Morgan v. Morgan*, 10 Eq. 99).

As to whether the section extends to fines and recoveries previous to the Fines and Recoveries Act, 1833, see 1 Hayes' Conv. 264, 5th ed.; Sugd. R. P. Stat. 89; and the argument in *Anderson v. Anderson* (30 Beav. 207).

6. Limitation of Time as to Suits in Equity.

24. No person claiming any land or rent in equity shall bring any suit to recover the same but within the period during which, by virtue of the provisions hereinbefore contained, he might have made an entry or distress, or brought an action to recover the same respectively, if he had been entitled at law to such estate, interest or right in or to the same as he shall claim therein in equity. No suit in equity to be brought after the time when the plaintiff, if entitled at law, might have brought an action.

Since 1878 the R. P. Lim. Act, 1874, has prescribed fresh periods of limitation, which, by the express terms of the act, were extended to "suits."

Prior to the R. P. Lim. Act, 1833, courts of equity had acted in obedience to the Statutes of Limitation in the case of legal demands, and by analogy to the rules laid down by those statutes in other cases (*Hovenden v. Annesley*, 2 Sch. & Lef. 629; *Smith v. Clay*, 3 Bro. C. C. 639, n.; *Cholmondeley v. Clinton*, 2 Jac. & W. 156; *Baker v. Courage*, 1910, 1 K. B. 62). The R. P. Lim. Act, 1833, was intended to put an end to the discretion of courts of equity where they had acted by analogy to the time limited at law (*Berrington v. Evans*, 1 Y. & C. 439). But sect. 24 only barred equitable rights so far as they would have been barred if legal (*Archbold v. Scully*, 9 H. L. C. 360). How far courts of equity bound by Statutes of Limitation.

Independently of statute, time is a bar in equity to stale demands where there has been improper delay (*Harcourt v. White*, 28 Beav. 303; *Forster v. Thompson*, 4 Dr. & War. 318; *Coppin v. Gray*, 1 Y. & C. C. C. 205; *Blair v. Ormond*, 1 De G. & Sm. 428). An action to foreclose an equitable mortgage of an advowson in gross (which was not 'land' within the statute) where no payment had been made for forty-eight years, was barred by laches (*Brooks v. Muckleston*, 1909, 2 Ch. 519). See further, *post*, p. 169.

As to the proceedings under the old practice in equity sufficient to prevent the operation of the statute, see *Coppin v. Gray* (*sup.*); *Purcell v. Blennerhassett* (3 J. & Lat. 24); and as to amended bills, see *Byron v. Cooper* (11 Cl. and Fin. 556); *Plowden v. Thorpe* (7 Cl. & Fin. 164); *Blair v. Ormond* (1 De G. & Sm. 428); *A.-G. v. Hall* (11 Price, 760).

A foreclosure action is an action for the recovery of land within sects. 2 and 24 of R. P. Lim. Act, 1833, and not an action for the recovery of the mortgage money within sect. 40 (*Heath v. Pugh*, 6 Q. B. Div. 340, 7 App. Cas. 235; *Harlock v. Ashberry*, 19 Ch. Div. 539; following the opinion of Lord St. Leonards in *Wrixon v. Vize*, 3 Dr. & War. 104; and R. P. Stat. 121, 2nd ed.; and overruling, on this point, *Dearman v. Wyche*, 9 Sim. 570; *Du Vigier v. Lee*, 2 Hare, 326; and *Sinclair v. Jackson*, 17 Beav. 405). In the case of an equitable charge on a reversionary interest in land, time commences to run against the right to foreclose from the time when the interest falls into possession (*Hugill v. Wilkinson*, 33 Ch. D. 480; see *Re Owen*, 1894, 3 Ch. 220). Foreclosure actions.

A redemption action is not an action to recover land (*Kinsman v. Rouse*, 17 Ch. D. 107).

A bill by the lord of a manor to recover his title deeds and court rolls was barred by this section (*Wells v. Doddington*, 2 Coll. C. C. 73). Title deeds.

So also the equitable title of a tenant in common suing for partition was barred by this section (*Thornton v. France*, 1897, 2 Q. B. 158). Partition.

3 & 4 Will. 4. As to waste, see *post*, p. 249.

c. 27, s. 24. Charities are within the operation of this section (*A.-G. v. Magdalen Coll.*, 6 H. L. C. 189; see the note to sect. 25, *post*).

Waste. See further the note as to Courts of Equity and the Statutes of Limitation, *post*, pp. 247 *et seq.*

Charities. S. L. R. (No. 2) Act, 1890, has repealed formal words which occurred in

Repeal of formal words. the following sections of this act, viz.:—24, 29, 30, 33, 39, 41, 42, and 43, and which have accordingly been omitted in the present edition.

In cases of express trust, the right shall not be deemed to have accrued until a conveyance to a purchaser.

25. Provided always, and be it further enacted, that when any land or rent shall be vested in a trustee upon any express trust, the right of the *cestui que trust*, or any person claiming through him, to bring a suit against the trustee, or any person claiming through him, to recover such land or rent, shall be deemed to have first accrued, according to the meaning of this act, at and not before the time at which such land or rent shall have been conveyed to a purchaser for a valuable consideration, and shall then be deemed to have accrued only as against such purchaser and any person claiming through him.

(1) *Old Law*...162.

(2) *Cases under Sect. 25*...162.

(3) *Running of Time between Trustee and c. q. t.*... 163.

(4) *Running of Time in case of Charitable Trusts*...165.

Trustee Act, 1888. In the case of proceedings against trustees commenced after 1st January, 1890, regard must be had to sects. 1, 8, and 12 of the Trustee Act, 1888, *post*, p. 243.

The following note relates to the law, irrespective of that act.

(1)
Old law.

Before R. P. Lim. Act, 1833, the rule that trusts are not within the Stat. Lim. would not apply where a claim was made after a long time against a trustee by *implication* of law arising upon a doubtful equity (*Townshend v. Townshend*, 1 Cox, 28; 1 Bro. C. C. 550); and where relief would originally have been given upon a constructive trust, it was refused to a party who, after long acquiescence, came into equity to seek relief (*Beckford v. Wade*, 17 Ves. 97; *Ex p. Hasell*, 3 Y. & Coll. 622; *Bell v. Bell*, 1 Lloyd & G. temp. Plunket, 65; see *Bonny v. Ridgard*, cited 4 Br. C. C. 138).

(2)
This section applies to express trusts only.

Sect. 25 is confined to express trusts—that is, trusts expressly declared by deed or will or other written instrument. It does not apply to a trust made out by circumstances (*Petre v. Petre*, 1 Drew. 393; see *Banner v. Berridge*, 18 Ch. D. 263; *Price v. Phillips*, 1894, W. N. 213), or to trusts resulting or trusts by operation of law (*Dickenson v. Teasdale*, 1 D. J. & S. 59), or to a trust which arises from acts of parties (*Sands to Thompson*, 22 Ch. D. 617). Distinguish the trust raised in the case of a purchase of land and treated as an express trust, *Rochevoucauld v. Boustead*, 1897, 1 Ch. 196; and see the other cases quoted *post*, p. 251. “In order to bring a case within the 25th section there must be a trustee in whom the land is vested; there must be an express trust, by which I understand the legislature to mean a trust which arises upon the construction of the written instrument, not upon any inference of law imposing a trust upon the conscience, a trust arising upon the words of the instrument itself. Therefore these three things must concur—there must be land, there must be a trustee of the land, and there must be a *cestui que trust* for whose benefit in this respect the land is to be held—and all that must be found upon the construction of the instrument” (*per Lord Cairns, Cunningham v. Foot*, 3 App. Cas. 984).

Who are express trustees;

There was an express trust within this section where a testator devised land upon trust for sale, the proceeds to be considered as part of his personal estate (*Mulloy v. Bigg*, 18 Eq. 246; reversed, on other grounds,

1 Ch. Div. 385), but not where a testator devised lands to his son and his heirs male in the fullest trust and confidence that he would not defeat subsequent limitations (*Dawkins v. Penrhyn*, 4 App. Cas. 51). Where trustees of a will entered on and administered as part of a testator's estate land of which he was held to die intestate, they were not express trustees within this section (*Yardley v. Holland*, 20 Eq. 428; see *Churcher v. Martin*, 42 Ch. D. 312; *Re Lacy*, *Royal Association v. Kydd*, 1899, 2 Ch. 149). But an express trust for the benefit of an heir-at-law was held to arise as against trustees in the possession of lands devised by a will which did not declare any trust of the surplus rents (*Salter v. Cavanagh*, 1 Drury & Walsh, 668). So where the will did not declare trusts of part of the real estate (*Patrick v. Simpson*, 24 Q. B. D. 129). And where a person acted as trustee of a will containing express trusts of realty, though the estate was not vested in her, she had placed herself in the position of an express trustee (*Life Association v. Siddal*, 3 D. F. & J. 58). One of several tenants in common who entered into possession of the lands and procured a fee-farm grant to himself was not an express trustee within this section for himself and his co-tenants (*Re Dane*, 1 R. 5 Eq. 498); nor was a purchaser from an executor at an undervalue with notice of the trusts of the will (*Pyrah v. Woodcock*, 24 L. T. 407; see, as to a purchaser with notice from an express trustee, *Young v. Harris*, 65 L. T. 47; *A.-G. v. Magdalen College*, 18 Beav. 223; 6 H. L. C. 189). A *c. g. t.* of real estate under a will was discharged in 1825 under the Insolvent Act, but omitted the estate from his schedule. In 1831 he became bankrupt, and his assignee in bankruptcy took a conveyance of the legal estate from the trustee, in trust for the creditors under the bankruptcy: held, that the legal estate thereby became vested in the assignee upon an express trust within this section—viz., the trust declared by the will, the benefit of which belonged to the creditors under the insolvency (*Sturgis v. Morse*, 3 De G. & J. 1). A deed of direction was held to constitute receivers and the trustee of rents of realty express trustees for the benefit of certain annuitants (*Knight v. Bowyer*, 2 D. G. & J. 421). But a mortgagee was not an express trustee for the mortgagor, even where the mortgage was in the form of a trust for sale (*Locking v. Parker*, 8 Ch. 30; *Re Atison, Johnson v. Mounsey*, 11 Ch. Div. 284). Where the mortgagee was paid off, see *Sands to Thompson*, 22 Ch. 617; *Teevan v. Smith*, 20 Ch. D. 730.

(3)
In the case of a direct or express trust, as where an estate is conveyed to the use of A. and his heirs in trust for B. and his heirs, no time, as between the trustee and *c. g. t.*, can bar the equitable right of the latter (Barnard, C. R. 449; *Townshend v. Townshend*, 1 Br. C. C. 551). The possession of the trustee is the possession of the *c. g. t.*, and if the only circumstance is that he does not perform his trust, his possession operates nothing as a bar, because his possession is according to his title (*Hovenden v. Annesley*, 2 Sch. & Lef. 633). In the case of a strict trustee, it is his duty to take care of the interest of his *c. g. t.*, and he is not permitted to do anything adverse to it; a tenant also has a duty to preserve the interests of his landlord; and many acts therefore of a trustee and a tenant, which if done by a stranger would be acts of adverse possession, will not be so in them, from its being their duty to abstain from them (*Cholmondeley v. Clinton*, 2 Jac. & W. 190; see *Latter v. Dashwood*, 6 Sim. 462; *Faussett v. Carpenter*, 5 Bligh, N. S. 75). But where any doubt arises as to the existence of a trust, and it is possible to reconcile such enjoyment with the facts of the case, the utmost regard is then to be paid to the length of time during which there has been an enjoyment of the property inconsistent with the supposed trust (*A.-G. v. Fishmongers' Co.*, 5 M. & C. 18). Where estates were devised upon trust to sell and pay debts, and subject thereto for infant children, and the surviving trustee retained possession of one of the estates in satisfaction of debts which he alleged himself to have paid, the testator being insolvent: on a bill for an account and conveyance of the estate forty-five years after the death, inquiries were directed whether

3 & 4 Will. 4,
c. 27, s. 25.

land;

Time no bar
between
c. g. t. and
trustee:
where
trustee in
possession;

3 & 4 Will. 4, c. 27, s. 25. the children had notice, whether they had released, and whether the trustee had advanced money to the value of the estate (*Chalmer v. Bradley*, 1 Jac. & W. 51, where numerous cases on this subject are cited).

Where for more than the statutory period trustees in possession of land paid by mistake the whole rents to a stranger, the right of the actual *c. q. t.* was not barred (*Lister v. Pickford*, 34 Beav. 576; see *Churcher v. Martin*, 42 Ch. D. 312). So where the trustees paid the whole rents to some *c. q. t.*'s to the exclusion of another, the latter was not barred (*Knight v. Bowyer*, 2 De G. & J. 421; see *Christ's Hosp. v. Grainger*, 1 Mac. & G. 465). Distinguish the case where, the trustees not acting, some *c. q. t.*'s received the whole rents to the exclusion of others, and the others were barred (*Burroughs v. McCreight*, 1 J. & Lat. 290).

For a case where the trustee remained in possession and paid the rents into Court, and a beneficiary mortgaged his share but no principal or interest was paid in respect of the mortgage for twelve years, and the mortgagee was held barred, see *Re Hazeldine*, 1908, 1 Ch. 34.

Where the same trustee held leases of Blackacre and Whiteacre (adjoining properties) on different trusts a person who was entitled as *c. q. t.* to possession of Whiteacre, and by reason of such possession obtained possession of Blackacre, and retained the same for more than the statutory period, was held to be a person claiming through the trustee otherwise than by purchase for value, and time did not run in her favour (*East Stonehouse Council v. Willoughby*, 1902, 2 K. B. 318, 335).

As to the effect of fines formerly between trustee and *c. q. t.*, see *Gilb. Ch. 62*; *Bell v. Bell*, 1 Ll. & G. temp. Plunket, 59; *Earl Pomfret v. Lord Windsor*, 2 Ves. sen. 472, 281; *Reynolds v. Jones*, 2 Sim. & Stu. 206; 1 Sand. on Uses, 291, 3rd ed.; 5 Cruise, Dig. 208—213.

where *c. q. t.* in possession; where stranger in possession time bars both trustee and *c. q. t.*; The case where the *c. q. t.* is in possession is dealt with in the note to sect. 7, ante, p. 144.

The rule that a trust is not barred by length of time does not apply between a *c. q. t.* entitled in possession and his trustees on the one side, and strangers on the other. Therefore, where a *c. q. t.* entitled to a present estate and his trustee have been both out of possession for the time limited, the trespasser has a good bar against both (*Llewellyn v. Mackworth*, Barnard, C. R. 445; 15 Vin. Abr. 125, n. to pl. 1; see *Townshend v. Townshend*, 1 Br. C. C. 550; *Melling v. Leek*, 16 C. B. 652; *Clay v. Clay*, 3 Br. C. C. 639, n.; *Hercy v. Ballard*, 4 Br. C. C. 469; *Harmood v. Oglander*, 6 Ves. 199; 8 Ves. 106; *Hovenden v. Annesley*, 2 Sch. & Lef. 629). In a colonial case, however, *c. q. t.*'s entitled in possession could, under a colonial act, enforce their rights even where their trustees were barred (*Williams v. Papworth*, 1900, A. C. 563).

The question is more difficult whether a trespasser's possession which bars a trustee also bars a *c. q. t.*, who, if his estate had been legal, would have had further time, as being an infant, or as being only entitled to a future estate. In the case of a *c. q. t.* entitled to a future estate, a strong opinion was expressed by the L. C. of Ireland that he would be barred by the trustee being barred (*Cooper v. Warre*, 18 Ir. Jur. 24, 28). A similar opinion was expressed in the case of a *c. q. t.* under disability (*Re Scott*, 8 Ir. Ch. R. 323; compare *Wych v. E. India Co.*, 3 P. W. 309). And a *c. q. t.* who was not himself barred was held barred by the trustee's bar (*Bolling v. Hobday*, 31 W. R. 9; see as to the proceeds of sale in that case being land, *Kirkland v. Peatfield*, 1903, 1 K. B. 759). Lewin seems to think that such a *c. q. t.* would be barred (1087, 11th ed.; and see 51 Sol. J. 155). The contrary view is suggested by Darb. & Bos. Stat. Lim. 420, referring to *Scott v. S.*, 4 H. L. C. 1065; and by Lightwood, Time Limit, 80.

where trustee alienates for value.

The 25th section renders lapse of time unimportant in all cases within it, that is, between the *c. q. t.* and his trustee, until the trust is disturbed; and that disturbance can only be effected by such a denial of the trust as takes place when the trustee sells to a third party for valuable consideration the property held in trust (*Law v. Bagwell*, 4 Dru. & War. 408). In such a case a lapse of the statutory period from the date of the conveyance will

bar the *c. q. t.*; but it seems that if at the date of the conveyance the rights of the *c. q. t.* are reversionary, or he be under disability, the running of time will be postponed accordingly (*Thompson v. Simpson*, 1 Dru. & War. 489; *A.-G. v. Magdalen College*, 6 H. L. C. 215). 3 & 4 Will. 4, c. 27, s. 25.

(4)

Before the R. P. Lim. Act, 1833, time did not run against charities in a court of equity, neither were charities bound to the times expressed in the statutes 32 Hen. 8, c. 2, and Lim. Act, 1623 (Duke, 161; *A.-G. v. Coventry*, 3 Madd. 368; 2 Vern. 399; *A.-G. v. Christ's Hosp.*, 3 M. & K. 344; *A.-G. v. Bristol*, 2 Jac. & W. 321; *A.-G. v. Poulden*, 8 Sim. 472; *A.-G. v. Smythies*, 2 M. & K. 749; *Christ's Hosp. v. Grainger*, 1 Mac. & G. 460; Shelford on Charities, p. 563). At law the old Stat. Lim. operated against all claimants, although they held in trust for charities; but in Chancery, unless in the case of a purchaser for value, they had no operation (43 Eliz. c. 4; Sugd. V. & P. 944, 11th ed.).

The R. P. Lim. Act, 1833, does not contain any saving in favour of charities, and they are within its provisions (*Magdalen Hosp. v. Knotts*, 4 App. Cas. 324). Where the Att.-Gen., having no independent rights of his own, stands only in the same situation as those who are entitled to the benefit of a charity, if they are barred by lapse of time, he is equally barred (*A.-G. v. Magdalen College*, 18 Beav. 223; 6 H. L. C. 189).

Where a testator charged land in Ireland with a rent-charge as a salary for a schoolmaster, to be appointed by the owner for the time being of the estate on which the rent was charged, time did not run against the gift until a schoolmaster was appointed (*A.-G. v. Persse*, 2 Dru. & War. 69).

Property given upon express trust for a charity is within sect. 25 (*Commrs. express trusts of Donations v. Wybrants*, 2 J. & Lat. 182). The section barred relief for charities; where charity land had not been aliened in fee, but had been held under a lease granted in breach of trust for 500 years at a rent which had been regularly paid (*A.-G. v. Davey*, 4 De G. & J. 136; *A.-G. v. Payne*, 27 Beav. 168; see *Magdalen Hosp. v. Knotts*, 8 Ch. Div. 728).

Length of time would not formerly protect a purchaser with notice of charitable trusts (*A.-G. v. Christ's Hosp.*, 3 M. & K. 344; see *A.-G. v. Bristol*, 2 Jac. & W. 321; *A.-G. v. Poulden*, 8 Sim. 472). But time will now, it seems, run in his favour from the conveyance (*A.-G. v. Magdalen Coll.*, 6 H. L. C. 189; see *A.-G. v. Flint*, 4 Hare, 147; *A.-G. v. Davis*, 18 W. R. 1132). As to the length of time during which an account of rents will be directed in the case of trustees for charities, see the note to sect. 42, *post*, p. 202.

The principle of sect. 25 has now been extended to personal estate by Jud. Act, 1873, s. 25, sub-s. 2, *post*, p. 250 (see *Banner v. Berridge*, 18 Ch. D. 262). 1873, s. 25 (2).

26. In every case of a concealed fraud the right of any person to bring a suit in equity for the recovery of any land or rent of which he, or any person through whom he claims, may have been deprived by such fraud, shall be deemed to have first accrued at and not before the time at which such fraud shall, or, with reasonable diligence, might have been first known or discovered: provided that nothing in this clause contained shall enable any owner of lands or rents to have a suit in equity for the recovery of such lands or rents, on account of fraud against any *bonâ fide* purchaser for valuable consideration, who has not assisted in the commission of such fraud, and who at the time that he made the purchase did not know and had no reason to believe that any such fraud had been committed.

In cases of fraud, no time shall run whilst the fraud remains concealed.

(1) *Cases under Sect. 26*...166.

(2) *Cases in Equity as to Fraud*...167.

3 & 4 Will. 4,
c. 27, s. 26.

(1)
Pleading concealed fraud.

What is concealed fraud within this section.

Before the Jud. Acts, a case of concealed fraud might have been set up in equity on an ejectment bill (*Chetham v. Hoare*, 9 Eq. 571); but not on petition (*Ex p. Breach*, 12 W. R. 769).

Since the Jud. Acts, it has been held that concealed fraud must be pleaded with the utmost particularity (*Riddell v. Strathmore*, 3 Times Rep. 329; *Lawrance v. Norreys*, 15 App. Cas. 210). The circumstances alleged must lead to the reasonable inference that fraud was the cause of the deprivation, and exclude other possible causes (*Lawrance v. Norreys*, *sup.*). On the argument of a demurrer to a bill raising a case of concealed fraud, the court had then nothing to do with the probability or improbability of the plaintiff's ultimate success at the hearing (*Vane v. Vane*, 8 Ch. 395). The same point was discussed on an application to strike out under Ord. 25, r. 4 (*Boaley v. Holder*, 54 L. T. 298). On the whole materials before it, the court struck out as vexatious a claim raising concealed fraud (*Lawrance v. Norreys*, 39 Ch. Div. 213; 15 App. Cas. 210).

To bring a case within the section there must have been (1) fraud, (2) which must have deprived the claimant or his predecessors in title of the estate, (3) and which was concealed, and (4) which concealment could not with reasonable diligence have been discovered sooner (*Willis v. Howe*, 1893, 2 Ch. 551).

The fraud must be the fraud of the person setting up the statute, or some person through whom he claims (*Re McCallum*, *M. v. M.*, 1901, 1 Ch. 143, C. A.; *Rigby*, L. J., *dissentiente*; see *Thorne v. Heard*, 1895, A. C. 495).

Mere ignorance does not prevent the operation of the statute (*Dawkins v. Penrhyn*, 6 Ch. Div. 324). Thus the occupation of an underground cellar without the knowledge of the owner of the surface was not concealed fraud within this section (*Rains v. Buxton*, 14 Ch. D. 537). This section does not mean the case of a party entering wrongfully into possession, but it applies to designed fraud, by which a party, knowing the rightful owner, conceals the circumstances giving the right, and who by means of such concealment is enabled to enter and hold (*Petre v. Petre*, 1 Drew. 397; see *Dean v. Thwaite*, 21 Beav. 621). It points to some contrivance by which the real owner has been not merely deprived, but defrauded; in the sense of being induced to believe that he was not owner, and that the person who so entered was owner and entitled to enter (*Willis v. Howe*, 1893, 2 Ch. 552). *Quere*, whether the nondisclosure by the grantor to the grantee of a conveyance which the grantor honestly believed to be of no effect would amount to fraud (*Re McCallum*, *M. v. M.*, 1901, 1 Ch. 147, 164; compare *Le Lievre v. Gould*, 1893, 1 Q. B. 500). The word "concealed" seems to indicate that there were facts known to the person who enters, and designedly concealed by him from the real owner, which facts if known would enable the real owner to recover (*Willis v. Howe*, 1893, 2 Ch. 552). As regards concealment, compare *Bullt Co. v. Osborne*, 1899, A. C. 363, and other decisions (*post*, p. 221), to the effect that in cases of concealed trespass it is not necessary, for the purpose of avoiding the statute, to show active concealment.

An allegation that, with a view to deprive the true owner of his right, the person in possession conspired with his solicitors to destroy the deeds, was a sufficient allegation of concealed fraud within this section (*Lawrance v. Norreys*, 39 Ch. D. 224; see 15 App. Cas. 213). As to whether preventing information as to the title from reaching the true owner would amount to concealed fraud, see 39 Ch. Div. 228; 15 App. Cas. 215. Bringing up an eldest son in the belief that he was a younger son was concealed fraud within this section (*Vane v. Vane*, 8 Ch. 383). So the procuring instruments of conveyance and devise to be executed by a person of unsound mind (*Lewis v. Thomas*, 3 Hare, 26; as to a conveyance by a lunatic, see *Price v. Berriington*, 3 Mac. & G. 486). But where lunacy was not proved but only dulness of intellect, the court refused after eighty years to set aside a compromise of an action to recover land (*Manby v. Bewicke*, 3 K. & J. 342). The omission from the Schedule of an insolvent of an estate to which he was entitled, was treated in a suit commenced twenty-eight years later as having been a concealed fraud (*Sturgis v. Morse*, 24 Beav. 541; 2 De G. & J. 1).

In another case the court refused after twenty-two years to assume that there had been any concealment of assets by contributories negotiating a compromise with a liquidator (*Watt v. Assets Co.*, 1905, A. C. 317). 3 & 4 Will. 4, c. 27, s. 26.

In a case before this statute, fraud relating to a sale, discovered thirty-seven years after conveyance, furnished an answer to the objection of lapse of time. It was said that it is the duty of the court, when transactions of long standing are brought before it, most anxiously to weigh all the circumstances, and to consider what evidence there may have been, which from lapse of time may be lost. But beyond this, in cases of fraud, time has no effect (*Charter v. Trevelyan*, 11 Cl. & Fin. 740).

As to what constitutes reasonable diligence in the discovery of concealed fraud, see *Chetham v. Hoare* (9 Eq. 571); and the judgment of *Malins, V.-C.*, diligence. *Vane v. Vane* (8 Ch 390, n.); *Willis v. Howe* (43 L. T. 375).

A purchaser for value is not entitled to the protection of this proviso, if his agent who negotiated the purchase had in the course of the transaction actual knowledge of the fraud, or had reason to believe that a fraud had been committed (*Vane v. Vane*, 8 Ch. 383). Proviso as to bona fide purchasers.

Though equity will interpose to prevent those mischiefs which would result from persons being allowed at any distance of time to disturb the possession of another; yet as its interference proceeds upon principles of conscience, it will not in any manner protect the abuse of confidence, and therefore no length of time will bar a fraud (1 Fonbl. Eq. 331; *Cotterill v. Purchase*, Forrest, 61; *Alden v. Gregory*, 2 Eden, R. 230; *Whalley v. Whalley*, 1 Mer. 436; *S. C.*, 3 Bligh, 1; as to length of time being no bar in cases of fraud, see also *Deloraine v. Browne*, 3 Bro. C. C. 633; *Smith v. Clay*, *Ib.* 639, n.; *Hercy v. Dinwoody*, 4 Bro. C. C. 258; 2 Ves. jun. 87; *Yate v. Moseley*, 5 Ves. 480; *Moth v. Atwood*, 5 Ves. 845; *Purcell v. Macnamara*, 14 Ves. 91; *Beckford v. Wade*, 17 Ves. 87; *Hovenden v. Annesley*, 2 Sch. & Lef. 607, 630; *Moore v. Blake*, 1 Ball & B. 62; *Medlicott v. O'Donnell*, *Ib.* 156; *Gould v. Okenden*, 4 Br. P. C. 198, Toml. ed.; *Morse v. Royal*, 12 Ves. 355; *Pickering v. Lord Stamford*, 2 Ves. jun. 272; *Byrne v. Frere*, 2 Molloy, 176; *Hatch v. Hatch*, 9 Ves. 292). An agreement on settlement of family disputes, where one party had been guilty of gross fraud and concealment of the rights of the other, was set aside after a great length of time (*Gordon v. Gordon*, 3 Swanst. 400). As to fraud in the case of levying fines, see *Langley v. Fisher* (9 Beav. 90).

A court of equity refused to impeach a transaction on the ground of fraud, where the facts had been within the knowledge of the party many years; but held that every new right of action in equity must be acted on at the utmost within twenty years, except in the case of a trustee whose possession was consistent with the title of the claimant (*Hovenden v. Annesley*, 2 Sch. & Lef. 637; see *Redgrave v. Hurd*, 20 Ch. D. 13). According to the law before this act, where a party was constituted a trustee by a court of equity on the ground of fraud, his possession was adverse, and time ran from the discovery of the fraud (2 Sch. & Lef. 633; 2 Ball & B. 129; *Brooksbank v. Smith*, 2 Y. & Coll. 58; *Blennerhasset v. Day*, 2 Ball & B. 118).

See further the note as to Courts of Equity and the Statutes of Limitation, *post*, pp. 247 *et seq.*

27. Provided always, and be it further enacted, that nothing in this act contained shall be deemed to interfere with any rule or jurisdiction of courts of equity in refusing relief, on the ground of acquiescence or otherwise, to any person whose right to bring a suit may not be barred by virtue of this act. Saving the jurisdiction of equity on the ground of acquiescence or otherwise.

If a party, having a right, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection while the act is in progress, he cannot afterwards complain. That is the proper sense of the word acquiescence (*Leeds v. Amherst*, 2 Phil. 123). It Acquiescence.

3 & 4 Will. 4, c. 27, s. 27. may be defined as "quiescence under such circumstances as that assent may be reasonably inferred from it" (*De Bussche v. Alt*, 8 Ch. Div. 314). Every presumption that can be fairly made will be raised against a stale demand. It may arise from the acts of the parties, or the very forbearance to make the demand affords a presumption either that the claimant is conscious it is satisfied, or intended to relinquish it (*Pickering v. Stamford*, 2 Ves. jun. 280). Parties, however, cannot be said to acquiesce in the claims of others unless they are fully cognizant of their right to dispute them (*Marker v. Marker*, 9 Hare, 16). And the doctrine does not apply where there is a common mistake (*Cholmondeley v. Clinton*, 2 Mer. 362); e.g. by executors and a legatee as to the construction of a will (*Newton v. Ayscough*, 19 Ves. 539; *Brooksbank v. Smith*, 2 Y. & C. 59; see *Knatchbull v. Fearnhead*, 3 M. & C. 122).

imports knowledge.

Acquiescence generally.

Acquiescence for nearly fifty years in a mortgage transaction, liable to have been impeached, was a bar to relief (*Hicks v. Cooke*, 4 Dow. 17). Long acquiescence by a party acquainted with the facts is a bar to setting aside a lease, upon the ground of fraud or mistake (*Selsey v. Rhodes*, 1 Bligh, N. S. 1). An heir-at-law was not entitled to an issue *devisavit vel non* after twenty years' acquiescence in his ancestor's will (*Tucker v. Sanger*, 1 Mclel. 424; 13 Price, 119). An acquiescence of twenty-three years, with a knowledge of the will, is a bar to a claim by a residuary legatee against an executor for an account, on the ground of neglect or misfeasance (*Portlock v. Gardner*, 11 L. J. Ch. 313). A wife was bound by the declaration of her husband alone of the uses of a fine levied of her lands after having acquiesced fifteen years from his death (*Swanton v. Raven*, 3 Atk. 105). Where the shareholders of a canal had acquiesced for forty-seven years in an agreement for letting tolls not warranted by statute they could not impeach such agreement in respect of the public interest (*Gray v. Chaplin*, 2 Russ. 126). Acquiescence will not be held to have taken place, so long as the circumstances of undue influence on one side, and distress on the other, continue to operate (*Purcell v. Macnamara*, 14 Ves. 106, 121, 122). A claim by mortgagees to make legatees refund was barred after twenty years by acquiescence (*Blake v. Gale*, 32 Ch. Div. 571).

Acquiescence in breaches of trust.

Length of time, when it does not operate as a statutory bar, operates simply as evidence of acquiescence. A *cestui que trust* is not less capable of giving assent to a breach of trust when his interest is in reversion than when it is in possession. But where the trust is clear, a breach of trust will not be held to have been sanctioned by the mere knowledge and non-interference on the part of the *cestui que trust* before his interest has come into possession (*Life Association v. Siddal*, 3 D. F. & J. 72, 74; see *Brown v. Cross*, 14 Beav. 105; *March v. Russell*, 3 M. & C. 31).

Acquiescence imports knowledge, for a man cannot be said to have acquiesced in what he did not know; and in cases involving a breach of trust, acquiescence imports full knowledge. A *cestui que trust* cannot be bound by acquiescence, unless he has been fully informed (*Life Association v. Siddal*, *sup.*). A *cestui que trust* who, knowing that his trustee has committed a breach of trust, obtains from him part only of that to which he is entitled, does not waive his claim to further relief, unless such an intention can be clearly inferred (*Re Cross*, *Harston v. Tension*, 20 Ch. Div. 122). In the case of a trustee's purchasing the trust property, the question of acquiescence cannot arise until it is ascertained that the *cestui que trust* knew that his trustee had become the purchaser (*Randall v. Errington*, 10 Ves. 427, 428; *Morse v. Royal*, 12 Ves. 335). If the *cestui que trust* joins with the trustees in that which is a breach of trust, knowing the circumstances, such a *cestui que trust* can never complain of such a breach of trust; and either concurrence in the act, or acquiescence without original concurrence, will release the trustees; but the court must inquire into the circumstances which induced concurrence or acquiescence (*Walker v. Symonds*, 3 Swanst. 64). All *c.q.t.'s*, who (being of age and under no incapacity) have had full information of the conduct of their trustees, and openly or tacitly acquiesced in it during a considerable time, are held to

have adopted such conduct, and precluded themselves from remedy (*Brice v. Stokes*, 11 Ves. 319; *Ryder v. Bickerton*, 3 Swanst. 83, n.; *Underwood v. Stevens*, 1 Mer. 712; *Trafford v. Boehm*, 3 Atk. 444). 3 & 4 Will. 4. c. 27, s. 27.

Laches.

"Where there is a Statute of Limitations the objection of simple laches does not apply until the expiration of the time allowed by the statute. But acquiescence is a different thing, it means more than laches. If a party who could object lies by, and knowingly permits another to incur an expense in doing an act under a belief that it would not be objected to, and so a kind of permission may be said to be given to another to alter his condition, he may be said to acquiesce: but the fact of simply neglecting to enforce a claim for the period which the law permits delay without losing right, I conceive cannot be any equitable bar" (*Archbold v. Scully*, 9 H. L. C. 383). A testator bequeathed to his widow a pecuniary legacy and a life annuity. She survived him twenty-eight years. After her death a bill for their recovery, filed by her executrix, was dismissed on the ground of great laches (*Pattison v. Hawkesworth*, 10 Beav. 375). See *Sibbering v. Balcarras* (3 De G. & Sm. 737), where the court refused to entertain a suit for setting aside the sale of a reversionary interest after the lapse of several years; and see *Spackman v. Evans*, L. R. 3 H. L. 220. An action to foreclose a mortgage of an advowson was barred by laches (*Brooks v. Muckleston*, 1909, 2 Ch. 519). Laches would bar an action for assignment of dower where for twelve years the widow does not claim any right (*Williams v. Thomas*, 1909, 1 Ch. 722). Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material. But in every case, if an argument against relief, which otherwise would be just, is founded upon mere delay, that delay of course not amounting to a bar by any Statute of Limitations, the validity of that defence must be tried upon principles substantially equitable. Two circumstances, always important in such cases, are the length of the delay and the nature of the acts done during the interval, which might affect either party and cause a balance of justice or injustice in taking the one course or the other, so far as relates to the remedy (*Lindsay Petroleum Co. v. Hurd*, L. R. 5 P. C. 239; adopted, *Allcard v. Skinner*, 36 Ch. D. 163).

In the case of legal right, courts of equity will not refuse relief on ground of delay, unless sufficient to create statutory bar (*Three Towns' Co. v. Maddever*, 27 Ch. Div. 523; *Re Baker*, *Collins v. Rhodes*, 20 Ch. Div. 230). So in the case of an injunction to aid a legal right (*Fullwood v. Fullwood*, 9 Ch. D. 176).

See further the note as to Courts of Equity and the Statutes of Limitation, *post*, pp. 247 *et seq.*

7. Limitation of Time between Mortgagor and Mortgagee.

A. As to the Barring of the Rights of Mortgagees.

[Sect. 28 of the *R. P. Lim. Act*, 1833, has been repealed and the following substituted, *viz.*:]

[*R. P. Lim. Act*, 1874, sect. 7.] When a mortgagee shall have obtained the possession or receipt of the profits of any land or the receipt of any rent comprised in his mortgage, the mortgagor, or any person claiming through him, shall not bring any action or suit to redeem the mortgage but within twelve years next after the time at which the mortgagee obtained such possession or receipt, unless in the meantime an acknowledgment in writing of the title of the mortgagor, or of his

Mortgagor to be barred at end of twelve years from the time when the mortgagee took possession or from the last written

3 & 4 Will. 4,
c. 27, s. 28.

acknowledg-
ment.

right to redemption, shall have been given to the mortgagor or some person claiming his estate, or to the agent of such mortgagor or person signed by the mortgagee or the person claiming through him; and in such case no such action or suit shall be brought but within twelve years next after the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given; and when there shall be more than one mortgagor, or more than one person claiming through the mortgagor or mortgagors, such acknowledgment, if given to any of such mortgagors or persons, or his or their agent, shall be as effectual as if the same had been given to all such mortgagors or persons; but where there shall be more than one mortgagee, or more than one person claiming the estate or interest of the mortgagee or mortgagees, such acknowledgment, signed by one or more of such mortgagees or persons, shall be effectual only as against the party or parties signing as aforesaid, and the person or persons claiming any part of the mortgage money or land or rent by, from, or under him or them, and any person or persons entitled to any estate or estates, interest or interests, to take effect after or in defeasance of his or their estate or estates, interest or interests, and shall not operate to give to the mortgagor or mortgagors a right to redeem the mortgage as against the person or persons entitled to any other undivided or divided part of the money or land or rent; and where such of the mortgagees or persons aforesaid as shall have given such acknowledgment shall be entitled to a divided part of the land or rent comprised in the mortgage, or some estate or interest therein, and not to any ascertained part of the mortgage money, the mortgagor or mortgagors shall be entitled to redeem the same divided part of the land or rent on payment, with interest, of the part of the mortgage money which shall bear the same proportion to the whole of the mortgage money as the value of such divided part of the land or rent shall bear to the value of the whole of the land or rent comprised in the mortgage.

(1) *Operation of the section*...170.

(2) *Acknowledgments*...171.

(3) *Disabilities*...172.

Sect. 7 of R. P. Lim. Act, 1874, has, by sect. 9 of the same act, been substituted for sect. 28 of R. P. Lim. Act, 1833. Sect. 7 of the R. P. Lim. Act, 1874, fixes the period of limitation for bringing an action for redemption at twelve years, but in other respects is substantially similar to R. P. Lim. Act, 1833, s. 28, which has accordingly been omitted.

CASES AS TO
BARRING
MORTGAGOR'S
RIGHTS.

(1)
Effect of sect.

A trust for sale of land by way of security for money lent is a mortgage within the section (*Locking v. Parker*, 8 Ch. 30). After possession by the mortgagee for the statutory period the mortgagor's rights are barred, not only in the land but also in the purchase-money, whether such money arise under such a trust for sale (*Re Alison, Johnson v. Mounsey*, 11 Ch. Div. 284), or under an ordinary power of sale (*Chapman v. Corpe*, 41 L. T. 22). Where the trustee under the mortgagor's bankruptcy was barred, the mortgagor was

barred also, notwithstanding annulment of the bankruptcy (*Markwick v. Hardingham*, 15 Ch. Div. 339). 3 & 4 Will, 4, c. 27, s. 28.

A mortgagee in possession of part of the land mortgaged can, under this section, acquire title to such part, although the remaining part is in possession of the mortgagor (*Kinsman v. Rouse*, 17 Ch. D. 104: the rule before R. P. Lim. Act, 1833, was different, *Rakestraw v. Bruyer*, Moseley, 189). Consider the decision where land and personalty were included in the same mortgage, and, the mortgagee having by possession acquired title to the land, it was held that the mortgagor could not redeem the personalty (*Charter v. Watson*, 1899, 1 Ch. 175). Possession of mortgagee.

A husband separated from his wife, becoming mortgagee in possession of her separate estate for twenty years, cannot set up the statute (*Booth v. Purser*, 1 Ir. Eq. R. 33). A solicitor who pays off a mortgage debt due from a client must be taken to act as the agent of the client, and if he receive the rents of the mortgaged property time will not run against the client (*Ward v. Carttar*, 1 Eq. 29). Where a mortgagee who had been in possession for six years without making any acknowledgment of the mortgagor's title, purchased the interest of the tenant for life of the equity of redemption, and continued in possession for twenty years longer; such possession was not adverse during the life estate (*Hyde v. Dallaway*, 2 Hare, 528; *Raffety v. King*, 1 Keen, 601). A mortgagee of a life interest who entered into possession under an order of the court and remained in possession did not become a trespasser by the mortgagor's death (*Hickman v. Upsall*, 2 Ch. D. 617). A second mortgagee was held not to have acquired a title by adverse possession (*Thorpe v. Holdsworth*, 7 Eq. 139). "I am disposed to think that the statute cannot apply so as to make the mere possession by the mortgagee for twenty years without acknowledgment a bar to redemption, where the original contract is in terms that the mortgagor may redeem at any time during a period extending beyond the twenty years" (*per Lord Cranworth, Alderson v. White*, 2 De G. & J. 109).

Where a man by his will creates particular estates and remainders and then mortgages his estate, and the mortgagee enters, the mortgagor and his devisees have only in common a single period to claim, which runs from the entry (*Broune v. Bishop of Cork*, 1 Dru. & Wal. 700; Sugd. R. P. Stat. 38; see *Raffety v. King*, 1 Keen, 601). As to redemption of her land by a wife after her husband's death under the old law, see *Price v. Copner*, 1 Sim. & Stu. 347.

Where possession of mortgaged land was taken and held by the mortgagee for three years before his death, and after his death was retained by the tenant for life of his real and personal estate for a period sufficient to bar the mortgagor, the land devolved as personal, not real estate (*Re Loveridge, Drayton v. Loveridge*, 1902, 2 Ch. 859. See *Re Woodhead, Cadman v. Carr*, 1884, W. N. 174). But the share which passed to one of the mortgagee's next of kin who died after the bar passed to him as real estate (*Re Loveridge, Pearce v. Marsh*, 1904, 1 Ch. 518).

A Welsh mortgage is a conveyance of an estate redeemable at any time on Welsh payment of the principal, with an understanding that the profits shall be received by the mortgagee without account in satisfaction of interest (see *Talbot v. Braddyl*, 1 Vern. 395; *Lawley v. Hooper*, 3 Atk. 280; *Yates v. Hambly*, 2 Atk. 237). As to whether an account would in such a case be directed, see Coote on Mortgages, 7th ed. 34 (*Fulthorpe v. Forster*, 1 Vern. 477; 5 Jarm. Conv., by Sweet, 96, 101). A Welsh mortgagee has no remedy to compel redemption or foreclosure (*Longuet v. Scawen*, 1 Ves. sen. 406); but if such a mortgagee be permitted to hold for more than the statutory period after the debt has been paid, the mortgagor would be barred (*Fenwick v. Reed*, 1 Mer. 125; 5 B. & Ald. 232; and see 2 Spence on Eq. Jurisd. pp. 616-618). As to Welsh mortgages, see further *Teulon v. Curtis*, Younge, 610; *Hartpoole v. Walsh*, 5 Br. P. C. 267, Toml. ed.; *Balfe v. Lord*, 2 Dr. & War. 480.

The acknowledgment must be given "in the meantime," and accordingly (2)
Acknowledgments:

3 & 4 Will. 4, c. 27, s. 28. an acknowledgment of the mortgagor's title made by the mortgagee after time has run in his favour does not revive the equity of redemption. (See *Sanders v. Sanders*, 19 Ch. Div. 373; *Markwick v. Hardingham*, 15 Ch. Div. 346; disapproving *Stansfield v. Hobson*, 3 D. M. G. 620). The old law was different (*Pendleton v. Booth*, 1 D. F. & Jo. 81). See as to acknowledgments of the mortgage title under the old law, *Hodde v. Healey*, 6 Madd. 181; *Price v. Copner*, 1 S. & S. 347.

must be made to the mortgagor or his agent; The section has been held to operate retrospectively as to acknowledgments (*Batchelor v. Middleton*, 6 Hare, 75). An acknowledgment by the mortgagee (in writing signed by himself) of his mortgage title to a third person is not sufficient (*Batchelor v. Middleton*, 6 Hare, 83, 84; *Markwick v. Hardingham*, 15 Ch. Div. 339). When a mortgagor became bankrupt a letter written to him subsequently did not operate as an acknowledgment either of his title or that of the assignee to the equity of redemption (*Markwick v. Hardingham*, *sup.*). Where a mortgagee in possession conveyed the land to a purchaser, subject expressly to the equity of redemption of the mortgagor, the deed was not a sufficient acknowledgment of the mortgagor's title (*Lucas v. Denison*, 13 Sim. 584).

who is agent; The acknowledgment may be made to an agent of the mortgagor, who need not, however, have at the time an authority to act (*Trulock v. Robey*, 12 Sim. 402). A sufficient acknowledgment was found in a letter to an infant's grandfather, whom she was entitled to treat as her agent (*Ib.*). In the case of a mortgage by a member of a building society to the society, the committee were not the agents of the mortgagor to receive an acknowledgment (*Wilson v. Walton Society*, 19 T. L. R. 408). Letters written by a mortgagee to the mortgagor's solicitor were (apart from their date) a sufficient acknowledgment in *Stansfield v. Hobson*, 3 D. M. & G. 620; but insufficient in *Thompson v. Bowyer*, 11 W. R. 975. It seems that the keeping of accounts (not signed) by the mortgagee in possession is not an acknowledgment (see *Baker v. Whetton*, 14 Sim. 426). In *Re Alison, Johnson v. Mounsey* (11 Ch. Div. 284), where the mortgagor was held barred, accounts had been kept by the mortgagee in possession (compare *Jackson v. Ogg*, *post*, p. 224).

mortgagee's accounts;

acknowledgment by one of several mortgagees. An acknowledgment of a mortgagor's title given by one of two joint mortgagees was inoperative. "The provision in this section as to acknowledgment by some of several mortgagees applies only where they have separate interests either in the money or the land" (*Richardson v. Younge*, 6 Ch. 478).

(3)

Disabilities.

There are no savings for disabilities of the mortgagor or his heirs in regard to the bar created by the section. And the sections as to disabilities (*ante*, p. 153) do not apply; an action to redeem not being "an action to recover land" within these sections (*Kinsman v. Rouse*, 17 Ch. D. 104; *Forster v. Patterson*, 17 Ch. D. 132).

B. As to the Barring of the Rights of Mortgagees.

THE REAL PROPERTY LIMITATION ACT, 1837.

7 Will. 4 & 1 Vict. c. 28. Mortgagees of "land" within the definition in 3 & 4 Will. 4, c. 27, s. 1, may bring actions to recover land within twenty years

Whereas doubts have been entertained as to the effect of a certain act of parliament made in the third and fourth years of his late Majesty King William the Fourth, intituled "An Act for the Limitation of Actions and Suits relating to Real Property, and for simplifying the Remedies for trying the Rights thereto," so far as the same relates to mortgages; and it is expedient that such doubts should be removed: It shall and may be lawful for any person entitled to or claiming under any mortgage of land, being land within the definition contained in the first section of the said act to make an entry or bring an

action at law or suit in equity to recover such land at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit in equity shall have first accrued, anything in the said act notwithstanding.

3 & 4 Will. 4, c. 27, s. 28.

after last payment of principal or interest.

By R. P. Lim. Act, 1874, s. 9 (*post*, p. 184), the period of twelve years is substituted for twenty years in R. P. Lim. Act, 1837.

Doubts were entertained whether a mortgagee, who was not proved to have been in possession or receipt of the profits within twenty years, and to whom no acknowledgment in writing had been given according to the 14th section (*ante*, p. 150), was not barred of his ejectment by the 2nd and 3rd sections, inasmuch as the mortgagee's right had accrued more than twenty years previously (*Doe v. Williams*, 5 Ad. & Ell. 291; see *Thornton v. France*, 1897, 2 Q. B. 154). These doubts have been removed by the above enactment.

CASES AS TO THE BARRING OF MORTGAGEE'S RIGHTS.

A foreclosure action is an action for the recovery of land within 1 Vict. c. 28 (*Harlock v. Ashberry*, 19 Ch. Div. 539). And if a mortgagee obtains an order for foreclosure absolute, this is a new title (*Heath v. Pugh*, 6 Q. B. Div. 360, 361), which accrues within the R. P. Lim. Act, 1833, s. 2, at the date of the order (*Pugh v. Heath*, 7 App. Cas. 238).

Foreclosure.

The R. P. Lim. Act, 1837, does not itself create a bar in any case in which it had not been already created by the act which it explains. It only declares (in conformity, and with manifest reference to the rule which had before prevailed in equity) that nothing in that act shall bar the title of a mortgagee (continuing to be such) who has received any payment on account of principal and interest from the person entitled to the equity of redemption within the statutory period before the commencement of any action (*Heath v. Pugh*, 6 Q. B. Div. 362).

An action to foreclose an equitable mortgage of an advowson in gross (which was not land within the statute) was barred by laches (*Brooks v. Muckleston*, 1909, 2 Ch. 519).

The R. P. Lim. Act, 1837, is not limited to proceedings between the mortgagee and mortgagor (*Lulbrook v. L.*, 1901, 2 K. B. 100). Where the owner of land mortgages it, and an intruder subsequently obtains possession and the mortgage continues to exist, the act applies in favour of the mortgagee, although as against the mortgagor and those claiming under him the intruder may have acquired a good title (*Ib.*).

Effect on mortgagee's title, where mortgage is followed by adverse possession of stranger.

In the case of a mortgage executed before the R. P. Lim. Act, 1833, where a stranger was in possession, but such possession was not adverse either at the date of the mortgage or of the passing of the last-mentioned act, the mortgagee brought ejectment, the mortgagor having within the statutory period paid interest on the mortgage: held, that the R. P. Lim. Act, 1837, preserved to the plaintiff the same right of entry as if the R. P. Lim. Act, 1833, had not passed; and he was entitled to recover, though the mortgagor's right of entry, within the meaning of the R. P. Lim. Act, 1833, had accrued before the mortgage, and was barred under that statute (*Doe v. Eyre*, 17 Q. B. 366; *Eyre v. Walsh*, 10 Ir. C. L. R. 346; *Ford v. Ager*, 2 H. & C. 279; 11 W. R. 1073).

In another case, where there was no adverse possession at the date of the mortgage, the land was subsequently sold and the purchaser paid the mortgage debt, and took a conveyance, in which mortgagor and mortgagee joined; held, that the purchaser was a person "claiming under" a mortgage within the R. P. Lim. Act, 1837; and that under the R. P. Lim. Act, 1833, s. 2, time ran from the paying off of the mortgage (*Doe v. Massey*, 17 Q. B. 373). *Quære* whether this decision is consistent with *Heath v. Pugh* (*sup.*), the mortgage not having continued to subsist (*Thornton v. France*, 1897, 2 Q. B. 158).

3 & 4 Will. 4,
c. 27, s. 28.

Where
adverse pos-
session of
stranger is
followed by
mortgagee.

Where there
is possession
of mortgagor.

When time
begins to run
against mort-
gagee.

Mortgage of
estate in
possession.

Mortgage of
estate in
reversion.

Copyholds.

Annuity.

Payments
within R. P.
Lim. Act,
1837.

Where, however, at the date of the mortgage an intruder is in possession holding adversely to the mortgagor, and time has already begun to run in his favour as against the mortgagor, the present act does not confer a new right of entry on the mortgagee (*Thornton v. France*, 1897, 2 Q. B. 158; see *Hemming v. Blanton*, 21 W. R. 636).

If a mortgagor remains in possession for twelve years without paying principal or interest and without acknowledgment, the mortgagee's title will be extinguished, although a prior mortgage (under which possession has not been taken) has been in existence during the earlier part of the time (*Kibble v. Fairthorne*, 1895, 1 Ch. 219). The puisne mortgagee was also barred where, while time was running against him, a prior mortgagee took possession (*Johnson v. Brock*, 1907, 2 Ch. 533; but see *Re Bermingham*, 5 Ir. R. Eq. 147). The effect of the extinguishment is to vest in the mortgagor the legal estate; which may avail for the protection of a person taking a subsequent mortgage from him (*Kibble v. Fairthorne*, *sup.*).

For the case of a mortgage of an equitable interest in land and the proceeds thereof, where the trustees remained in possession, see *Re Hazeldine*, 1908, 1 Ch. 34.

As regards the point from which time runs against a mortgagee in the case of a legal mortgage of an estate in possession in freehold land; if the mortgage deed contains a provision that the mortgagor may retain possession of the land for a time certain, *e.g.* until default on a particular day, and the mortgage deed is executed by the mortgagee, there is in effect a redemise by the mortgagee until the day for payment of the principal, and the mortgagee having no right of entry until that day, time will not run against him until then (*Wilkinson v. Hall*, 3 Bing. N. C. 508; see *Doe v. Goldwin*, 2 Q. B. 143). Where, however, the mortgage deed contains no such provision or has not been executed by the mortgagee, the mortgagee has an immediate right of entry upon execution by the mortgagor of the mortgage deed (*Doe v. Lightfoot*, 8 M. & W. 564; *Doe v. Day*, 2 Q. B. 147; *Rogers v. Grazebrook*, 8 Q. B. 895; *Green v. Burns*, 6 L. R. Ir. 173), and time runs against him from that point, not from the day for payment of the principal (*Doe v. Lightfoot*, *sup.*). Quære as to the dicta to the contrary effect in *Kibble v. Fairthorne*, 1895, 1 Ch. 225; *Johnson v. Brock*, 1907, 2 Ch. 536.

Where a mortgagee is also tenant for life of the whole of the mortgaged estate, the statute does not begin to run against the mortgage title until his death; and the same rule applies where the mortgagee is entitled for life as tenant in common with others to the mortgaged estate (*Wynne v. Styan*, 2 Phill. C. C. 303; see *Topham v. Booth*, 35 Ch. D. 607).

In the case of an equitable charge on a reversionary interest in land, time runs against the right of foreclosure from the date when the interest falls into possession (*Hugill v. Wilkinson*, 38 Ch. D. 480; *Re Owen*, 1894, 3 Ch. 220; *Powell v. Brodhurst*, 1901, 2 Ch. 167; *Henry v. Smith*, 2 Dr. & W. 381; and see *Re Lake*, 63 L. T. 416).

In the case of a mortgage of copyholds a mortgagee cannot maintain ejectment until he has been admitted, but his admittance relates back to the date of the surrender (*Holdfast v. Clapham*, 1 Term. Rep. 600; *Doe v. Webber*, 3 Bing. N. C. 922). The mortgagee, however, may commence an action for foreclosure before admittance (*Sutton v. Stone*, 2 Atk. 101).

As to whether the R. P. Lim. Act, 1837, applies to the grantor of an annuity charged on land, see argument in *Searle v. Colt* (1 Y. & C. C. C. 36).

A payment within the R. P. Lim. Act, 1837, must be a payment of principal or interest, and must be made by the mortgagor, or by some person bound to pay principal or interest on his behalf (*Harlock v. Ashberry*, 19 Ch. Div. 539)—*i.e.* bound as between himself and the mortgagor (*Bradshaw v. Widdrington*, 1902, 2 Ch. 436). Payment by a stranger will not do (*Ellis v. Ellis*, 1905, 1 Ch. 619). The mortgagee's receipt of the surrender value of a policy included in the mortgage was not a sufficient payment (*Re Clifden, Annaly v. Agar-Ellis*, 1900, 1 Ch. 774). Where a mortgagor assigned the equity of redemption, and subsequently paid interest, the payment did not prevent time running in favour of the assignee (*Newbould v. Smith*, 33

Ch. D. 127). The H. L. expressed no opinion on the point (14 App. Cas. 423: compare *Adnam v. Sandwich*, 2 Q. B. D. 490). Payment of rent made to the mortgagee by a tenant of the land in consequence of notice was not sufficient (*Harlock v. Ashberry*, *sup.*; compare *Wrigley v. Gill*, 1906, 1 Ch. 165, and cases there quoted); but such payment made by a receiver who was the mortgagor's agent was sufficient (*Berwick v. Price*, 1905, 1 Ch. 642; see *Chinnery v. Evans*, 11 H. L. C. 115). Time did not run against the mortgagee where the same person was entitled to the interest of the mortgage and the rents of the whole mortgaged land (*Topham v. Booth*, 35 Ch. D. 607. For the case where he was only entitled to the rents of part, see *Re Finnegan*, 1906, 1 I. R. 370. See also the case where a wife was entitled to a mortgage on her husband's land, *Re Hawes, Burchell v. Hawes*, 62 L. J. Ch. 463; and the cases quoted *post*, pp. 189, 216). Where estates A., B. and C. are included in one mortgage, and the owner of A. pays interest, the mortgagee's remedy against B. and C. is preserved (*Chinnery v. Evans*, 11 H. L. C. 115; see *Dickenson v. Teasdale*, 1 D. J. S. 52. Compare *Lewin v. Wilson*, 11 App. Cas. 639).

It was said that the mere laches of the mortgagee to demand interest from the tenant for life of the equity of redemption would not prejudice his claim against those in remainder (*Wrixon v. Vize*, 2 Dr. & War. 192; *Loftus v. Swift*, 2 Sch. & L. 642). Payment of interest by a tenant for life of the equity of redemption to the right person keeps the mortgage alive so that foreclosure can be had (*Barclay v. Owen*, 60 L. T. 222. As to payments keeping alive the remedy on covenant, see *Pears v. Laing*, 12 Eq. 41; *Dibb v. Walker*, 1893, 2 Ch. 429; *Leahy v. De Moleyns*, 1896, 1 I. R. 206; *Thompson v. Hurly*, 1905, 1 I. R. 594). But where the tenant for life by deed admitted payment of interest, this was not a sufficient acknowledgment, as against the remainderman, to prevent the statute from operating (*Gregson v. Hindley*, 10 Jur. 383). Compare *Re Fitzmaurice* (15 Ir. C. L. R. 445); *Beckett v. De la Cour* (11 L. R. Ir. 187). Where the mortgage debt is settled on A. for life, remainder to B., B. may be barred by non-payment of interest to A. where the debt is vested in trustees with power to give receipts (*Barcroft v. Murphy*, 1896, 1 I. R. 590).

See, further, the cases as to payments quoted under sect. 8 of R. P. Lim. Act, 1874, *post*, p. 193; and sect. 5 of the Civ. Proced. Act, 1833, *post*, p. 215.

8. Limitation of Time as to Church Property and Advowsons.

29. Provided always, and be it further enacted, that it shall be lawful for any archbishop, bishop, dean, prebendary, parson, vicar, master of hospital or other spiritual or eleemosynary corporation sole, to make an entry or distress, or to bring an action or suit to recover any land or rent within such period as hereinafter is mentioned next after the time at which the right of such corporation sole, or of his predecessor, to make such entry or distress, or bring such action or suit, shall first have accrued; (that is to say,) the period during which two persons in succession shall have held the office or benefice in respect whereof such land or rent shall be claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies and such term of six years taken together shall amount to the full period of sixty years; and if such times taken together shall not amount to the full period of sixty years, then during such further number of years in addition to such six years as will, with the time of the holding of such two persons and such six years, make up the full period

No lands or rents to be recovered by ecclesiastical or eleemosynary corporation sole, but within two incumbencies and six years, or sixty years.

3 & 4 Will. 4, c. 27, s. 29. of sixty years; and no such entry, distress, action, or suit shall be made or brought at any time beyond the determination of such period.

Law before the statute.

Before this act, ecclesiastical corporations, and all ecclesiastical persons seised in right of churches, were not within the Stat. Lim., and could not bar their successors, by neglecting to bring actions for recovery of land within the time prescribed for other persons, although an ecclesiastical person, guilty of such neglect, would himself have been barred (Plowd. 358, 538; 11 Rep. 78 b; 7 Roll. R. 151; 2 Bos. & Pull. 546; see 3rd Real Prop. R. 58—62).

Although the Statute of Fines, 4 Hen. 7, c. 24 (*ante*, p. 130), did not bar the successors of ecclesiastical persons entitled to lands in respect of offices for life, yet each person was bound by a lapse of five years in his own time after the fine had been levied (*Runcorn v. Cooper*, 5 B. & C. 696; *Croft v. Howel*, Plowd. 358; 1 Prest. Conv. 235; *Magdalen College case*, 11 Rep. 67).

The Prescription Act, 1832, extends to any ecclesiastical person, but tithes are excepted from that act (*ante*, p. 2).

Cases under the section.

Where lands belonging to a spiritual corporation sole became vested in the Eccles. Commrs., this section extended to the commissioners under sect. 57 of the Eccles. Commrs. Act, 1840 (*Eccles. Commrs. v. Rowe*, 5 App. Cas. 736); but it does not extend to an ordinary lay successor to a spiritual corporation (*Irish Commrs. v. Grant*, 10 App. Cas. 14).

No advowson to be recovered but within three incumbencies or sixty years.

30. No person shall bring any quare impedit or other action, or any suit to enforce a right to present to or bestow any church, vicarage, or other ecclesiastical benefice, as the patron thereof, after the expiration of such period as hereinafter is mentioned; (that is to say,) the period during which three clerks in succession shall have held the same, all of whom shall have obtained possession thereof adversely to the right of presentation or gift of such person, or of some person through whom he claims, if the times of such incumbencies taken together shall amount to the full period of sixty years; and if the times of such incumbencies shall not together amount to the full period of sixty years, then after the expiration of such further time as, with the times of such incumbencies, will make up the full period of sixty years.

Limitation of the right to recover presentations.

If a stranger present to a benefice, the recovery of that presentation depends on the statutes 13 Edw. 1, c. 5, s. 2, and 7 Anne, c. 18. "If a stranger usurps my presentation, and I do not pursue my right within six months, I shall lose that turn without remedy, for the peace of the church, and as a punishment for my own negligence; but that turn is the only one I shall lose thereby" (3 Steph. Comm. 531).

Limitation of right to recover advowsons.

The limitation of the right to recover advowsons laid down by R. P. Lim. Act, 1833, s. 30, was in accordance with a suggestion of Blackstone (3 Steph. Com. 565, where the old law is stated; see *Robinson v. Bristol*, 20 L. J. C. P. 208).

The effect of time on an action to foreclose an advowson was considered in *Brooks v. Muckleston*, 1909, 2 Ch. 519.

Incumbencies after lapse to be reckoned within the period, but

31. Provided always, and be it further enacted, that when on the avoidance, after a clerk shall have obtained possession of an ecclesiastical benefice adversely to the right of presentation or gift of the patron thereof, a clerk shall be presented or

collated thereto by his Majesty, or the ordinary, by reason of a lapse, such last-mentioned clerk shall be deemed to have obtained possession adversely to the right of presentation or gift of such patron as aforesaid; but when a clerk shall have been presented by his Majesty upon the avoidance of a benefice, in consequence of the incumbency thereof having been made a bishop, the incumbency of such clerk shall, for the purposes of this act, be deemed a continuation of the incumbency of the clerk so made bishop.

3 & 4 Will. 4,
c. 27, s. 31.

not incumbencies after promotions to bishoprics.

Presentation must be made by a common person within six calendar months after the death of the last incumbent, otherwise the right accrues to the ordinary, which is called a *lapse* (3 Leon. 46; 2 Inst. 273; Wats. Cl. L. c. 12). The six months commence from the time the patron has notice of the avoidance (2 Burn, Eccl. Law, 327; see Benefices Act, 1898, s. 5); but if the clerk of a stranger be instituted and inducted, and the patron gives no disturbance within six months, he has no remedy for that turn, because induction is an act of which he is bound to take notice (*Id.* 329). If the avoidance be by resignation or deprivation, the six months do not commence till notice of the avoidance given by the ordinary to the patron (Com. Dig. Eglise (H. 9)). But where the incumbent is himself patron, a sentence of deprivation is not necessary to render the first living void, the object of such a sentence being to give notice to the patron (*Apperley v. Hereford*, 9 Bing. 681). If the bishop should not present within six months after the lapse to him, then the right to present goes to the archbishop (Com. Dig. Eglise (H. 11)); and if neither the bishop nor archbishop present, then to the Crown, which is not confined to any time (Cro. Car. 335; Plowd. 498). It is clear that, as against the bishop at least, the patron may at any time present, notwithstanding six months have elapsed, provided advantage has not been taken of the lapse (3 Moore & Scott, 114). So that if after a lapse and before the bishop or archbishop has collated his clerk, the patron presents one, the latter shall be instituted (Hutt. 24; Hob. 152, 154; 2 Inst. 273). So after a lapse to the king, if the patron's clerk be presented, instituted, and inducted, and die incumbent, before the king has taken advantage of the lapse, his right is gone (Owen, 2—5; Cro. Eliz. 44, 119; 7 Rep. 28). Advowsons donative, which were abolished by the Benefices Act, 1898, s. 12, were not subject to lapse (Co. Litt. 344 a; see *Fairchild v. Gayre*, Cro. Jac. 63; *Britton v. Wade*, *ib.* 515), unless augmented by Queen Anne's bounty (1 Geo. 1, stat. 2, c. 10, ss. 6, 14; *Mutter v. Chauvel*, 1 Mer. 475; 11 East, 478).

When an incumbent is made a bishop, the right of presentation to livings held by him vests for that turn in the king, and is called a *prerogative presentation*. This right of the Crown was formerly doubted (*Wentworth v. Wright*, Owen, 144), but has since been fully established and acted on, but the right must be exercised in the lifetime of the person promoted, otherwise the turn of the Crown is lost (2 Bl. Rep. 770; *R. v. London*, 1 Show. 464; *S. P.*, Show. P. C. 185; Com. Dig. Eglise (H. 6); *Armagh v. A.-G.*, 2 Br. P. C. 514). If after a grant of the next presentation to a living the incumbent be made a bishop, by which the living becomes vacant, and the king is entitled to present, the grantee may present on the next vacancy occasioned by the death or resignation of the king's presentee (*Calland v. Troward*, 2 H. Bl. 324; 8 Br. P. C. 71). The right of the Crown to present to an English benefice upon the appointment of the incumbent to a bishopric, is not barred by the Crown having before such appointment granted the advowson to a subject. But no such right exists in the case of an appointment to the bishopric of Christchurch, in New Zealand (*R. v. Eton College*, 8 Ell. & Bl. 610).

The right of presentation given to the universities by the statutes Universities.
3 Jac. 1, c. 5, ss. 18, 19, 20; 1 Will. & M. c. 26, s. 2, and 13 Anne, c. 13,

3 & 4 Will. 4, c. 27, s. 31. s. 1, arises only in the case of a sole patron, or all of several patrons professing the Roman Catholic religion. Where two are jointly seised of an advowson, the one being a Roman Catholic, the other a Protestant, the sole right is in the latter (*Edwards v. Exeter*, 5 Bing. N. S. 652; see *Cottingham v. Fletcher*, 2 Atk. 155). By statute 13 Anne, c. 13, the presentation to any benefice by any Roman Catholic is void (see *Boyer v. Norwich*, 1892, P. 41; 1892, A. C. 417). And by the Church Patronage Act, 1737, s. 5, every grant made of advowson or right of presentation, collation, nomination or donation, by any Roman Catholic, or by his mortgagee or trustee, is void unless made for valuable consideration to a Protestant (see *Religious Disabilities Act*, 1846).

Pluralities. The Pluralities Act, 1838, ss. 1—13, applies generally to all persons and benefices without distinction of value; see also *Pluralities Acts Amend. Act*, 1885, s. 13. By the 11th section of the Pluralities Act, 1838, institution into a second benefice *ipso facto* avoids the first. See *Storie v. Winchester*, 9 C. B. 62; *Ex p. Bartlett*, 12 Q. B. 488, as to avoidance by non-residence under ss. 54, 58 of the same statute, when the clerk is in prison.

When person claiming an advowson in remainder, &c., after an estate tail, shall be barred. **32.** In the construction of this act every person claiming a right to present to or bestow any ecclesiastical benefice, as patron thereof, by virtue of any estate, interest or right which the owner of an estate tail in the advowson might have barred, shall be deemed to be a person claiming through the person entitled to such estate tail, and the right to bring any quare impedit, action or suit, shall be limited accordingly.

No advowson to be recovered after 100 years. **33.** Provided always, and be it further enacted, that no person shall bring any quare impedit or other action, or any suit to enforce a right to present to or bestow any ecclesiastical benefice, as the patron thereof, after the expiration of one hundred years from the time at which a clerk shall have obtained possession of such benefice adversely to the right of presentation or gift of such person, or of some person through whom he claims, or of some person entitled to some preceding estate or interest, or undivided share, or alternate right of presentation or gift, held or derived under the same title, unless a clerk shall subsequently have obtained possession of such benefice on the presentation or gift of the person so claiming, or of some person through whom he claims, or of some other person entitled in respect of an estate, share or right held or derived under the same title.

There is no saving of the rights of persons under disabilities. It will still be necessary to require abstracts of titles to advowsons to be carried back for a century at least (1 Dart, V. & P. 334, 6th ed.). An abstract of title to an advowson should be accompanied with evidence that the presentations have from time to time been made by the persons appearing to be the owners of the advowson. See 3 Bl. Comm. 250; Co. Litt. 115 a.

9. Final Extinction of Right.

At the end of the period of limitation the right of the party out of **34.** At the determination of the period limited by this act to any person for making an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent or advowson, for the recovery

whereof such entry, distress, action or suit respectively might have been made or brought within such period, shall be extinguished. 3 & 4 Will. 4, c. 27, s. 34.

possession to be extinguished.

Effect of this section.

There is a marked distinction between the old Statutes of Limitation and the present one. The former statutes only barred the remedy but did not touch the right. Under the present act when the remedy is barred, the right and title of the real owner are extinguished (*Incorp. Society v. Richards*, 1 Dr. & War. 289; *Re Alison, Johnson v. Mounsey*, 12 Ch. Div. 296). Where a tenant from year to year remained in possession for the statutory period without paying rent, the title of the landlord was barred, not only to the land, but also to the arrears of rent (*Re Jolly, Gathercole v. Norfolk*, 1900, 2 Ch. 616). The above cases related to land. The effect of the statute is different as regards the personal remedy for a mortgage debt; in which case the debt is not extinguished (*Kibble v. Fairthorne*, 1895, 1 Ch. 224).

As regards land, it is now settled, at least in England, that the effect of this section is to extinguish the title of the dispossessed owner, not to transfer it to the statutory owner (*Tichborne v. Weir*, 67 L. T. 735; *Re Nisbet and Potts*, 1905, 1 Ch. 399). For the view of the Irish judges, see the cases as to leaseholds quoted below. Accordingly it is impossible to read literally certain earlier dicta in cases relating to the fee simple in freeholds; e.g. where it was said by *Parke, B.*, that the effect of the act was to make a "parliamentary conveyance" to the intruder (*Doe v. Sumner*, 14 M. & W. 42), or where it was said by *Lord S. Leonards*, "The statute has executed a conveyance" (*Scott v. Nixon*, 3 Dr. & War. 407; *Burroughs v. McCreight*, 1 J. & L. 303; *Incorp. Society v. Richards*, *sup.*; and see *Sanders v. Sanders*, 19 Ch. Div. 379). The effect of the section was thus described by *Mr. Hayes* (1 *Hayes Conv.* 5th ed. 269): "We must not confound the negative effect of the statute with the positive effect of a conveyance. . . . The wrongdoer must be considered according to the principle of the old law as claiming generally, and therefore as claiming the absolute property (unless indeed he expressly qualify his claim), and the statute as merely diminishing from time to time the danger of eviction, till at length his originally precarious fee becomes, by the exclusion of every stronger claim, a firm inheritance." And these words have been quoted with approval by *Bowen, L. J.*, in *Tichborne v. Weir* (*sup.*). See *Williams on Seisin*, p. 7; 11 *Jur. N. S.* 151, part 2.

Cases as to the fee simple in freeholds.

When the owner of land entered into restrictive covenants and was subsequently dispossessed, it was held that the right of the covenantee (which was in the nature of an equitable easement) was not affected by the statutory extinguishment of the title of the dispossessed owner. For the only rights extinguished by the section were those of persons who during the statutory period might by themselves or by some one representing them have brought an action to recover the land (*Re Nisbet and Potts*, 1906, 1 Ch. 388, 410).

In the case of a leasehold interest, it was held by the C. A. in England that occupation for the statutory period did not transfer the lease to the occupier so as to render him liable to be sued after the expiration of the term on repairing covenants (*Tichborne v. Weir*, 67 L. T. 735; see *Walter v. Yalden*, 1903, 2 Q. B. 309). On the other hand, the Irish judges have adopted the view that the title by possession is limited by rights yet remaining unextinguished, and is commensurate with the interest which the rightful owner lost by the operation of the statute and has the same legal character (*O'Connor v. Foley*, 1906, 1 I. R. 39). And they have in effect held that in such a case there has been a transfer of the estate in the term (*Rankin v. McMurtry*, 24 L. R. Ir. 297; *Mulcaire v. Lane Joynt*, 32 L. R. Ir. 683; *MacCormick v. Courtney*, 1895, 2 I. R. 97; *Re Hayden*, 1904, 1 I. R. 1; see *Re McClure and Garrett*, 1899, 1 I. R. 225; *Doyle v. Foley*, 1903, 2 I. R. 95; *Coyle v. McFadden*, 1901, 1 I. R. 298). Compare effect of *Nullum Tempus Act*, *ante*, p. 123.

As to leaseholds.

In a recent case, where *Tichborne v. Weir* was discussed, the Irish C. A.

3 & 4 Will. 4, c. 27, s. 34. held that an intruder for the statutory period on leasehold land was subject to the statutory incidents of the tenancy, which included a disability to assign created by the Irish Act, 7 Geo. IV. c. 29 (*O'Connor v. Foley*, 1906, 1 I. R. 20).

As to copyholds.

In the case of copyholds, it has been held that a squatter on copyhold land who has acquired a good title under the statute against the copyholder, has no title to the freehold against the lord; but that time begins to run against the lord only from the date at which after proclamation or notice the squatter failed to come in and be admitted (*Ecd. Commrs. v. Parr*, 1894, 2 Q. B. 420; *Re Nisbet and Potts*, 1905, 1 Ch. 400; see *A.-G. v. Tomline*, 15 Ch. D. 158).

Land held on trust.

The effect of sect. 34 in the case of land settled on trust, where possession for more than the statutory period has been held by (1) the trustee, or (2) the *c. q. t.*, or (3) a stranger, is discussed in the notes to sects. 25 and 7, *ante*.

In *Re Hazeldine*, 1908, 1 Ch. 34, land devised on trust for sale was retained by the trustees who paid the rents into court. A beneficiary conveyed his share in the land and proceeds thereof by way of mortgage, and the mortgagee remained for twelve years without any payment or acknowledgment. On a summons dealing with the rents in court, the C. A. held that the title of the mortgagee was extinguished by sect. 34. Sed qu. as to the effect of the trustee's possession.

Right of trespasser before time has run.

A person in possession of land in the assumed character of owner, and exercising peaceably the ordinary rights of ownership, has a perfectly good title against all the world but the rightful owner (*Perry v. Clissold*, 1907, A. C. 79; where *Doe v. Barnard*, 13 Q. B. 954, is disapproved). He has, even before time has run in his favour under this statute, a devisable interest (*Asher v. Whitlock*, L. R. 1 Q. B. 1; *Keeffe v. Kirby*, 6 Ir. C. L. R. 591; *Clarke v. Clarke*, I. R. 2 C. L. 395; *Calder v. Alexander*, 16 T. L. R. 294; see under the old law, *Doe v. Birchmore*, 9 Ad. & Ell. 662).

Possession by succession of independent trespassers.

A continuous adverse possession for the statutory period by a succession of persons not claiming under one another bars the true owner (*Willis v. Howe*, 1893, 2 Ch. 553). In such a case it has been suggested that at the end of the period the last trespasser has a good title (*Dixon v. Gayfere*, 17 Beav. 430), but this has been disapproved (*Asher v. Whitlock*, L. R. 1 Q. B. 4). And the better view seems to be that at the end of the statutory period the first trespasser has a right to the possession and may maintain ejectment against a subsequent trespasser by whom he has been expelled (see *Dalton v. Fitzgerald*, 1897, 2 Ch. 90; *Asher v. Whitlock*, L. R. 1 Q. B. 4; *Doe v. Martin*, 1 Car. & M. 32; *Doe v. Dyball*, 3 C. & P. 610). If before the statutory period has expired the trespasser abandons possession, and the possession is vacant, the rightful owner is in the same position in all respects as before the trespass (*Trustees Co. v. Short*, 13 App. Cas. 798). This does not mean that there is any suspension of the right of action, but that the right of action in respect of the old intrusion is gone; and if there is a fresh intrusion, there is a fresh right of action (*Johnson v. Brock*, 1907, 2 Ch. 538).

Old law.

Before this statute twenty years' possession gave a *prima facie* title against every one, and a complete title against a wrongdoer who could not show any right, even if such wrongdoer had been in possession many years, provided they were less than twenty (*Doe v. Cooke*, 7 Bing. 346; see *ante*, p. 129).

Rents and heriots.

The section would, it seems, extinguish the right to rent-charges, *Hanks v. Pulling* (6 E. & B. 659; Sugd. R. P. S. 9). But it is doubtful whether either heriot service or heriot custom are within the section (*Zouche v. Dalbiac*, L. R. 10 Ex. 172).

Extinguished title cannot be revived.

When a title has been extinguished by the statute, the old title cannot be restored by a subsequent acknowledgment (*Kibble v. Fairthorne*, 1895, 1 Ch. 219; *Sanders v. Sanders*, 19 Ch. Div. 379; *Re McClure and Garrett*, 1899, 1 I. R. 225; *Beamish v. Whitney*, 1908, 1 I. R. 38; see also *Re Alison, Johnson v. Mounsey*, 11 Ch. Div. 296; *Markwick v. Hardingham*, 15 Ch. Div. 346; *Lyell v. Kennedy*, 18 Q. B. Div. 796); or by subsequent re-entry (*Bryan v. Cowdal*, 21 W. R. 693; *Brassington v. Llewellyn*, 27 L. J. Ex. 297). The law before this statute was different (*Pendleton v.*

Rooth, 1 D. F. & J. 81). The law as to simple contract debts under Lim. 3 & 4 Will. 4, Act, 1623, and Stat. of Frauds Amdt. Act, 1828, is also different (*Spickernell v. Hotham*, Kay, 669); see pp. 230, 235, *post*, as well as the law as to money charged on land, *post*, p. 195.

In a case which was held to fall within R. P. Lim. Act, 1833, s. 8, after the expiration of twenty years, during which no rent had been paid, the tenant, within five years before action, paid some arrears. It was held that under sect. 8 time ran from the last payment of rent, and that sect. 34 had not extinguished the title of the plaintiff who was the reversioner (*Bunting v. Sargent*, 13 Ch. D. 330; see, however, *Sanders v. Sanders*, 19 Ch. Div. 379; *Re Hobbs*, *Hobbs v. Wade*, 36 Ch. D. 557, and other cases above cited).

The court has compelled a purchaser to take a title depending upon parol evidence of adverse possession under this statute (*Scott v. Nixon*, 3 Dru. 388; *Games v. Bonnor*, 54 L. J. Ch. 517; see *Kirkwood v. Lloyd*, 12 Ir. Eq. R. 598; *Moulton v. Edmonds*, 1 D. F. & J. 250; *Lethbridge v. Kirkman*, 25 L. J. Q. B. 89). So where the rights of the Crown were barred under 48 Geo. 3, c. 47 (*Tuthill v. Rogers*, 6 Ir. Eq. R. 441). But the above are cases where objections apparent on the face of the title as shown were held covered by the possession. The court did not compel the purchaser to take a leap in the dark (*Re Nisbet v. Potts*, 1905, 1 Ch. 401). Where the contract is an open one, a possessory title, to be sufficient, must be shown for forty years (*Jacobs v. Revell*, 1900, 2 Ch. 858).

Purchaser compelled to accept title depending on the statute.

10. Receipt of Rent.

35. The receipt of the rent payable by any tenant from year to year, or other lessee, shall as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this act.

Receipt of rent to be deemed receipt of profits.

11. Abolition of Real and Mixed Actions, &c.

[Sect. 36 contained a list of the names of the old writs in real and mixed actions. By the operation of that section, and sect. 26 of the C. L. P. Act, 1860, real and mixed actions (except ejectment) and plaints in the nature of such actions were abolished.]

An *ejectment* was a possessory action, wherein the title to land might be tried, in all cases where the party claiming title had a *right of entry*, whether such title was to an estate in fee, fee tail, for life or for years (see 2 Archbold's Pr., by Prentice, 825—883, 13th ed.). This relief is now obtained by means of an action for the recovery of land (see R. S. C., Ord. 18, r. 2, and note thereto in Annual Practice).

Ejectment.

[Sects. 37 and 38, which contained provisions as to saving rights in respect of real actions, have been repealed by S. L. R. Act, 1874.]

39. No descent cast (*f*), discontinuance (*g*), or warranty (*h*), which may happen or be made, shall toll or defeat any right of entry or action for the recovery of land.

No descent, warranty, &c., to bar a right of entry.

(*f*) A mere entry is not possession. Continual or other claim will longer preserve any right of entry, or distress or action (*ante*, sects. 10, 11, p. 148). By the common law, descents of corporeal inheritances in fee

Descent cast.

3 & 4 Will. 4, c. 27, s. 39. simple took away the entry of the party who had right (Litt. s. 385); as if a disseisor died seised, and the lands descended to his heir, the entry of the disseisee was thereby taken away unless there had been a continual claim (Litt. s. 414), and the like law was of an abatement and intrusion, and of the feoffees or donees of abators or intruders. But by stat. 32 Hen. 8, c. 33, the "dying seised of any disseisor of and in any lands, &c., having no title therein, shall not be deemed a descent to take away the entry of the person or his heir, who had lawful title of entry at the time of the descent, unless the disseisor has had peaceable possession for five years next after the disseisin, without entry or continual claim by the person entitled." If a disseisor died after five years' quiet possession, and the disseisee entered, the heir of the former might have maintained an ejectment, for the right of possession belonged to him, although the mere right was in the disseisee (*Smyth v. Tyndall*, 2 Salk. 685). The doctrine of descent cast did not apply, if the claimant was under any legal disabilities during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm; because in all these cases there was no laches or neglect in the claimant, and therefore no descent took away his entry (Litt. l. 3, c. 6); nor did it affect copyhold or customary estates, where the freehold is in the lord (*Doe v. Danvers*, 7 East, 299); nor cases where the party had not any remedy but by entry as a devisee (Co. Litt. 240 b; 7 East, 321. On the descent cast, see Co. Litt. 237 b; Bac. Abr. Descent (F) (G) (H); Com. Dig. Descent (D); Roscoe on Real Actions, 81—87; Adams on Ejectment).

Discontinu-
ance.

(g) A *discontinuance* of estates in lands and tenements is defined by Lord Coke to be "An alienation made or suffered by tenant in tail, or by any that is seised in *auter droit*, whereby the issue in tail, or the heir or successor, or those in reversion or remainder, are driven to their action and cannot enter" (Co. Litt. 325 a). At common law, an estate might be discontinued five ways:—1. By feoffment. 2. By fine. 3. By common recovery. 4. By confirmation: and 5. By release with warranty. A grant by deed or fine, of such things as lie not in livery (Litt. s. 618; Co. Litt. 332 a), did not work any discontinuance. A feoffment made after 1st October, 1845, has no tortious operation (Real Prop. Act, 1845, s. 4, *post*).

A discontinuance of an estate tail could only be made by a tenant in tail in possession (*Doe v. Jones*, 1 B. & C. 243; *Trevilian v. Lane*, Cro. Eliz. 56; see 1 Rep. 76 a; Litt. s. 658; Co. Litt. 325 a). But the existence of a term of years prior to the estate of a tenant in tail did not prevent a fine levied by him from operating as a discontinuance (*Doe v. Finch*, 1 Nev. & M. 130). As to a prior estate by the curtesy, see *Anderson v. Anderson*, 30 Beav. 209; see further the notes to *Doe v. Finch*, *sup.*, where much learning on the subject of discontinuance, &c. is collected (*S. C.*, 4 B. & Ad. 283). As to discontinuance, see Bac. Abr. and Com. Dig. *Discontinuance*; Co. Litt. 325 a; 347 b, and notes by Butler; Roscoe on Real Actions, 43—53; 1 Prest. on Conv. and on Abst. Index; Roper on Husband and Wife, c. 2, s. 2; *Doe v. Ross*, 7 M. & W. 125.

Warranty.

(h) As to the law of warranty, see Com. Dig. *Guaranty*; Co. Litt. 365 a; 393 b, and notes by Butler; Bac. Abr. *Warranty*; Shepp. T. 181—203; *Doe v. Jones*, 1 Crompt. & Jerv. 528. Fines and Recoveries Act, 1833, s. 14.

[Sections 41, 42 of this Act are inserted p. 196, *post*. As to section 40, see p. 186, *post*.]

12. Limits of the Act.

Act to extend
to the spi-
ritual courts.

43. No person claiming any tithes, legacy or other property for the recovery of which he might bring an action or suit at law or in equity, shall bring a suit or other proceeding in any spiritual court to recover the same but within the period during which he might bring such action or suit at law or in equity.

The mode in which personal legacies were recovered in the ecclesiastical courts is stated in 3 Hagg. Eccl. R. 161, 162. By the Court of Probate Act, 1857, s. 23, the Court of Probate, to which the jurisdiction of the ecclesiastical courts has been transferred, shall entertain no suit for legacies. 3 & 4 Will. 4, c. 27, s. 44.

44. Provided always, and be it further enacted, that this act shall not extend to Scotland; and shall not, so far as it relates to any right to permit* to or bestow any church, vicarage or other ecclesiastical benefice, extend to Ireland.

Act not to extend to Scotland nor to advowsons in Ireland.
* *Leges* present.

The provisions of the R. P. Lim. Act, 1833, relating to advowsons, &c., were extended to Ireland by Grand Juries (Ireland) Act, 1843, and 7 & 8 Vict. c. 27, and the words of this section excluding Ireland have been repealed (S. L. Rev. Act, 1874). See 32 & 33 Vict. c. 42.

This act applies to New South Wales (*Day v. Day*, L. R. 3 P. C. 751; *Trustees Co. v. Short*, 13 App. Cas. 793); and to New Zealand (*Plimmer v. Wellington*, 9 App. Cas. 708), but does not apply to Jamaica (*Pitt v. Dacre*, 3 Ch. D. 295). Where a Hindoo banker claimed as a creditor in an English administration action, the English statute applied (*Finch v. Finch*, 35 L. T. 235). But the Indian statute was held to govern the case of money in an English court representing land in India (*Re Peat*, 7 Eq. 302). As to which statute, see also *Hay v. Gordon* (21 W. R. 11). See also the questions raised as to bonds charged on the revenues of Oudh in *Doss v. Secretary, &c. of India* (1875, W. N. 59); and as to the Bombay Civil Service Fund, in *Edwards v. Warden* (1 App. Cas. 281). By the law of Lower Canada, the period of prescription is thirty years (*Herrick v. Sixby*, L. R. 1 P. C. 436; *Macdonald v. Lambe*, *Ib.* 539; see *Labrador Co. v. The Queen*, 1893, A. C. 104). As to adverse possession in Nova Scotia, see *Des Barres v. Shey* (22 W. R. 273); and in Ceylon, see *Clark v. Elphinstone* (6 App. Cas. 164). See as to the period of limitation in New Brunswick, *Lewin v. Wilson*, 11 App. Cas. 639.

THE REAL PROPERTY LIMITATION ACT, 1874, ss. 9, 11, 12.

37 & 38 VICT. C. 57.—*An Act for the further Limitation of Actions and Suits relating to Real Property.*
[7th August, 1874.]

WHEREAS it is expedient further to limit the times within which actions or suits may be brought for the recovery of land or rent and of charges thereon (a). Be it enacted, &c.

(a) The preamble did not prevent sect. 8 from operating as a bar to an action on a covenant for payment of a mortgage debt (*Sutton v. S.*, 22 Ch. Div. 520).

[Sect. 1, reducing the period of limitation for the recovery of land or rent, will be found ante, p. 125.

Sect. 2, containing provisions for the case of future estates in the case of land or rent, will be found ante, p. 138.

Sects. 3, 4, & 5, containing provisions as to disabilities in the case of land or rent, will be found ante, p. 153.

Sect. 6, containing provisions as to possession under an assurance by a tenant in tail which shall not bar the remainders, will be found ante, p. 159.

37 & 38 Vict.
c. 57, s. 9.

Sect. 7, containing provisions as to the barring of the rights of a mortgagor, will be found ante, p. 169.

Sects. 8 & 10, containing provisions as to money charged on land, will be found post, pp. 185, 207.]

Act to be read with 3 & 4 Will. 4, c. 27, of which certain parts are repealed, and other parts to be read in reference to alteration by this act.

7 Will. 4 & 1 Vict. c. 28, to be read with this act.

9. From and after the commencement of this act all the provisions of the act passed in the session of the third and fourth years of the reign of his late Majesty King William the Fourth, chapter twenty-seven, except those contained in the several sections thereof next hereinafter mentioned, shall remain in full force, and shall be construed together with this act, and shall take effect as if the provisions hereinbefore contained were substituted in such act for the provisions contained in the sections thereof numbered two, five, sixteen, seventeen, twenty-three, twenty-eight, and forty respectively (which several sections, from and after the commencement of this act, shall be repealed), and as if the term of six years had been mentioned, instead of the term of ten years, in the section of the said act numbered eighteen, and the period of twelve years had been mentioned in the said section eighteen instead of the period of twenty years; and the provisions of the act passed in the session of the seventh year of the reign of his late Majesty King William the Fourth, and the first year of the reign of her present Majesty, chapter twenty-eight, shall remain in full force, and be construed together with this act, as if the period of twelve years had been therein mentioned instead of the period of twenty years.

Short title.

11. This act may be cited as the "Real Property Limitation Act, 1874."

Commencement of act.

12. This act shall commence and come into operation on the first day of January, one thousand eight hundred and seventy-nine.

THE LAND TRANSFER ACT, 1897.

(60 & 61 VICT., c. 65, s. 12.)

As to title by possession.

12. A title to registered land adverse to or in derogation of the title of the registered proprietor shall not be acquired by any length of possession, and the registered proprietor may at any time make an entry or bring an action to recover possession of the land accordingly. Provided that where a person would, but for the provisions of the principal act [*viz.*, the *Land Transfer Act*, 1875], or of this section, have obtained a title by possession of registered land, he may apply for an order for rectification of the register under section ninety-five of the principal act, and on such application the court may, subject to any estates or rights acquired by registration for valuable consideration in pursuance of the principal act or this act,

order the register to be rectified accordingly. And provided also that this section shall not prejudice, as against any person registered as first proprietor of land with a possessory title only, any adverse claim in respect of length of possession of any other person who was in possession of such land at the time when the registration of such first proprietor took place.

60 & 61 Vict.
c. 65, s. 12.

The Land Transfer Act, 1897, provides for the compulsory application throughout England of the system of registration established by the Land Transfer Act, 1875, and also for the amendment of the last-mentioned act.

Further, under sect. 18 of the L. T. Act, 1875, all registered land (unless the contrary is expressed on the register) is deemed to be subject to such of certain rights mentioned in the section as may be for the time being subsisting. And under sect. 18 of the L. T. Act, 1897, these rights include (subject to the provisions of the L. T. Act, 1897) rights acquired or in course of being acquired under the Limitation Acts.

The final proviso in sect. 12 of the L. T. Act, 1897, should be compared with sect. 8 of the L. T. Act, 1875, dealing with the registration of a possessory title.

The construction of the above enactments remains to be considered by the courts. Under the differently-worded statutes in force in British Honduras the title of an adverse possessor who was not on the register was held to prevail against the title of the registered holder (*Belize Estate Co. v. Quilter*, 1897, A. C. 367). Under the Registration of title (Ireland) Act, 1891, an occupant was held entitled on ground of adverse possession to be registered as owner (*Re Hayden*, 1904, 1 I. R. 1).

II. LIMITATION OF TIME FOR THE RECOVERY OF MONEY CHARGED ON LAND, LEGACIES, PERSONALTY OF INTESTATES, ARREARS OF DOWER, RENT, AND INTEREST.

- A. *Limitation for Recovery of Money charged on Land and Legacies, The Real Property Limitation Act, 1874, s. 8, R. P. Lim. Act, 1833, s. 40...185.*
- B. *Limitation for Recovery of Personal Estate of Intestates, Law of Property Amendment Act, 1860, s. 13...195.*
- C. *Arrears of Dower, R. P. Lim. Act, 1833, s. 41...196.*
- D. *Arrears of Rent or of Interest in respect of Money charged on Land or in respect of Legacies, R. P. Lim. Act, 1833, s. 42...196.*
- E. *Time not enlarged by Express Trusts, R. P. Lim. Act, 1874, s. 10...207.*

A. *Limitation for Recovery of Money charged on Land and Legacies.*

THE REAL PROPERTY LIMITATION ACT, 1874.

(37 & 38 VICT. c. 57, s. 8.)

8. No action or suit or other proceeding shall be brought to Money recover any sum of money secured by any mortgage, judgment, charged upon or lien, or otherwise charged upon or payable out of any land or legacies to be

37 & 38 Vict. c. 57, s. 8. rent at law or in equity, or any legacy, but within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of the principal money, or some interest thereon, shall have been paid, or some acknowledgment of the right thereto shall have been given in writing signed by the person by whom the same shall be payable, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit or proceeding shall be brought but within twelve years after such payment or acknowledgment, or the last of such payments or acknowledgments, if more than one, was given.

deemed satisfied at the end of twelve years if no interest paid nor acknowledgment given in writing in the meantime.

37 & 38 Vict. c. 57, s. 8. From the 1st of January, 1879, the above section of R. P. Lim. Act, 1874, was by sect. 9 of the same act substituted for sect. 40 of R. P. Lim. Act, 1833. The latter section fixed the period of limitation for the recovery of money charged upon land and legacies at twenty years; but the wording being in other respects similar to the R. P. Lim. Act, 1874, sect. 8, sect. 40 has not been printed here at length. The decisions under the two sections have been arranged together in one note.

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| (1) <i>Mortgages</i> ...186. | (6) <i>Effect of Express Trusts</i> ...191. |
| (2) <i>Judgments</i> ...187. | (7) " <i>Present right to receive</i> "...192. |
| (3) <i>Liens</i> ...187. | (8) <i>Part payment</i> ...193. |
| (4) <i>Money charged on Land</i> ...189. | (9) <i>Acknowledgments in Writing</i> ... |
| (5) <i>Legacies</i> ...190. | 194. |

(1)
MORTGAGES.

A foreclosure action was held not to be an action to recover the mortgage money within sect. 40, but an action to recover land within sects. 2 and 24 of R. P. Lim. Act, 1833 (*Harlock v. Ashberry*, 19 Ch. Div. 539; *Heath v. Pugh*, 6 Q. B. Div. 345; 7 App Cas. 235). A claim for payment out of money in court made by mortgagees holding a mortgage on a reversionary interest in real estate, was held barred by sect. 40 (*Humble v. H.*, 24 Beav. 535).

Sutton v. Sutton.

Section 8 of the R. P. Lim. Act, 1874, barred after twelve years the personal remedy of a mortgagee to obtain payment of principal from his mortgagor, whether on a collateral bond given by him (*Fearnside v. Flint*, 22 Ch. D. 579), or on his covenant in the mortgage deed (*Sutton v. Sutton*, 22 Ch. D. 511); even where the property charged was a reversionary interest in land, which had not fallen in (*Kirkland v. Peatfield*, 1903, 1 K. B. 756). In *Sutton v. Sutton*, Cotton, L.J., referring to *Hunter v. Nockolds* (1 Mac. & G. 640; in which Lord Cottenham had held that in actions on covenant or specialty, sect. 42 of R. P. Lim. Act, 1833, was controlled by sect. 3 of Civil Proc. Act, 1833, *post*, p. 210), said, it might be right in the case of an act passed in 1833, to read it as explained by an act passed only three weeks later; but in the case of an act passed in 1874, there was no such necessity to explain it by an act passed in 1833 (22 Ch. Div. 519; see *Re Frisby*, 43 Ch. D. 110). The section, however, did not bar an action which was brought, not against the mortgagor himself, but against a surety, who had covenanted for payment by the mortgage deed (*Re Frisby, Alison v. Frisby, per Kay, J.*, and *Bowen, L.J.*, Cotton, L.J., differing, 43 Ch. D. 106); or who had given a promissory note (*Re Wolmershausen*, 62 L. T. 541). An action on a bond given by a surety for a mortgagor to recover from the surety an indemnity against the non-payment by the mortgagor of the mortgage debt, is not within this section (*Re Powers, Lindsell v. Phillips*, 30 Ch. Div. 291).

Presumption of payment Before R. P. Lim Act, 1833, if the mortgagor continued in possession, and there had been neither payment nor demand of any principal nor interest

for twenty years, this was sufficient to raise the presumption of payment (1 Ch. R. 59, 105; *Trash v. White*, 3 Br. C. C. 289; *Christopher v. Sparke*, 2 Jac. & W. 228; *Cooke v. Soltau*, 2 Sim. & Stu. 154; *contra Joplis v. Baker*, 2 Cox, 118; *Leman v. Neunham*, 1 Ves. sen. 51); but such presumption was liable to be rebutted, and payment of interest on part of the debt kept the whole alive (*Loftus v. Smith*, 2 Sch. & Lef. 642).

37 & 38 Vict.
c. 57, s. 8.

before 3 & 4
Will. 4, c. 27.

(2)

JUDGMENTS.

Sect. 40 of the R. P. Lim. Act, 1833, applied to a case in which a judgment was sought to be enforced against the personal estate, as well as to a case in which it was sought to be enforced against the land of the debtor (*Watson v. Birch*, 15 Sim. 523; *Jay v. Johnstone*, 1893, 1 Q. B. 190; *Henry v. Smith*, 2 Dru. & War. 391). Where an action of debt is brought on a judgment and judgment recovered, time runs against the former judgment from its own date (*Watters v. Lidwill*, 9 Ir. L. R. 362; *Kealy v. Bodkin*, *ib.* 383).

Sect. 8 of the R. P. Lim. Act, 1874, applies to judgments generally, not merely judgments which operate as a charge on land (*Hebblethwaite v. Peever*, 1892, 1 Q. B. 124; *Jay v. Johnstone*, 1893, 1 Q. B. 189; *Taylor v. Hollard*, 1902, 1 K. B. 676). It barred after twelve years the right of a judgment creditor to obtain an adjudication in bankruptcy against the judgment debtor (*Ex p. Tynte*, 15 Ch. D. 125).

Proceedings to revive a judgment (as to which see C. L. P. Act, 1852, ss. 128—134; 19 & 20 Vict. c. 97, s. 10) were also held within this section (*Watters v. Lidwill*, 9 Ir. L. R. 362; *Williams v. Welch*, 3 Dowl. & L. 565; *Wall v. Walsh*, 1 R. 4 C. L. 103). As to the effect of such proceedings on the running of time, see *Farrell v. Gleeson* (11 Cl. & Fin. 702); *Farran v. Beresford* (10 Cl. & Fin. 319); *Re Blake* (2 Ir. Ch. R. 643); see Darb. & Bos. Stat. Lim. 176. And as to what lands were bound by the proceedings, see *Murray v. Clarke* (4 Ir. C. L. R. 610); *Kirkwood v. Lloyd* (11 Ir. Eq. R. 561; 12 Ir. Eq. R. 585); *Re Bodkin* (12 Ir. Ch. R. 61); *Ryan v. Cambie* (2 Ir. Eq. R. 328); *Franks v. Mason* (9 Ir. Eq. R. 358).

The above-mentioned sections of the C. L. P. Act, 1852, have now been repealed; and where time has elapsed since the date of a judgment which it is desired to enforce, the practice is now regulated by R. S. C. Ord. 42, rr. 22, 23. An order for leave to issue execution made under the latter rule would seem not to affect the running of time (*Evans v. O'Donnell*, 16 L. R. 452).

Revivor.

Leave to issue
execution.

A decree in equity for payment of a specific sum was a "judgment" within sect. 40 (*Dunne v. Doyle*, 10 Ir. Ch. R. 502).

Decree in
equity.

Time does not run against a judgment on a *post obit* bond, until the death of the debtor (*Barber v. Shore*, 1 Jebb & S. 610; *Tuckey v. Hawkins*, 4 C. B. 655; *Gilman v. Chute*, 11 Ir. L. R. 442; *Kennedy v. Whaley*, 12 Ir. L. R. 54). As to the running of time in the case of judgments entered on bonds, see *Re Kingston* (1 R. 3 Eq. 485); *Re Keay* (1 R. 3 Eq. 659).

Judgment on
post obit bond,
when time
begins to run.

Before R. P. Lim. Act, 1833, if a judgment creditor had lain by for twenty years without any effort to enforce his judgment, and it had not been acknowledged, it was presumed to be satisfied (Peake's Ev. 25, n.; see 4 Anne, c. 16, s. 12; *Kemys v. Ruscomb*, 2 Atk. 45; *Willaume v. Gorges*, 1 Campb. 217; *Grenfell v. Girdlestone*, 2 Y. & C. 662; *White v. Parnter*, 1 Knapp, 228, 229).

Presumption
of satisfaction
of judgments
before 3 & 4
Will. 4, c. 27.

(3)

LIENS.

As regards liens, in the case of a contract to sell a reversionary interest in stock, the purchaser was held entitled to enforce a lien for his deposit after a long lapse of time, no Statute of Limitations directly applying (*Levy v. Stogdon*, 1898, 1 Ch. 487; 1899, 1 Ch. 5).

A vendor's lien for unpaid purchase-money was held to be within sect. 40 of the R. P. Lim. Act, 1833 (*Toft v. Stephenson*, 7 Hare, 1; 1 D. M. & G. 28). As to when time commences to run, see *Toft v. Stephenson*, 5 D. M. & G. 735.

As regards a vendor's lien generally, it is settled that where a vendor delivers possession of an estate to a purchaser without receiving the purchase-money, equity, whether the estate be conveyed (*Chapman v. Tanner*, 1 Vern. 267; *Pollexfen v. Moore*, 3 Atk. 272; and see 1 Br. C. C. 302, 424, and 6 Ves. jun. 483; *Mackreth v. Symmons*, 15 Ves. 329), and a receipt is

General note
as to vendor's
lien.

37 & 38 Vict. c. 57, s. 8. endorsed on the conveyance (*Coppin v. Coppin*, 2 P. W. 291; 3 Russ. 488), or be not conveyed (*Smith v. Hibbard*, 2 Dick. 730; *Charles v. Andrews*, 9 Mod. 152), and although there was not any special agreement for that purpose, and whether the estate be freehold or copyhold (*Winter v. Anson*, 3 Russ. 488), gives the vendor a lien on the land for the money. The lien extends to interest (*Re Stucley, Stucley v. Kekewich*, 1906, 1 Ch. 76). The doctrine applies in the case of other property besides land, e.g. a share in proceeds of sale of leaseholds (*Davies v. Thomas*, 1900, 2 Ch. 462; see *Levy v. Stogdon*, 1898, 1 Ch. 478), or a reversionary interest in trust funds (*Re Stucley, Stucley v. Kekewich*, 1906, 1 Ch. 67). But the application of the doctrine depends upon the intention of the parties (*Re Albert, &c. Co.*, 11 Eq. 179).

When lost. Where a vendor took a mortgage of part of the estate, his lien over the rest of the estate was held to be excluded (*Capper v. Spottiswoode*, Taml. 21); and where he took a mortgage of the whole estate for part of the unpaid purchase-money his lien for the balance was lost (*Bond v. Kent*, 2 Vern. 281; see 1 Sch. & Lef. 135). So there is no lien where the vendor takes a mortgage of another estate (6 Ves. 760), or a charge upon stock (*Nairn v. Prowse*, 6 Ves. 752); nor where the consideration for the conveyance was expressed to be the covenant for the payment of an annuity and a sum in gross in the event of the purchaser's marriage (*Clark v. Royle*, 3 Sim. 499; see *Stuart v. Ferguson*, 1 Hayes, 452; *Parrott v. Sweetland*, 3 M. & K. 655; *Dixon v. Gayfere*, 21 Beav. 118; 1 De G. & J. 655; *Matthew v. Bowler*, 6 Ha. 110; *Buckland v. Pocknell*, 13 Sim. 406); nor where land was purchased under the Lands Clauses Act, and the consideration was a yearly rent-charge (*Jersey v. Briton Ferry Co.*, 7 Eq. 409); nor where the purchase-money of lands sold to a company was expressed to be payable out of moneys to be received by the company on sale of shares (*Re Brentwood Co.*, 4 Ch. Div. 562); nor as against the mortgagees of the purchaser where vendor joined in the mortgage (*Cood v. Pollard*, 9 Price, 544; *Smith v. Evans*, 28 Beav. 59). For the lien in the case of purchases with trust money, see *White v. Wakefield* (7 Sim. 401); *Muir v. Jolly* (26 Beav. 143). Vendors were held to have lost their lien by permitting the purchaser to register his conveyance with a view to a sub-sale (*Kettlewell v. Watson*, 26 Ch. Div. 501; see *Ex p. Parker*, 1 Glyn. & J. 228).

When not lost. The lien, however, may subsist notwithstanding a personal security is given for the money, whether by bill of exchange (*Hughes v. Kearney*, 1 Sch. & Lef. 132; *Grant v. Mills*, 2 Ves. & B. 306; *Ex p. Peake*, 1 Mad. 346); or promissory note (*Gibbons v. Baddall*, 2 Eq. Cas. Abr. 682, n. b; *Ex p. Loaring*, 2 Rose, 79); or bond (*Winter v. Anson*, 3 Russ. 488; *Collins v. Collins*, 31 Beav. 347). Nor is the lien lost by an improper payment to the vendor's solicitors (*Wrout v. Dawes*, 25 Beav. 369).

Enforcement. The lien can be enforced by sale or mortgage (*Re Stucley, Stucley v. Kekewich*, 1906, 1 Ch. 76).

Against whom it prevails. The lien prevails against the purchaser and his heir; against volunteers claiming under him; against sub-purchasers with notice; sometimes against sub-purchasers without notice (*Rice v. Rice*, 2 Drew. 85; Sugd. V. & P. 682, 14th ed.); and against assignees whether in bankruptcy or claiming under an assignment for the benefit of creditors (*Fawell v. Heelis*, Amb. 724); and against a person appointed under Lunacy Act, 1899, s. 116, to get in a lunatic's estate (*Davies v. Thomas*, 1900, 2 Ch. 464).

Is assignable. The lien is assignable by parol (*Dryden v. Frost*, 3 M. & C. 670), but the assignee will take it subject to any prior incumbrances created by the vendor (*Lacy v. Ingle*, 2 Ph. 413).

In the case of sales to a railway company. A vendor of land to a railway company who have entered and used it for the purpose of their railway, is entitled to the same lien on land for the unpaid purchase-money and the same remedies for enforcing it as an ordinary vendor (see *Munns v. Isle of Wight R. Co.*, 5 Ch. 414, where an order was made for a receiver, and the cases there quoted: *Wing v. Tottenham Co.*, 3 Ch. 740, where the vendor was held entitled to a sale). The company will not be restrained from running trains over the land until the sale (*Lyatt v.*

Stafford Co., 13 Eq. 261). The vendor has no lien for the costs of an arbitration under the Lands Clauses Consolidation Act (*Ferrers v. Stafford Co.*, 13 Eq. 524). 37 & 38 Vict. c. 57, s. 8.

The word "mortgage" in Real Estate Charges Act, 1854, has been extended so as to include the lien, both in the case of testators and intestates (see *R. E. C. Acts*, 1867 and 1877, *post*; *Broadbent v. Groves*, 24 Ch. D. 94). As to a lien on real estate for an unpaid legacy, see *Barker v. Barker* (10 Eq. 438). Real Estate Charges Acts.

An unpaid vendor has not at law any lien on the title deeds for his purchase-money (*Goode v. Burton*, 1 Ex. 189; see also *Hope v. Booth*, 1 B. & Ad. 498; *Baker v. Dewey*, 1 B. & C. 704; *Lampon v. Corke*, 5 B. & Ad. 606; *Oxenham v. Esdaile*, 3 Y. & J. 362; *Hooper v. Ramsbottom*, 4 Camp. 121; *Harding v. Ambler*, 3 M. & W. 279). At common law.

A purchaser may have a lien on the land for the deposit paid by him to the vendor (*Rose v. Watson*, 10 H. L. C. 683; *Levy v. Stogdon*, 1898, 1 Ch. 478; 1899, 1 Ch. 5; *Whitbread v. Watt*, 1902, 1 Ch. 835), which may be lost by his repudiation of the contract (*Cornwall v. Henson*, 1899, 2 Ch. 710). He may also have a lien for his costs (*Kitton v. Hewett*, 1904, W. N. 21). Purchaser's lien.

Under sect. 8 of the R. P. Lim. Act, 1833, the rule is that in the case of simple contract debts charged on land, the remedy against the land is not barred for twelve years (*Re Stephens*, *Warburton v. Stephens*, 43 Ch. D. 39; see *Barnes v. Glenton*, 1899, 1 Q. B. 891), although the personal remedy by action is barred in six (*Barnes v. Glenton*, 1899, 1 Q. B. 885; compare *Hugill v. Wilkinson*, 38 Ch. D. 480; *Powell v. Brodhurst*, 1901, 2 Ch. 167; *Firth v. Slingsby*, 58 L. T. 483). (4)
MONEY CHARGED UPON OR PAYABLE OUT OF LAND.

The same section barred after twelve years the right to recover paying expenses made a charge on land by statute (*Hornsey Board v. Monarch Society*, 24 Q. B. Div. 1); and also an action to recover interest on money paid for redeeming land tax, which by statute was charged on the land (*Skene v. Cook*, 1902, 1 K. B. 682). The section applies where money is charged on land, even where there is no personal liability on the part of the owner of the land to pay the money (*Ib.* 689). The section, however, does not apply to an action on the personal covenant of a lessee in respect of a royalty (*Darley v. Tennant*, 53 L. T. 257); or in respect of rent reserved (*Donegan v. Neill*, 16 L. R. Ir. 309).

A share of the proceeds of land settled on trust for sale was held to be "money payable out of land," within sect. 42 of the R. P. Lim. Act, 1833 (*Bowyer v. Woodman*, 3 Eq. 313; see *Pawsey v. Barnes*, 20 L. J. Ch. 393; and see the argument, *Re Lloyd*, L. & L., 1903, 1 Ch. 389, 395, 397). In *Mutlow v. Bigg* (18 Eq. 246), land was devised on trust for sale, and part having been sold, but part remaining unsold, an action was brought for execution of the trust. *V.-C. Hall* held that sect. 40 had no application, except as regards the part sold.

In the case of a settlement of land the claim of a remainderman to be recouped out of the assets of the life tenant arrears of mortgage interest, which ought to have been kept down by him, but which had in fact been paid by means of a sale of part of the land, was within sect. 40 of the R. P. Lim. Act, 1833, as being a lien or charge on a life estate in land (*Kirwan v. Kennedy*, 3 I. R. Eq. 472).

Money due on a bond by an ancestor was not money payable out of land within sect. 40 (*Roddam v. Morley*, 2 K. & J. 336; 1 D. G. & Jo. 18; see *Morley v. Morley*, 5 D. M. & G. 610).

The statute cannot be applied to a case where there is no assignable person liable to pay the charge, no person who by the delay could be induced to suppose that the charge was abandoned or merged, and where the rent out of which the interest ought to be paid belongs to the same person who is entitled to the interest (*Burrell v. Egremont*, 7 Beav. 206); as where a tenant for life paid off a charge on settled estates (*Ib.*; see *Kensington v. Bouverie*, 7 D. M. & G. 144, 7 H. L. C. 557; *Baldwin v. Baldwin*, 4 Ir. Ch. R. 501; *Carbery v. Preston*, 13 Ir. Eq. R. 455); or where Same hand to pay and receive.

37 & 38 Vict. c. 57, s. 8. the person entitled beneficially to the rents of land was also entitled to the interest of a mortgage thereon, although the trustees were different (*Topham v. Booth*, 35 Ch. D. 607). In these cases payment of interest has been presumed. The same principle was applied where a married woman living with her husband was entitled to the interest of mortgage money charged on her husband's land (*Re Hawes, Burchell v. Hawes*, 62 L. J. Ch. 463; see *Re Dixon, Heynes v. Dixon*, 1900, 2 Ch. 561). There must be a hand to receive as well as a hand to pay, and the party to receive must be capable of giving a discharge (*M'Carthy v. Daunt*, 11 Ir. Eq. R. 29; *Carroll v. Hargrave*, 1 R. 5 Eq. 123). See further, the cases quoted under R. P. Lim. Act, 1837 (*ante*, p. 175); and under Civil Proc. Act, 1833, s. 5 (*post*, p. 216).

Sect. 40 had no application in the case of an annuity charged on real estate in Jamaica (*Pitt v. Dacre*, 3 Ch. Div. 295).

(5)

LEGACIES.

Section 40 was applicable to legacies payable out of personal estate only (*Paget v. Foley*, 2 Bing. N. C. 679; *Sheppard v. Duke*, 9 Sim. 569; *Henry v. Smith*, 2 Dru. & War. 391; *O'Hara v. Creagh*, 1 Long. & T. 65). The section extended to a residue (*Prior v. Horniblow*, 2 Y. & Coll. 201); or share of residue (*Christian v. Devereux*, 12 Sim. 271); and to an annuity payable out of personalty (*Re Ashwell*, Johns. 112; see *Dower v. Dower*, 15 L. R. Ir. 264). Sect. 8 of the R. P. Lim. Act, 1874, barred after twelve years the right to recover legacies or shares in residue which were not held by executors on express trusts (*Re Rowe, Jacobs v. Hind*, 61 L. T. 581; *Re Davis, Evans v. Moore*, 1891, 3 Ch. 119; *Re Barker, Buxton v. Campbell*, 1892, 2 Ch. 491; see *Rudd v. Rudd*, 1895, 1 Ir. R. 15). But where defendants are sued as trustees of a fund and not as executors, then apart from the Trustee Act, 1888, no Stat. Lim. applies (*Re Timmis, Nixon v. Smith*, 1902, 1 Ch. 184). So the words in the above section "action to recover a legacy" did not include an action by a residuary legatee against trustees to recover loss from non-realization of residue (*Re Swain, Swain v. Bringeman*, 1891, 3 Ch. 233). Or an action to make trustees liable for improperly paying over a settled share (*Re Timmis, sup.*)

Where the person liable for payment of a legacy and the person entitled to receive it are the same, no question of limitation can arise (*Binns v. Nicholls*, 2 Eq. 256; see *Blachford v. Worsley*, 27 Ch. D. 676). Compare the cases as to charges (*sup.*), and as to specialties (*post*, p. 216). As to the effect of an order in lunacy (carrying over funds to a particular account) in preserving the right to recover a legacy, see *Re Walker* (7 Ch. 120); and generally as to the running of time in the case of actions to recover legacies, see especially the cases as to a present right to receive a legacy, p. 192, *post*.

An executor who had possessed assets sufficient to pay a legacy, died leaving it unpaid, and having charged his real estates with his debts. The right to sue for the legacy as such having been barred, it could not be claimed under the charge of debts (*Piggott v. Jefferson*, 12 Sim. 26).

Annuities.

An annuity given by will and payable out of personal estate only should, it seems, be treated as a series of "legacies" within the section payable *de anno in annum* (*Dower v. Dower*, 15 L. R. Ir. 264; see *Edwards v. Warden*, 9 Ch. 505). In this view non-payment of the annuity for the full statutory period does not extinguish the annuitant's title, but each instalment must be considered separately, having regard to the time at which a present right to receive the same accrued (*Ibid.*; see *Re Ashwell*, Joh. 117).

Presumption
of payment
of legacies
before 3 & 4
Will. 4, c. 27.

Before the R. P. Lim. Act, 1833, lapse of time was frequently held a bar to a suit for a legacy upon the ground of raising a presumption of payment (*Higgins v. Crawford*, 2 Ves. jun. 572; *Pickering v. Stamford*, *ib.* 582; *Jones v. Turberville*, *ib.* 11; *Montessor v. Williams*, 1 Rop. on Leg. 792, 2nd ed.; *Campbell v. Graham*, 1 R. & M. 453; 2 Cl. & Finn. 429). Even after the R. P. Lim. Act, 1833, the presumption was applied in the case of an annuity (*Shadbolt v. Vanderplank*, 29 Beav. 405). For cases where the presumption was not raised, see *Shields v. Rice* (3 Jur. 970); *Lee v. Brown* (4 Ves. 362); *Prior v. Horniblow* (2 Y. & Coll. 206); *Ravenscroft v. Frisby* (1 Coll. 16).

According to the law as it stood before 1879, where an express trust existed, there having regard to sect. 25 of the R. P. Lim. Act, 1833, the claim was not barred by sect. 40. So held where land was vested in trustees upon express trust to secure payment of debts (*Dillon v. Cruise*, 3 Ir. Eq. R. 70; *Hunt v. Bateman*, 10 Ir. Eq. R. 360; see *Dundas v. Blake*, 11 Ir. Eq. R. 138; *Heenan v. Berry*, 2 J. & Lat. 303); or of charges (*Young v. Waterpark*, 13 Sim. 204; 15 L. J. Ch. 63; *Blair v. Nugent*, 3 J. & Lat. 658; *Lawton v. Ford*, 2 Eq. 97; see *Burrowes v. Gore*, 6 H. L. C. 907); or of legacies or annuities (*Watson v. Saul*, 1 Giff. 188; *Ward v. Arch*, 12 Sim. 472). On the other hand where an annuity was given by will, and real estate was charged with it, and then the estate was simply devised charged with the payment of the annuity, it was not an express trust (*Francis v. Grover*, 5 Hare, 39). Compare the case where an annuity was charged on land in favour of a charity, and the devisee being bound to give effect to the gift, was held to be an express trustee (*Commrs. of Donations v. Wybrants*, 2 J. & Lat. 182). A devise of realty subject to and charged with legacies did not create an express trust in favour of the legatees (*Proud v. Proud*, 32 Beav. 234). A vendor's lien was not an express trust (*Toft v. Stephenson*, 7 Hare, 1; *Dundas v. Blake*, 11 Ir. Eq. R. 138; *Henderson v. Atkins*, 28 L. J. Ch. 913). Where a testator charged his real estates with his debts, and devised a particular plantation in trust to pay his debts, it was held, that as to the plantation a trust had been created in favour of the creditors, but that as to the other real estates they had a mere charge (*Jacquet v. Jacquet*, 27 Beav. 332). On the construction of an entire will, it was held in one case that an express trust arose to secure a legacy (*Thomson v. Eastwood*, 2 App. Cas. 215; see *Williams v. Williams*, 1900, 1 Ch. 152), and in another that there was no express trust to secure annuities (*Cunningham v. Foot*, 3 App. Cas. 974; see *Re Lacy, Royal Association v. Kydd*, 1899, 2 Ch. 156).

Now the R. P. Lim. Act, 1874, s. 10, provides that after 1st January, 1879, no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent at law or in equity, and secured by an express trust, except within the time within which the same would be recoverable if there were not any such trust (see *post*, p. 207).

The case of sums of money secured by an express trust of personality — of money vested in a trustee, but which sums are not charged upon or payable out of land, appears to be unaffected by the last-mentioned section; and in the case of such sums it was held, previously to the R. P. Lim. Act, 1874, that the trust of personality prevented the statute from operating as a bar (see *Playfair v. Cooper*, 17 Beav. 187; compare the Jud. Act, 1873, sect. 25 (2); *Banner v. Berridge*, 18 Ch. D. 262). It seems that the last-mentioned rule did not apply to the case where the trust of personality was one imposed upon an executor (*Cadbury v. Smith*, 9 Eq. 42; *Scott v. Jones*, 4 Cl. & Fin. 382; *Re Stephens, Warburton v. Stephens*, 43 Ch. D. 45). But the executor might become a trustee (see *Charlton v. Durham*, 4 Ch. 433); e.g. where he severed a legacy (*Phillipo v. Munnings*, 2 M. & C. 309; explained in *Harcourt v. White*, 28 Beav. 309; *Tyson v. Jackson*, 30 Beav. 384; see *Re Smith, Henderson Roe v. Hitchins*, 42 Ch. D. 302); or executed a declaration of trust (*Re Rowe, Jacobs v. Hind*, 60 L. T. 599). The executor might become a trustee by assenting to a legacy given to him in trust (*Dix v. Burford*, 19 Beav. 412); but not in general by performance of his duties *qua* executor (*Re Mackay, Mackay v. Gould*, 1906, 1 Ch. 31), e.g. not by assenting to an absolute legacy (*Re Rowe, sup.*); or by signing a residuary account (*Re Rowe*, 61 L. T. 581; see *Tyson v. Jackson*, 30 Beav. 384). The ordinary implied trust which affects personal estate held by an executor for the benefit of legatees does not prevent the running of time (*Re Davis, Evans v. Moore*, 1891, 3 Ch. 124; *Re Barker, Buxton v. Campbell*, 1892, 2 Ch. 491; see *Re Lacy, Royal Association v. Kydd*, 1899, 2 Ch. 149).

In the case of proceedings against trustees, regard must be had to sects. 7, 8, and 12 of the Trustee Act, 1888 (*post*, p. 243).

37 & 38 Vict.
c. 57, s. 8.

(6)
Express trusts
— of money payable out of land;

Trustee Act,
1888.

37 & 38 Vict.
c. 57, s. 8.

(7)

Present right
to receive.

In the case of
next of kin.

Residuary
legatees.

Pecuniary
legatees.

Charges.

As regards the meaning of the words "next after a present right to receive the same shall have accrued to some person capable of giving a discharge" (which occur in both the above sections), these words should be compared with the first words in the sections, which suggest that at the time when the present right accrues some "proceeding" can be brought. This view was adopted by *Kekewich, J.*, who interpreted the words "present right to receive" as meaning a right to recover by legal proceedings (*Re Pardoe; M'Laughlin v. Penny*, 1906, 1 Ch. 269), and held that where an action could not have been brought, time did not run (*Ib.*; see *Re Blachford; Blachford v. Worsley*, 27 Ch. D. 676, where the legatee was one of the executors). See, however, *Hornsey Board v. Monarch Society*, 24 Q. B. Div. 6. In the case of next of kin, it has been laid down that they have no present right to receive from the administrator a reversionary estate belonging to the intestate before it falls into possession (*Re Johnson; Sly v. Blake*, 29 Ch. D. 971). So in the case of a residuary legatee, his claim to recover residuary assets was not barred as to assets received by the executor within the statutory period before action, but was barred as to assets received previously (*Adams v. Barry*, 2 Coll. 290; *Re Davis; Evans v. Moore*, 1891, 3 Ch. 119; *Bright v. Larcher*, 27 Beav. 130; see the form of Decree in *Larkins v. Phipps*, 1873, W. N. 207). In the case of a pecuniary legatee whose legacy is payable immediately, time runs against him from the death, not from the expiration of a year from the death (*Waddell v. Harshaw*, 1905, 1 I. R. 46). It would seem on principle that this rule applies even where the only assets are reversionary, at least where such reversionary assets can be made available for payment of the legacy (see *Bright v. Larcher*, 27 Beav. 136; 4 De G. & J. 618; see contra the dicta of *Kay, J.*, *Re Ludlam; L. v. L.*, 63 L. T. 332). Where a pecuniary legacy was bequeathed out of a reversionary fund, the present right to receive did not arise until the reversion fell in (*Re Ludlam; L. v. L., ib.*; *Earle v. Bellingham*, 24 Beav. 448). As to a reversionary share of residue, the title to which was accelerated, see *Russell v. Crowley*, 1907, 1 I. R. 275. In the case of a legacy payable on a future event time ran from the event (*Rudd v. R.*, 1895, 1 I. R. 15).

With respect to charges on land, it has been said that in each case the moment to be looked to is the moment when the charge comes into present operation (*Hornsey Board v. Monarch Society*, 24 Q. B. Div. 9; *Re Lambert*, 1906, 1 I. R. 231). A present right to receive means an immediate right without waiting for the happening of any future event (*Farran v. Beresford*, 10 Cl. & Fin. 334; see *Ryan v. Combie*, 2 Ir. Eq. R. 334). Where the tenant for life of land failed to keep down mortgage interest, time did not run against the remainderman's claim to be recouped out of the life tenant's assets until his death (*Kirwan v. Kennedy*, 3 I. R. Eq. 472). And where a testator devised all his real estate to A. for life and on her death charged the same with money, and the devise included a contingent reversionary interest in land which did not fall in until long after the death of A., time as regards such reversionary interest ran against the chargees not from the falling in of the interest but from the death of A., when the money might have been raised by sale or mortgage (*Re Owen*, 1894, 3 Ch. 225).

Where a legacy was charged upon real estate, it was held that a present right to receive the same accrued notwithstanding the existence of prior charges (*Proud v. Proud*, 11 W. R. 101). See, however, *Faulkner v. Daniel*, 3 Hare, 212, where legatees whose legacies were charged on real estate subject to prior charges were not affected by lapse of time so long as the prior charges subsisted. See also *Ravenscroft v. Frisby*, 1 Coll. 22.

In a case before the C. A. the expenses of paving works were charged by statute upon the plots fronting the street upon the completion of such works by the local board, but the amount charged upon each plot was not ascertained by apportionment for several years later; and the Board subsequently sued the owner of one plot to enforce his proportion of the charge. It was held that time ran against the Board not from the apportionment but from the

completion of the works when the charge arose (*Hornsey Board v. Monarch Society*, 24 Q. B. Div. 1). It was said that a "present right to receive" was distinguishable from "a present right to sue" (*Id.* 9), an interpretation which should be compared with the cases set out above. 37 & 38 Vict. c. 57, s. 8.

The present right to receive must accrue to some person capable of giving a discharge for the same; accordingly, where a legacy was bequeathed to an infant, time ran from her majority (*Piggott v. Jefferson*, 12 Sim. 26). When time has commenced to run against a legatee and the executor is subsequently found a lunatic, time continues to run (*Boldero v. Halpin*, 19 W. R. 320).

(8)

The words in sect. 40, "by the person by whom the same shall be payable or his agent," apply equally to the making of a payment and the signing of an acknowledgment (*Chinnery v. Evans*, 11 H. L. C. 115, 124; see *Harlock v. Ashberry*, 19 Ch. Div. 539). A payment to take a case out of the statute must be such a payment as amounts to an acknowledgment of liability (19 Ch. Div. 548). Compare *Lewin v. Wilson*, 11 App. Cas. 639. The whole idea is that the payment is an admission of the right of the person to whom it is paid (*Bradshaw v. Widdrington*, 1902, 2 Ch. 436, 450). Payment by a mere stranger will not do (*Homan v. Andrews*, 1 Ir. Ch. Rep. 106; *Linsell v. Bonsor*, 2 Bing. N. C. 245; *Chinnery v. Evans*, 11 H. L. C. 115). The person by whom money is payable means, in the case of a claim by equitable lien, the person entitled to the land on which the charge is sought to be fixed (*Toft v. Stephenson*, 1 D. M. & G. 40; *Pears v. Laing*, 12 Eq. 54). In the case of a mortgage, it is sufficient if there is a payment by the mortgagor, or by a person who as between himself and the mortgagor is bound to pay (*Bradshaw v. Widdrington*, 1902, 2 Ch. 436, 450). Payment of interest by a receiver who was the agent of a mortgagor was sufficient (*Chinnery v. Evans*, 11 H. L. C. 134; *Berwick v. Price*, 1905, 1 Ch. 642; see *Re Hale*, *Lilley v. Foad*, 1899, 2 Ch. 107; *Whitley v. Lowe*, 25 Beav. 421). Where on the death of a mortgagor his widow (entitled to dower) took possession of the land with the heir's consent, payment of interest by the widow (who was regarded as the heir's agent) kept the mortgage alive as against him (*Ames v. Mannering*, 26 Beav. 583). If estates A., B. and C. are included in one mortgage, and payments of interest are made out of the rents of A., these payments are sufficient to keep alive the remedy of the mortgagee against B. and C. (*Chinnery v. Evans*, 11 H. L. C. 115). Where a loan was secured by covenant and a mortgage of Blackacre, and the mortgagor died having specifically devised Blackacre to A., and Whiteacre, which also belonged to him, to B., and the mortgagee thirty-five years later claimed to enforce the specialty debt against Whiteacre, payment of interest by A. kept alive the mortgagee's right to resort to Whiteacre for payment of his principal. The court held that being a payment by one of several interested, it bound the others on the principle of *Roddam v. Morley*, 1 De G. & J. 1, quoted under the Civil Procedure Act, 1833, s. 5, *post* (*Re Lacey*; *Howard v. Lightfoot*, 1907, 1 Ch. 332). In cases within sect. 8 payment of interest by one co-debtor or co-contractor will preserve the remedy against the other, 19 & 20 Vic. c. 97 not applying (*Re Frisby*, *Alison v. Frisby*, 43 Ch. D. 111; see *Re Powers*, 30 Ch. Div. 291; *Baillie v. Irwin*, 1897, 2 I. R. 614; *Seager v. Aston*, 26 L. J. Ch. 302). For payments on judgments against co-debtors, see *Brew v. Brew*, 1899, 2 I. R. 163; *Re Kingston*, I. R. 3 Eq. 485. A mortgagor, however, who assigned the equity of redemption did not by subsequently paying interest prevent time running in favour of the assignee (*Newbould v. Smith*, 33 Ch. D. 127; 14 A. C. 423; compare *Lyall v. Fluker*, 1873, W. N. 208). The mortgagee's receipt of the surrender value of a policy on the mortgagor's life included in the mortgage was not a sufficient payment to entitle the mortgagee to sue on the covenant (*Re Clifden*; *Annally v. Agar-Ellis*, 1900, 1 Ch. 774; see *Re Conlan*, 29 L. R. Ir. 199; *Scott v. Synge*, 27 L. R. Ir. 560). But where a mortgagor assigned an annuity to the mortgagee as security and the mortgagee received the annuity to an amount exceeding the money secured, it was held that the surplus was a payment sufficient to keep alive another mortgage held by

37 & 38 Vict. c. 57, s. 8. the same mortgagee from the same mortgagor (*Staley v. Barrett*, 26 L. J. Ch. 321; see *Re Irwin*, 1907, 1 I. R. 357).

Same hand to pay and receive.

Where the hand to pay and to receive was the same, payment of interest on a charge has been presumed (see the cases under R. P. Lim. Act, 1837, *ante*, p. 175, and under Civil Proc. Act, 1833, s. 5, *post*, p. 216); as where the person entitled to interest on the charge was also tenant for life of the charged land, and owed a duty to the remainderman (*Burrell v. Egremont*, 7 Beav. 236); *secus* where payment of the money charged was claimed out of the chargor's personal estate under his covenant, and the devisee of the land was absolute owner, and owed no such duty (*Re England, Steward v. England*, 1895, 2 Ch. 107). The last decision was affirmed by the C. A., on the principle that the landowner was not personally liable to the chargee to pay the interest (*id.*, 1895, 2 Ch. 825). And this principle appears to have been applied to the case of a tenant for life by *North, J.*, in refusing to presume a payment of interest (*Re Allen, Bassett v. Allen*, 1898, 2 Ch. 499).

Part-payment by an administrator out of an asset recovered by him within the statutory period, will not revive the right to sue for general administration, which was barred at the time (*Re Johnson, Sly v. Blake*, 29 Ch. D. 964). Payment of interest under an order in a foreclosure action to which infants were parties was considered as made without prejudice to their rights (*Thwaites v. M'Donogh*, 2 Ir. Eq. R. 97).

(9)

ACKNOWLEDGMENTS IN WRITING.

Who is agent.

The words of the 8th sect. of the R. P. Lim. Act, 1874, and sect. 42 of the R. P. Lim. Act, 1833, being nearly the same, most of the decisions as to acknowledgments under these two sections are arranged in one note. As to acknowledgments under the 14th and 28th sections, see *ante*, pp. 151, 172.

Both sections refer to an "agent." An agent need not be authorised in writing (*Coles v. Trecothick*, 9 Ves. 250). Nor need the agent have at the time an actual authority to act (*Trulock v. Robey*, 12 Sim. 407). Wherever a specific appointment of an agent is necessary, a subsequent recognition of acts done by him in that capacity is better even than a previous authority (*James v. Bright*, 5 Bing. 533; *Foster v. Bates*, 12 M. & W. 233). See generally, as to the extent and nature of an agent's authority, *Pole v. Leask*, 28 Beav. 562; 9 Jur. N. S. 829. In *Toft v. Stephenson* (1 D. M. & G. 28), an inquiry was directed as to the agency of an attorney who had acknowledged a debt.

By whom an acknowledgment may be made.

An acknowledgment is sufficient if signed by the person who represents the estate out of which the money claimed is payable, or by his agent. Thus, where an estate was devised to a trustee in trust to sell and pay the testator's debts, and subject thereto in trust for A., an acknowledgment was sufficient where *signed by the trustee* or his agent; but such an acknowledgment will not impose on him any personal liability to pay the debt. The words in sect. 42, "by whom the same was payable," do not denote merely the persons who are legally bound by contract to pay, but all persons against whom payment might be enforced (*Bolding v. Lane*, 1 D. J. & S. 122; *St. John v. Boughton*, 9 Sim. 219). An acknowledgment signed by the attorney of the trustees of the will of a deceased purchaser of land who had entered before payment of purchase-money was sufficient (*Toft v. Stephenson*, 1 D. M. & G. 28). An acknowledgment by one of two executors and devisees in trust of real estate, even if effectual as regards personal estate, did not prevent the operation of sect. 42 of R. P. Lim. Act, 1833, as regards the real estate (*Astbury v. Astbury*, 1898, 2 Ch. 111). An acknowledgment by a debtor given after he has transferred his property for the benefit of creditors is not sufficient (*Lyall v. Fluker*, 1873, W. N. 208; conf. *Newbould v. Gould*, 33 Ch. Div. 127). An acknowledgment by a mortgagor of more than six years' arrears of interest being due upon a first mortgage, does not preclude a *puisne* mortgagee from relying on the statute (*Bolding v. Lane*, 1 D. J. & S. 122; see *Chinnery v. Evans*, 11 H. L. Cas. 115; and *Astbury v. Astbury*, 1898, 2 Ch. 117; where it is suggested that an acknowledgment by an executor will not bind a different person who is devisee of the real estate). In *Re Fitzmaurice* (15 Ir. Ch. R. 445), the

tenant for life of the equity of redemption in a mortgaged estate, gave a written acknowledgment to the mortgagee, which kept alive against the remainderman the mortgagee's right to recover more than six years' interest. See *Beckett v. De la Cour*, 11 L. R. Ir. 187; *Gregson v. Hindley*, 10 Jur. 383; *Barclay v. Owen*, 60 L. T. 222.

Both the sections require the acknowledgment to be made "to the person To whom. entitled" or his agent. But in dealing with this the court has not restricted itself within narrow limits. If it be made in a schedule, affidavit, or answer, it is sufficient, although it may be said that in those cases it is made to the court and not to the party. *Sugden*, L. C., thought the decisions right, and that they proceeded upon a *liberal* but yet a fair and just construction of the statute (*Blair v. Nugent*, 3 J. & Lat. 677).

Sufficient acknowledgments have been held to arise from an answer in Chancery (*Ib.* 673); an affidavit in a suit (*Tristram v. Harte* (Long. & T. 186); an insolvent's schedule (*Barrett v. Bermingham*, 4 Ir. Eq. R. 537; *Morrrough v. Power*, 5 Ir. L. R. 494; *Hanan v. Power*, 8 Ir. L. R. 505); a debtor's will (*Millington v. Thompson*, 3 Ir. Ch. R. 235; see *Re Hoyle*, *H. v. H.*, 1893, 1 Ch. 92; *Scott v. Synge*, 27 L. R. Ir. 560). In *Hill v. Stawell* (2 Ir. L. R. 302), where the report of the master on an inquiry as to incumbrances was not a sufficient acknowledgment, the creditor was not a party (*Wrixon v. Vize*, 3 Dr. & W. 123). A statutory declaration made by a mortgagor in the lunacy of the mortgagee was held, having regard to its terms, to be an insufficient acknowledgment (*Hervey v. Wynn*, 22 T. L. R. 93).

As to what is a sufficient acknowledgment. An acknowledgment under What the present sections need not, it seems, amount to a new promise to pay. amounts It is a withdrawal by virtue of the statutes of the abrogation of the remedy to an acknow- and leaves the old debt still recoverable (*Re Lacey*; *Howard v. Lightfoot*, ledgment. 1907, 1 Ch. 345). The personal liability of the party signing the acknowledgment is out of the question (*St. John v. Boughton*, 9 Sim. 295). Consider *Holland v. Clark* (1 Y. & C. Ch. 151), where a letter written by one of two executors, not for the purpose of charging himself with the payment of a legacy, but of throwing the burden on his co-executor, was held by *Knight Bruce*, V.C., not to be a sufficient acknowledgment. And consider the *dicta* in *Grenfell v. Girdlestone* (2 Y. & C. Ex. 676, a decision on the law before 1833). A written proposal of terms adding "this being done, it is hoped the judgment against B. will be satisfied," was a sufficient acknowledgment of the judgment debt (*Vincent v. Willington*, Long. & T. 456). A correspondence between the treasurer of a Co. and a person holding a mortgage on works of the Co. was a sufficient acknowledgment (*Jortin v. S. E. Ry. Co.*, 6 D. M. & G. 270). The acknowledgment need not state the amount alleged to be due (*St. John v. Boughton*, 9 Sim. 225).

Sect. 8 of R. P. Lim. Act, 1874, operates only as a suspension of the When must remedy and not as an extinguishment of the right (*Kibble v. Fairthorne*, 1895, the acknow- 1 Ch. 224). Accordingly an acknowledgment after the statutory period has ledgment elapsed is sufficient (*Harty v. Davis*, 13 Ir. L. R. 23; *Re Clifden*, *Annaly v. Agar-Ellis*, 1900, 1 Ch. 774; *Waring v. Waring*, 5 Ir. Ch. R. 6; see *contra*, section be *Gregson v. Hindley*, 10 Jur. 383; *Homan v. Andrews*, 1 Ir. Ch. R. 106; made. *Hervey v. Wynn*, 22 T. L. R. 93: compare on this point the rule as to land, ante, p. 180; and as to simple contract debts, post, p. 230). So a payment after the statutory period (*Beamish v. Whitney*, 1908, 1 I. R. 38).

A condition of sale as to evidence of the discharge of a statute barred equitable charge on land was discussed in *Hopkinson v. Chamberlain*, 1908, 1 Ch. 853.

B. Limitation for Recovery of Personal Estate of Intestates.

Law of Property Amendment Act, 1860, s. 13.

The above section, after reciting R. P. Lim. Act, 1833, s. 40, Extension of proceeds: "no suit or other proceeding shall be brought to re- sect. 40 of 3 cover the personal estate, or any share of the personal estate, of 27, to cases of & 4 Will. 4, c.

23 & 24 Vict.
c. 38, s. 13.

claims to
estates of
intestates.

any person dying intestate, possessed by the legal personal representative of such intestate, but within twenty years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or release of the same, unless in the meantime some part of such estate or share, or some interest in respect thereof, shall have been accounted for or paid, or some acknowledgment of the right thereto shall have been given in writing, signed by the person accountable for the same, or his agent, to the person entitled thereto, or his agent; and in such case no such action or suit shall be brought, but within twenty years after such accounting, payment, or acknowledgment, or the last of such accountings, payments, or acknowledgments, if more than one was made or given."

It should be observed that sect. 8 of R. P. Lim. Act, 1874, does not extend to claims to estates of intestates. As to such claims accordingly the period of limitation is still the period prescribed by the above section.

The above section is retrospective (*Willis v. Howe*, 43 L. T. 375; *Re Johnson, Sly v. Blake*, 29 Ch. D. 964), and applies to a partial as well as an entire intestacy (*Willis v. Howe, sup.*). An action was barred by this section in *Martin v. Beauchamp* (1888, W. N. 247); also in *Re Lacy, Royal Association v. Kydd* (1899, 2 Ch. 149), and *Re M'Causland*, 1908, I. R. 327; where executors were held not to be express trustees for next of kin. Having regard to this section, an action to obtain revocation of an old grant of administration was dismissed as vexatious (*Willis v. Beauchamp*, 11 P. D. 59). The section was no bar to a claim made by the next of kin to leaseholds of the intestate which had been occupied for more than twenty years by the administrator (who was also heir-at-law to the intestate), under a belief that the property was freehold (*Reed v. Fenn*, 35 L. J. Ch. 464). See also, as to lapse of time in the case of claims to an intestate's estate, *Cresswell v. Dewell* (4 Giff. 460).

As to a "present right to receive" the personal estate of an intestate, and as to part payments and acknowledgments in relation thereto, see the cases quoted under sect. 8 of R. P. Lim. Act, 1874, *ante*, pp. 192 *et seq.*

C. Arrears of Dower.

R. P. Lim. Act, 1833, s. 41.

No arrears of
dower to be
recovered for
more than
six years.

41. No arrears of dower, nor any damages on account of such arrears, shall be recovered or obtained by any action or suit for a longer period than six years next before the commencement of such action or suit.

In equity, as at law, there was before this act no limitation to a claim of the arrears of dower (*Oliver v. Richardson*, 9 Ves. 222; see *Mordaunt v. Thorold*, 3 Lev. 375; *Curtis v. Curtis*, 2 Br. C. C. 620; *Dormer v. Fortescue*, 3 Atk. 130; *Tilley v. Bridger*, 2 Vern. 519; *Prec. in Ch.* 252; *Wakefield v. Child*, 1 Fonbl. Eq. 159, n.; the Dower Act, 1833, *post*; *Bamford v. Bamford*, 5 Hare, 203; *Marshall v. Smith*, 5 Giff. 37; *Williams v. Thomas*, 1909, 1 Ch. 713).

D. Arrears of Rent or of Interest in respect of Money charged on Land or in respect of Legacies.

R. P. Lim. Act, 1833, s. 42.

No arrears of
rent or in-
terest to be

42. No arrears of rent (a) or of interest in respect of any sum of money charged upon or payable out of any land or

rent (b), or in respect of any legacy (c), or any damages, in respect of such arrears of rent or interest, shall be recovered by any distress, action or suit, but within six years next after the same respectively shall have become due (d), or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable or his agent (e): provided nevertheless, that where any prior mortgagee or other incumbrancer shall have been in possession of any land, or in the receipt of the profits thereof, within one year next before an action or suit shall be brought by any person entitled to a subsequent mortgage or other incumbrance on the same land, the person entitled to such subsequent mortgage or incumbrance may recover in such action or suit the arrears of interest which shall have become due during the whole time that such prior mortgagee or incumbrancer was in such possession or receipt as aforesaid, although such time may have exceeded the said term of six years.

3 & 4 Will. 4,
c. 27, s. 42.

recovered for
more than
six years.

(a) As to how far this section was retrospective, see *Paddon v. Bartlett* (3 Ad. & Ell. 884); *Peyton v. M'Dermot* (1 Dru. & Wal. 198); *Vincent v. Willington* (1 Long. & T. 456). The section remains in full force after, as well as before, 1879 (see sect. 9 of the R. P. Lim. Act, 1874, ante, p. 184).

How far this
section retro-
spective.

- (1) *Arrears of Rent and Annuities*...197.
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- (5) *Interest on Debts generally*...202.

(1)

By the Lim. Act, 1623, s. 3, actions of debt for arrears of rent must have been commenced within six years. The section was confined to actions for arrears of rent upon a demise without deed, and did not extend to rent reserved by specialty (*Freeman v. Stacey*, Hutton, 109).

Sect. 42 was held in Ireland to include tithe rentcharge (*Eccl. Commrs. v. Sligo*, 5 Ir. Ch. R. 46; *Conolly v. Gorman*, 1898, 1 I. R. 20). Only two years' arrears of an ordinary tithe rentcharge can be recovered (54 Vict. c. 8, s. 10, sub-s. 2). As to uncommuted tithes, see 53 Geo. 3, c. 127, and 5 & 6 Will. 4, c. 74 (both repealed except as to uncommuted tithes by S. L. Rev. Acts, 1887 and 1888); *Robinson v. Purday* (16 M. & W. 11).

As regards rent reserved, the opinion was expressed in 1836 that, having regard to the definition of "rent" in sect. 1, the words "arrears of rent" in sect. 42 did not include a conventional rent reserved on a lease (*Paget v. Foley*, 2 Bing. N. C. 688, 690). In 1841, the Court of Exchequer held that "rent" in sect. 2 of the act did not include such a conventional rent (*Grant v. Ellis*, 9 M. & W. 122, approved in *Irish Commission v. Grant*, 10 A. C. 26; *Jones v. Withers*, 74 L. T. 576; see ante, p. 127); but it was suggested by *Parke, B.*, and *Rolfe, B.*, that there was a distinction between "rent" in the earlier sections of the act and "arrears of rent" in sect. 42 (*Grant v. Ellis*, 9 M. & W. 120, 125). Later on it was laid down by the

3 & 4 Will. 4,
c. 27, s. 42.

H. L. (in a case of rent reserved where a remedy against land was being asserted) that sect. 42 prevents the recovery of more than six years' arrears: the House in effect holding (1) that "rent" in sect. 42 did include rent reserved on a lease; and (2) that as against the land the six years' limit applied to rent reserved (*Archbold v. Scully*, 9 H. L. C. 375, 382). Where, however, arrears of rent reserved by specialty were sought to be recovered in a personal action on the specialty it was decided that such action might be brought at any time within the twenty years allowed by the Civil Procedure Act, 1833, s. 3, *post*, p. 211 (*Paget v. Foley*, 2 Bing. N. C. 679; see *Hunter v. Nockolds*, 1 Mac. & G. 653). The last-mentioned rule has not been altered by the R. P. Lim. Act, 1874, s. 8, *ante*, p. 185. See *Darley v. Tennant*, 53 L. T. 257; *Donagan v. Neill*, 16 L. R. Ir. 309. For the period during which an account of mesne rents will be directed in equity, see *post*, p. 201.

Fee-farm
rent.

Arrears of a fee-farm rent were limited by this section to six years (*Humfrey v. Gery*, 7 C. B. 567).

Annuities.

An annuity charged on land by will comes within the meaning of the word rent in the 42nd section, as explained by sect. 1; therefore no more than six years' arrears are recoverable (*Ferguson v. Livingston*, 9 Ir. Eq. R. 202; *Francis v. Grover*, 5 Ha. 39); so also when the annuity is charged on realty and personalty (*Re Nugent*, 19 L. R. Ir. 140). The rule applies even where the property charged is a reversionary interest in land (*Smith v. Hill*, 9 Ch. D. 150; approving *Vincent v. Going*, 1 J. & Lat. 697; *Sinclair v. Jackson*, 17 Beav. 405; see *contra Wheeler v. Howell*, 3 K. & J. 198). The 2nd section of the act provides for the case where the right or title to an annuity is disputed (see *ante*, p. 126). The 42nd section provides for the case where the title to the annuity is *not* disputed, but the distress is made for the arrears due (*James v. Salter*, 3 Bing. N. C. 552).

In the case of an annuity charged on land by deed and also secured by covenant, arrears were in a proceeding against the land limited by sect. 42 to six years (*Hunter v. Nockolds*, 1 Mac. & G. 640; *Harrison v. Duignan*, 2 Dr. & War. 295). But in such a case it was held that an action of covenant might under sect. 3 of the Civil Procedure Act, 1833, be brought within twenty years (*Strachan v. Thomas*, 12 Ad. & El. 558); even where the annuity as a charge on land had become extinguished by non-payment for thirty-three years (*Manning v. Phelps*, 10 Exch. 59). As to the effect on this ruling of *Sutton v. Sutton* (22 Ch. D. 511), see note on Mortgage Interest, *post*, p. 199.

An annuity bequeathed out of personalty only is neither "rent" nor "interest in respect of a legacy" within this section (*Roch v. Callen*, 6 Ha. 531; *Re Ashwell*, Johns. 112); so held contrary to the opinion of Lord St. Leonards (R. P. Stat. 138).

The words "arrears of rent" in sect. 42 were held to include a portion charged by will upon land, and payable by periodical instalments (*Uppington v. Tarrant*, 12 Ir. Ch. R. 268, 269).

(2)
ARREARS OF
INTEREST.

(b) "Sect. 40 enumerates mortgages, liens, judgments; but sect. 42 adopts the previous general description of money 'charged upon or payable out of land,' a description which includes every security, omitting the enumeration which it was unnecessary to repeat. It is impossible to draw any distinction between the sums of money mentioned in the one section and in the other" (Sugd. R. P. Stat. 139: see *Bolding v. Lane*, 4 Giff. 574).

(a)
On mortgages
of land.

The section was applied in the case of a charge on land (*Thompson v. Hurley*, 1905, 1 I. R. 588). A mortgagee of canal works was limited under this section to six years' arrears (*Hodges v. Croydon Canal Co.*, 3 Beav. 86); and a mortgagee of a reversionary interest in the proceeds of lands devised on trust for sale was similarly limited; the mortgagor's property being held to be "money payable out of land" within this section (*Bowyer v. Woodman*, 3 Eq. 313; compare *Re Lambert*, 1906, 1 I. R. 220). But a mortgagee of turnpike tolls (which are not within the act) was not limited to six years' arrears (*Mellish v. Brooks*, 3 Beav. 22). Nor was any such limit applied to the case of a mortgagee of a reversionary interest in trust

funds invested on mortgage (*Smith v. Hill*, 9 Ch. D. 143; see *Jordan v. 3 & 4 Will. 4, Young*, 1878, W. N. 229); or in pure personalty (*Clarkson v. Henderson*, 14 Ch. D. 348; *Mellersh v. Brown*, 45 Ch. D. 225, a foreclosure action).

In some cases under R. P. Lim. Act, 1833, sect. 42, a difficulty arose in consequence of Civil Proc. Act, 1833, s. 3 (*post*); and the courts treated the provision of the latter section as an exception out of the former (*Paget v. Foley*, 2 Bing. N. C. 690; *Strachan v. Thomas*, 12 Ad. & E. 558). In *Hunter v. Nockolds* (1 Mac. & G. 640) Lord *Cottenham* (overruling *Du Vigier v. Lee*, 2 Hare, 326) laid down that the effect of the conjoint enactment was, that no more than six years' arrears of interest in respect of any sum charged upon or payable out of any land or rent could be recovered by way of distress, action, or suit, other than and except in actions on covenant or debt on specialty, in which case the limitation was twenty years (see *Hughes v. Kelly*, 3 Dru. & War. 482). In a later case which fell within the R. P. Lim. Act, 1874, the C. A. held that the personal remedy of a mortgagee (on covenant) to obtain payment from the mortgagor of the principal sum secured by the mortgage was barred in twelve years by sect. 8 of the last-mentioned act; and they refused to follow Lord *Cottenham* in treating sect. 3 of the Civil Procedure Act, 1833, as permitting (by way of exception to the R. P. Lim. Acts) an action on covenant to recover a mortgage debt to be brought within twenty years (*Sutton v. Sutton*, 22 Ch. Div. 511; see *Macdonnell v. Fitzgerald*, 1897, 1 I. R. 568). It should be observed that the section discussed by the C. A. was sect. 8 of the R. P. Lim. Act, 1874, which deals with principal sums secured by mortgage. They did not discuss interest, or sect. 42 of the R. P. Lim. Act, 1833, which remains in full force (see sect. 9 of the R. P. Lim. Act, 1874, *ante*, p. 184). It has, however, been held in Ireland that having regard to *Sutton v. S.*, only six years' arrears of interest on money charged on land can be recovered in an action on covenant (*Thompson v. Hurley*, 1905, 1 I. R. 595). Sed qu.

After *Hunter v. Nockolds* it was held, in several cases, that in an action to foreclose real estate, a mortgagee could not recover more than six years of interest, although the mortgage debt was secured by covenant (*Sinclair v. Jackson*, 17 Beav. 405; *Shaw v. Johnson*, 1 Dr. & Sm. 412; *Round v. Bell*, 30 Beav. 121). It made no difference that the property mortgaged was reversionary (*Vincent v. Going*, 1 J. & Lat. 697; *Sinclair v. Jackson*, 17 Beav. 405; *Smith v. Hill*, 9 Ch. D. 143; see *contra*, *Wheeler v. Howell*, 3 K. & J. 198; *Jordan v. Young*, 1878, W. N. 229). Compare the large arrears recovered where a contingent reversion was charged (*Re Lambert*, 1906, 1 I. R. 220). Where mortgaged land was taken under the L. C. C. Act, 1845, the money being paid into court, and the mortgagee petitioned for payment, the proceeding was treated as analogous to an action to recover land, and the mortgagee only recovered six years' interest (*Re Stead*, 2 Ch. D. 713). On the other hand, on the principle of retainer, a mortgagee selling through land under his power can retain, out of money in his hands more than six years' arrears (*Re Marshfield*; *Marshfield v. Hutchins*, 34 Ch. D. 721). See in the case of personal estate, *Re Hancock*; *Hancock v. Berry*, 59 L. T. 199. On the same principle where the executors of a mortgagee sold land and paid the proceeds into court in a suit to administer the mortgagee's estate, the executors on their petition for payment out were entitled to more than six years' arrears (*Edmunds v. Waugh*, 1 Eq. 418).

In redemption actions a mortgagor can only redeem on payment of all arrears of interest, even exceeding six years (*Edmunds v. Waugh*, 1 Eq. 421; *Dingle v. Coppen*, 1899, 1 Ch. 726; *Powell v. Brodhurst*, 1901, 2 Ch. 167). And where A. mortgaged to B. a share passing under a will in proceeds of sale of land, and in an action to administer the testator's estate the land was sold and the proceeds went into court; the mortgagor petitioning for payment out was only allowed to recover the fund on payment to the mortgagee of full arrears (*Re Lloyd*; *L. v. L.*, 1903, 1 Ch. 385; see *Re Hazeldine*, 1908, 1 Ch. 34).

In *Elvy v. Norwood* (5 De G. & S. 240), the heir of a mortgagor who had covenanted for himself and his heirs to pay interest, could not redeem Tacking.

3 & 4 Will. 4, c. 27, s. 42. without paying twenty years' interest, as the mortgagee was entitled to tack. Since the Administration of Estates Act, 1833, a mortgagee of freeholds may tack his simple contract debt in a foreclosure suit as against the heir of the mortgagor (*Thomas v. Thomas*, 22 Beav. 341). As to a mortgagee of copyholds, see *Rolfe v. Chester* (20 Beav. 610). The question of tacking must be raised on the pleadings (*Sinclair v. Jackson*, 17 Beav. 405).

Effect on mortgage interest of barring of principal.

As regards mortgage interest. A further question may be raised as to the effect upon it of the barring of principal. It has been said that when a mortgage debt has gone, the right to interest has gone also (*Skene v. Cook*, 1901, 2 K. B. 15); reference being made to the doctrine that interest is an accessory which falls to the ground with the principal (*Parrs' Bank v. Yates*, 1898, 2 Q. B. 465). It seems doubtful whether this doctrine applies to the case where a mortgage deed contains separate covenants for payment of principal and interest (see *Parrs' Bank v. Yates*, *sup.*; *Hollis v. Palmer*, 2 Bing. N. C. 717). And it may be pointed out that, while payment of a statute barred principal debt cannot be enforced, the debt itself is not extinguished (*Smith v. Betty*, 1903, 2 K. B. 322); and further that principal and interest are distinct debts and can be sued for separately (*Attwood v. Taylor*, 1 Man. & G. 207).

Possession of prior incumbrancer.

Under the exception in this clause, where there are several incumbrances on an estate, and one incumbrancer enters, the right of a subsequent incumbrancer to recover interest during such possession is saved, provided he come within one year after the possession terminates. A judgment creditor who has the first security, and enters, is a prior incumbrancer in possession within this proviso (*Henry v. Smith*, 2 Dru. & War. 390). The prior incumbrance referred to in this exception is one which affects the interest upon which the subsequent incumbrance is also a charge (*Vincent v. Going*, 1 J. & Lat. 697). An annuitant was able under the exception to recover more than six years' arrears, which accrued during the possession of a prior incumbrancer (*Drought v. Jones*, 2 Ir. Eq. R. 303, "a doubtful authority"; Sugd. R. P. Stat. 146, n.). See also *Montgomery v. Southwell*, 2 Con. & Law. 263. Where a mortgagor sold the equity of redemption and assigned outstanding charges to a trustee for the purchaser, and the purchaser entered, the land was not in the possession of a prior incumbrancer within this exception (*Chinnery v. Evans*, 11 H. L. C. 115; where the nature of this exception is explained by Lord Westbury).

(b)
On judgments.

Debts secured by judgments are sums of money charged upon or payable out of land within the meaning of this section. In relation to the Stat. Lim., the rights of judgment creditors to arrears of interest, as against the real and personal estates of their debtor, are equal and co-extensive. As far as the statute protects the real estate, to the same extent the personal estate is protected. The interest given by the Debtors (Ireland) Act, 1840, s. 26, is subject to the R. P. Lim. Act, 1833, s. 42 (*Henry v. Smith*, 2 Dru. & War. 381; compare *Watson v. Birch*, 15 Sim. 523; *Jay v. Johnstone*, 1893, 1 Q. B. 190). In the case of an Irish judgment not registered as a mortgage only six years' arrears of interest are recoverable out of the judgment debtor's personal estate (*Macdonnell v. Fitzgerald*, 1897, 1 I. R. 556). See as to the Irish judgment creditor's remedy against the land, *Shea v. Moore*, 1894, 1 I. R. 158.

1 & 2 Vict. c. 110, ss. 17, 18.

Formerly a judgment did not carry interest, but interest might be recovered at law as damages, by action on the judgment (*Gawnt v. Taylor*, 3 M. & K. 302). Now by Judgments Act, 1838, ss. 17, 18 (*post*), every judgment debt carries interest at 4 per cent. from entering up until satisfaction. As to interest on debts generally, see p. 203, *post*.

(c)
On unpaid purchase-money of land.

In the case of a contract to sell land the vendor's right to receive interest on the purchase money did not accrue until completion, and he recovered forty years' arrears (*Toft v. Stevenson*, 5 D. M. & G. 735).

(d)
On charges on land.

Interest on an incumbrance for six years before writ was allowed where the action enured for benefit of all incumbrancers (*Archdall v. Anderson*, 25 L. R. Ir. 433; see *Greenway v. Bromfield*, 9 Hare, 201).

(c) Arrears of interest on legacies can only be recovered for six years, calculated from the filing of the bill (*Hughes v. Williams*, 3 Mac. & G. 683; *Chappell v. Rees*, 1 D. M. & G. 393; *Re Walker*, 7 Ch. 120; see *Thompson*

v. *Eastwood*, 2 App. Cas. 215). But where the assets consisted of a 3 & 4 Will. 4, reversion, and for the benefit of the estate realization was delayed, legatees received interest from the expiration of one year from the death of testatrix, a period exceeding six years (*Blachford v. Worsley*, 27 Ch. D. 676). As to interest on legacies, see *Lord v. Lord* (2 Ch. 782); *Re Richards* (8 Eq. 119); and as to the time from which such interest runs, see *Re Waters* (42 Ch. D. 517); *Re Bignold* (45 Ch. D. 496); *Re Friend, Friend v. Young* (1898, W. N. 26); *Re Gardner, Long v. Gardner* (1892, W. N. 164); R. S. C., Ord. 55, r. 64.

Sect. 42 does not apply to money charged on personal estate. In an action to enforce a vendor's lien on personal estate interest for more than six years was allowed (*Re Stucley; Stucley v. Kekewich*, 1907, 1 Ch. 67), see *ante*, p. 188.

(d) According to the law as it stood before 1879, it was settled that where an express trust existed, there having regard to sect. 25 of R. P. Lim. Act, 1833, the claim was not barred by sect. 42. So held in the case of annuities secured on realty (*Ward v. Arch*, 12 Sim. 472; *Mansfield v. Ogle*, 24 L. J. Ch. 700; *Cox v. Dolman*, 2 D. M. & G. 592; *Snow v. Booth*, 8 D. M. & G. 69; *Lewis v. Duncombe*, 29 Beav. 175; *Knight v. Bowyer*, 2 De G. & J. 421; see *Round v. Bell*, 30 Beav. 121; *Cunningham v. Foot*, 3 App. Cas. 974); in the case of a mortgage secured by a term in a trustee (*Shaw v. Johnson*, 1 Dr. & Sm. 412); in the case of a simple contract debt charged by will on real estate (*Blower v. Blower*, 7 W. R. 101); and in the case of interest on a legacy directed to be raised by a sale of realty (*Gough v. Bult*, 16 Sim. 323; *Kellett v. Kellett*, 1 R. 5 Eq. 298; *Thompson v. Eastwood*, 2 App. Cas. 215). Now by R. P. Lim. Act, 1874, s. 10 (*post*, p. 207), an express trust does not prevent time running in case of arrears of rent or of interest in respect of any money or legacy charged upon or payable out of any land or rent. The section does not affect legacies not so charged or payable.

In the case of proceedings against trustees commenced after 1889, regard must now be had to the Trustee Act, 1888, ss. 1, 8, and 12, *post*, p. 243.

(e) See the cases as to acknowledgments, *ante*, p. 194.

Sect. 42 differing from sect. 40 makes no mention of part payment. So that it would seem that part payment of an instalment of interest would not prevent the operation of the statute as to the balance (*Astbury v. Astbury*, 1898, 2 Ch. 115).

The 42nd section contains no exception in favour of persons under disabilities; and if the act be construed literally, infants and lunatics, and other persons under disabilities, will only be enabled to recover six years' interest (see *De Beauvoir v. Owen*, 5 Exch. 182; *Sugd. V. & P.*, 11th ed., 638).

A suit for the recovery of mesne rents and profits in equity, was not a suit for the recovery of arrears of rent within sect. 42 (*Hicks v. Sallitt*, 3 D. M. & G. 816). On the question how far the account was to be carried back in such suits, the following distinctions were laid down. In cases of express trusts, it was said that the Statutes of Limitation would afford no defence, and that an account would be directed from the accruer of the plaintiff's title (*Sturgis v. Morse*, 3 De G. & J. 1; *Wright v. Chard*, 4 Drew. 673; *Mathew v. Brise*, 14 Beav. 341; see now R. P. Lim. Act, 1874, s. 10, *post*, p. 207). Where there is no express trust, but the person in possession has had notice of the plaintiff's title, it was formerly held, that as at law more than six years' mesne profits could not be recovered, so in equity the account would not be carried back beyond six years from the filing of the bill (*Reade v. Reade*, 5 Ves. 744; *Harmood v. Oglander*, 6 Ves. 215); and in *Hicks v. Sallitt* (3 D. M. & G. 782), where the defendant was a purchaser for value, with notice of the plaintiff's title, *Turner, L. J.*, thought that the Lim. Act, 1623, might be applicable, by analogy to the action of account at law. An account for six years was granted in *Hickman v. Upsall* (4 Ch. Div. 144); see *Burnell v. Burnell* (11 Ch. D. 213). But, "where there is no trust, no fraud, no infancy, no suppression, where, in short, there

c. 27, s. 42.
(e)
On legacies.

(f)
On charges
on personal
estate.

(3)
EXPRESS
TRUSTS.

Trustee Act,
1888.

Acknow-
ledgments.
Part pay-
ment.

Disabilities.

(4)
ACCOUNT OF
RENTS IN
EQUITY.

(a)
From accruer
of plaintiff's
title.

(b)
For six years.

(c)
From filing
of bill.

3 & 4 Will. 4, is a mere *bonâ fide* adverse possession, it is not according to the course of c. 27, s. 42. the court to carry back the account of rents beyond the filing of the bill" (*Hicks v. Sallitt*, 3 D. M. & G. 782, where Lord Cranworth refers to the older cases; see *Thomas v. Thomas*, 2 K. & J. 79; *Penny v. Allen*, 7 D. M. & G. 409; *Morgan v. Morgan*, 10 Eq. 99). The principle of the rule, however, is that in order to disentitle the plaintiff to an account of rents before the institution of the suit, there must be neglect in bringing the suit (*Hickman v. Upsall*, 4 Ch. D. 148).

Infancy of plaintiff.

Where the plaintiff has been under the disability of infancy during the possession of the defendant, the latter is regarded as a bailiff for the former, and an account will be directed during the period of infancy (*Blomfield v. Eyre*, 8 Beav. 250; *Nanney v. Williams*, 22 Beav. 452; *Schroder v. Schroder*, Kay, 591; *Pascoe v. Swan*, 27 Beav. 508; *Pelly v. Bascombe*, 4 Giff. 390; *Thomas v. Thomas*, 2 K. & J. 79; *Wall v. Stanwick*, 34 Ch. D. 763; see *Re Hobbs*, *Hobbs v. Wade*, 36 Ch. D. 553, and the older cases discussed in *Howard v. Shrewsbury*, 17 Eq. 399). But so far as regards the arrears of rent, it was said that the bill must be filed within six years after the plaintiff comes of age (*Lockey v. Lockey*, 1 Eq. Ca. Abr. 304, pl. 10; see as to recovering the land, *Tinker v. Rodwell*, 69 L. T. 591, *ante*, p. 130). It has been laid down in Ireland, that a person entering on the estate of an infant, whether the infant has been actually in possession or not, will be fixed with a fiduciary position towards the defendant, (1) when he is the infant's natural guardian; (2) when he is so connected by relationship or otherwise with the infant as to impose upon him a duty to protect, or at least not to prejudice, the infant's rights; (3) when he takes possession with knowledge or express notice of the infant's rights (*Quinton v. Frith*, I. R. 2 Eq. 396). See cases quoted *ante*, p. 130.

Laches.

Where the plaintiff has been guilty of laches an account will only be directed from the filing of the bill (*Dormer v. Fortescue*, 3 Atk. 130; *Pettward v. Prescott*, 7 Ves. 541; *Pickett v. Loggan*, 14 Ves. 215; *Schroder v. Schroder*, Kay, 591). The right to an account, even in the case of mines, may be lost by laches (*Parrott v. Palmer*, 3 M. & K. 632). A party's right to an account may also be restricted in consequence of laches in not finding out a mistake earlier by the means which were in his power (*Denys v. Shuckburgh*, 4 Y. & Coll. Ex. 42).

In case of charities.

There is no fixed limit of time in directing an account against the trustee of a charity. In each case the court is bound by the particular circumstances (*A.-G. v. Exeter*, Jac. 448). An account against a corporation for a breach of trust in receiving charity funds was not confined either to the filing of the information, or to six years before that time (*A.-G. v. Brewers' Co.*, 1 Mer. 495; *A.-G. v. Stafford*, 1 Russ. 547). And an account of the rents and profits of a charity estate was decreed for a period of 200 years against the corporation, who, by their answer, admitted the receipt, and stated that they had from time to time debited themselves in their books with the amount (*A.-G. v. Exeter*, Jac. 443; 2 Russ. 362; 3 Russ. 395; *A.-G. v. Caius College*, 2 Keen, 110; *A.-G. v. Pretymann*, 4 Beav. 462; see now R. P. Lim. Act, 1874, s. 10, *post*, p. 207). Where, however, charitable trustees have acted honestly, though mistakenly, the court will not make them account for rents received prior to the filing of the information (*A.-G. v. Wax Chandlers' Co.*, L. R. 6 H. L. 14; *A.-G. v. Christchurch*, 2 Russ. 324). When the court limits an account of the rents and profits of charity estates to the time of filing the information, or to six years before that date, it does not act with reference to the statute. The court proceeds upon the principle that it will not deal harshly with men, who, meaning to discharge their duty faithfully, have nevertheless mistaken it (*A.-G. v. Exeter*, 2 Russ. 367). The principles upon which the court acts in taking an account against corporations who are trustees of charities, and have misapplied the funds, are discussed in *A.-G. v. Newbury* (3 M. & K. 647); see *A.-G. v. Davis* (18 W. R. 1132).

(5)

INTEREST ON At common law, independently of statute, it was the general rule that

interest was not payable on any debts, unless expressly agreed on, or unless a promise could be implied from the usage of trade or other circumstances (*Higgins v. Sargent*, 2 B. & C. 348; *Rhodes v. Rhodes*, Johns. 653; see *L. C. D. R. v. S. E. R.*, 1892, 1 Ch. 140). As to implication from the usage of trade. Bills and notes have always been held to carry interest (*Cameron v. Smith*, 2 B. & Ald. 305). This interest is now regulated by the Bills of Exchange Act, 1882, ss. 9 (sub-s. 3) and 57 (see *Lawrence v. Willcocks*, 1892, 2 Q. B. 696). Interest on bills or notes is given as damages (*Ib.*; see *Ex parte Charman*, 1887, W. N. 184). As to implication from other circumstances. An agreement to pay interest was implied between banker and customer (*Calton v. Bragg*, 15 East, 228). Also where a tradesman delivered accounts charging interest and the customer without objection made payments on account (*Re Anglesey, Willmot v. Gardner*, 1901, 2 Ch. 548).

3 & 4 Will. 4,
c. 27, s. 42.

DEBTS GENER-
ALLY.

Interest on
debts at
common law.

In some early cases it was said that interest might be given where a debt was wrongfully detained (*Eddowes v. Hopkins*, 1 Doug. 376; *Arnott v. Redfern*, 3 Bing. 353). But this was said to be inconvenient by Lord Tenterden, who laid down the rule that interest is not due on money secured by a written instrument, unless it appears on the face of the instrument that interest was intended to be paid, or unless it be implied from the usage of trade, as in the case of mercantile instruments (*Page v. Newman*, 9 B. & C. 381). This rule is not now open to question (*L. C. D. R. v. S. E. R.*, 1893, A. C. 441). The result of the modern English authorities seems to be that in a case which cannot be brought within the common law rule (stated above) or within the Civil Procedure Act, 1833, ss. 28 and 29 (stated below), interest on a debt cannot be claimed on the ground that the debt has been wrongfully withheld (*L. C. & D. R. v. S. E. R.*, 1893, A. C. 437-441; *Toronto v. T.*, 1906, A. C. 117, 120). A dictum to the contrary effect by Lord Westbury in *Caledonian Co. v. Carmichael* (L. R. 2 H. L. Sc. 66) has been quoted in some modern English cases (*Webster v. British Co.*, 15 Ch. D. 174; *Borthwick v. Elderslie*, 1905, 2 K. B. 520). But the dictum related to Scotland where the law may be different (see *L. C. & D. R. v. S. E. R.*, 1893, A. C. 443).

The Civil Procedure Act, 1833, enacts (sect. 28) that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time; or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demandant shall give notice to the debtor that interest will be claimed from the date of such demand until the time of payment; provided that the interest shall be payable in all cases in which it is now payable by law. The act provides further (sect. 29), that the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give damages in the nature of interest, over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above the money recoverable in all actions on policies of assurance made after the passing of this act.

3 & 4 Will. 4,
c. 42, ss. 28,
29.

Lord Tenterden was the author of the above statute, which was passed with reference to the rule laid down by him in *Page v. Newman*, *sup.* (*L. C. & D. R. v. S. E. R.*, 1893, A. C. 440). Sect. 28 was declaratory of the law before the statute (*Webster v. British Co.*, 15 Ch. Div. 173, 178). Under both sect. 28 and sect. 29, any interest given is by way of damages (*Ib.* 174, 175; see *Re Roberts, Goodchap v. Roberts*, 14 Ch. Div. 49).

Sect. 28.

The act gives the jury a discretion, "if they shall think fit" (*Attwood v. Taylor*, 1 M. & G. 322; *A.-G. v. Ludlow*, 1 Hall & T. 219). And interest will not be given where there has been no default on the part of the person against whom interest is claimed (*A.-G. v. Ludlow*, *sup.*; *Webster v. British Co.*, *sup.*). There must be either a written demand or a written instrument under which the sum is payable (*Harper v. Williams*, 4 Q. B. 219). A

3 & 4 Will. 4, c. 27, s. 42. written application for a loan was not such a written instrument (*Taylor v. Colt*, 3 H. & C. 452). The instrument must ascertain the sum and the time (*L. C. & D. R. v. S. E. R.*, 1892, 1 Ch. 144). As regards the sum certain interest was allowed where the instrument gave data for ascertaining the amount, and a dispute as to such amount was settled by the court (*McIntosh v. G. W. R. Co.*, 4 Giff. 683; see *Newton v. Nock*, 43 L. T. 197; *L. C. & D. R. v. S. E. R.*, 1892, 1 Ch. 143). The sum certain must be due absolutely and in all events (*L. C. & D. R. v. S. E. R.*, 1893, A. C. 436). As regards the time certain, six months after death is a time certain (*Re Horner, Fooks v. Horner*, 1896, 2 Ch. 188). Where the instrument does not mention the time certain, but contains provisions which on the happening of an event render the time certain, this is not sufficient within the statute (*Merchant Co. v. Armitage*, L. R. 9 Q. B. 114; *L. C. & D. R. v. S. E. R.*, 1892, 1 Ch. 120; see *contra, Duncombe v. Brighton Co.*, L. R. 10 Q. B. 371).

Demand in writing. A demand in writing may entitle the jury to give interest from date of demand, although the writing claimed interest from a prior date (*Londesborough v. Mowatt*, 4 El. & Bl. 1). The demand need not specify the exact amount of the debt (*Mildmay v. Methuen*, 3 Drew. 91, a demand for work and labour in an administration suit; *Geake v. Ross*, 32 L. T. 666, disapproving *Hill v. South Staffordshire Ry. Co.*, 18 Eq. 154; see *Ex p. Kemp*, 1894, 3 Ch. 702). A solicitor may give notice that he will claim interest on his bill of costs delivered (*Berrington v. Phillips*, 1 M. & W. 48; see *Ward v. Eyre*, 15 Ch. D. 130). And where the client is dead the notice should be given to the representative, even where an administration action is pending (*Re McMurdo*, 1896, W. N. 171). A summons in a winding-up was a sufficient demand (*Ex p. Alison*, 15 Eq. 394). But an answer in a Chancery suit was not (*Ward v. Eyre, sup.*); nor a claim in a writ (*Rhymney R. Co. v. Rhymney Iron Co.*, 25 Q. B. Div. 146; see *Wills v. Wood*, 1892, 1 Q. B. 687); nor a statement in a tradesman's bill-head that interest will be charged after a certain time (*Re Lloyd Edwards, Williams v. Trench*, 61 L. J. Ch. 22). Where a written notice as to interest was given under this section, and the defendants paid the principal due into court, the court ordered payment of subsequent interest in addition (*Hull Co. v. N. E. R. Co.*, 5 M. & G. 872). Interest on compensation for injury by waterworks was given from the written demand (*Fletcher v. Birkenhead*, 1906, 1 K. B. 605).

Sect. 29. An action for damages for minerals wrongfully taken is not within sect. 29 (*Phillips v. Homfray*, 1892, 1 Ch. 465).

Damages and interest. As regards damages, while interest cannot be payable on damages, it may be taken into consideration on computing damages (*G. W. Ry. Co. v. Fisher*, 1905, 1 Ch. 325), and was included in the damages given for breach of implied covenants for title (*Ib.*), and also in the damages given for a maritime collision (*The Kong Magnus*, 1891, P. 235).

Rate. When the rate of interest is not expressed, the rate is a question for the court (*Gibbs v. Fremont*, 11 Exch. 25, where 25 per cent. was allowed). The rule was to recommend the jury to give 5 per cent. (*Re Roberts*, 14 Ch. Div. 52; see *Peruvian Guano Co. v. Dreyfus*, 1892, A. C. 166); but the court will follow the current rate at the time (*L. C. & D. R. Co. v. S. E. R. Co.*, 1892, 1 Ch. 120, 137; see *Wainwright's case*, 62 L. T. 30, where 4 per cent. was given). The rate usually allowed on bills of exchange is 5 per cent. (*Re Commercial Bank*, 36 Ch. D. 529; see *Lawrence v. Willcocks*, 1892, 1 Q. B. 696). Judgment debts carry interest at 4 per cent. (Judgments Act, 1838, s. 17, *post*, where see note; and see R. S. C. Ord. 42, r. 16; Ord. 55, r. 62); and on the recovery of judgment on a covenant the covenant is merged in the judgment (*Ex p. Fewings*, 25 Ch. Div. 338; *Re European Co.*, 4 Ch. Div. 33). But a mortgagee may on the construction of his deed be entitled to retain his security until paid interest at a rate higher than 4 per cent. (*Economic Society v. Usborne*, 1902, A. C. 147; see *Popple v. Sylvester*, 22 Ch. D. 98; *Arbuthnot v. Bunsilall*, 62 L. T. 234). Where judgment is signed in default of appearance on a claim for a liquidated demand, the rate of interest not being specified, the rate up to judgment is 5 per cent. (R. S. C. Ord. 13, rr. 3 and 4).

Courts of equity have adopted the rate of 4 per cent. in many cases. Thus the purchase money of a reversionary interest in personality with interest thereon for twenty-six years at 4 per cent. was held secured by the vendor's lien (*Re Stucley, Stucley v. Kekewich*, 1906, 1 Ch. 67). A purchaser of land duly rescinding may recover his deposit with interest at 4 per cent. (*Weston v. Savage*, 10 Ch. D. 736; *Re Marshall & Salt*, 1900, 2 Ch. 206). Where on an open contract for the purchase of land, the purchaser does not complete at the proper time, he must pay interest on the price at 4 per cent. (*Paine v. Meller*, 6 Ves. 352; *Fletcher v. Lancashire Ry. Co.*, 1902, 1 Ch. 908; see *Re Richard & G. W. Ry.*, 1905, 1 K. B. 68). Executors of a surety retained out of a legacy bequeathed by him to the principal debtor the amounts paid by their testator with interest at 4 per cent. (*Re Watson, Turner v. Watson*, 1896, 1 Ch. 937). Where advances have to be brought into hotchpot interest must be calculated at 4 per cent. (*Re Davy, Hollingsworth v. Davy*, 1908, 1 Ch. 61; where the earlier decisions are referred to by C. A.). Qu. whether the same rate applies in setting off shares in a partition action (see *Re Dracup, Field v. Dracup*, 1894, 1 Ch. 59). In questions between tenant for life and remainderman interest has been calculated at 3 per cent. in apportioning an annuity (*Re Perkins, Brown v. Perkins*, 1907, 2 Ch. 596); in applying the rule in *Re Chesterfield's Trusts* (*Re Goodenough, Marland v. Williams*, 1895, 2 Ch. 537; *Re Cleveland, Hay v. Woolmer*, *ib.* 542; *Rowlls v. Bebb*, 1900, 2 Ch. 118); and in applying the rule in *Howe v. Dartmouth* (*Re Nicholson*, 1895, W. N. 106; *Re Lynch Blossie*, 1899, W. N. 27; *Re Woods, Gabellini v. Woods*, 1904, 2 Ch. 4; *Re Chaytor, Chaytor v. Home*, 1905, 1 Ch. 233). As to the rate between *cestui que trust* and trustee, see below.

3 & 4 Will. 4,
c. 27, s. 42.

Rate of
interest in
equity.

4 per cent.

3 per cent.

The earlier cases in equity as to interest are collected, C. P. Coop. 209—250, n. The Court of Chancery followed the law in dealing with legal claims (*Booth v. Leycester*, 3 M. & C. 459). But it usually decreed interest in cases of purely equitable demands, *e.g.*, suits for equitable waste, or against trustees who misapplied trust moneys (*L. C. & D. R. v. S. E. R.*, 1892, 1 Ch. 142; see further *Hyde v. Price*, 8 Sim. 578; *Re Powell*, 10 Hare, 134; *Martyn v. Blake*, 3 Dru. & War. 125; *Mansfield v. Ogle*, 4 De G. & J. 38; *Spartali v. Constantinidi*, 20 W. R. 823). Interest was given as damages for non-payment of money (*Marsh v. Jones*, 40 Ch. Div. 563). On setting aside a sale by a trustee to himself interest was not charged on rents (*Silkstone Co. v. Edey*, 1900, 1 Ch. 167). In ordinary cases it is against the practice of a court of equity to allow anything in the nature of compound interest (*Re Magheramorne, Hogg v. Hogg*, 1901, W. N. 152; see the special cases below). As to the interest allowed on portions, see *Balfour v. Cooper*, 23 Ch. Div. 472; Lewin, 11th ed. 479.

As regards interest between trustee and *c. q. t.*, the true principle has been said to be, that a trustee must be charged with such interest as he either has received, or ought to have received, or which he may fairly be presumed to have received (*A.-G. v. Alford*, 4 D. M. & G. 851). Thus a trustee who kept moneys in his hands and used them as his own has been charged with simple interest at the rate of 5 per cent. (*Jones v. Foxall*, 15 Beav. 388; *Williams v. Powell*, *ib.* 461; *Burdick v. Garrick*, 5 Ch. 233; *Re Jones, Jones v. Searle*, 49 L. T. 91; see *Vyse v. Foster*, 8 Ch. 329; and compare Rule 11 of the rules under the Judicial Trustee Act, 1896). More recently 4 per cent. has been charged (*Re Emmet, E. v. E.*, 17 Ch. D. 142; see in Ireland *McArdle v. Gaughran*, 1903, 1 I. R. 106); but in England 5 per cent. is still the rule (*Re Davis, D. v. D.*, 1902, 2 Ch. 314). Where promoters were compelled to make good to the company a secret profit they were charged with interest at 3 per cent. (*Re Olympia, Ltd.*, 1898, 2 Ch. 171; see, however, *Gluckstein v. Barnes*, 1900, A. C. 255). Where the trustee had not had the use of the money he was in recent cases charged only with 3 per cent. (*Re Barclay, Barclay v. Andrew*, 1899, 1 Ch. 674; *Gilroy v. Stephen*, 51 L. J. Ch. 834; 46 L. T. 761; see *Re Stuart, Smith v. Stuart*, 1897, 51 Ch. 593). Compound interest has been charged against a trustee where there was a direction to accumulate (*Re Emmet, E. v. E.*, 17 Ch. D.

Interest in
equity.

Interest
between
trustee and
c. q. t.

3 & 4 Will. 4, 142; *Re Barclay, sup.*); where he had employed the money in trade (*Jones v. Foxall*, 15 Beav. 388; *Williams v. Powell*, *ib.* 461; see *Burdick v. Garrick*, 5 Ch. 242); and where the *c. q. t.* was an infant, and the income was not required for maintenance. (*Jones v. Foxall, sup.*; *Vyse v. Foster*, L. R. 7 H. L. 346; *Gilroy v. Stephen*, 51 L. J. Ch. 834; 46 L. T. 761). See further Lewin, 11th ed. 394 *ad seq.*

Interest between banker and customer; principal and agent. As to interest between banker and customer, see *Crosskill v. Bower* (32 Beav. 86); *Williamson v. Williamson* (7 Eq. 542); and between principal and agent (*Turner v. Burkinshaw*, 2 Ch. 488; *Burdick v. Garrick*, 5 Ch. 233; *G. W. R. Co. v. Cunliffe*, 9 Ch. 525; *Baring v. Stanton*, 3 Ch. D. 502). Where unconscionable bargains have been entered into with money lenders, the court will only allow the sums actually advanced to be recovered together with interest at 5 per cent. (*Miller v. Cook*, 10 Eq. 641; *Tyler v. Yates*, 6 Ch. 665; *Aylesford v. Morris*, 8 Ch. 484; see now Money Lenders Act, 1900). There is no general rule as to the interest the court will allow on repayment of money expressed to be the consideration of an absolute assignment, which is treated only as a security (*Re Unsworth*, 2 Dr. & Sm. 337; where 5 per cent. was allowed). Where under a contract a fixed sum is charged on land and made payable at a fixed date, nothing being said about interest, the chargee is *prima facie* entitled to receive out of the land interest from that date (*Re Drax, Savile v. Drax*, 1903, 1 Ch. 781). Interest at the rate of 4 per cent. was allowed on a simple contract debt secured by deposit of deeds, where there had been no stipulation as to interest (*Re Kerr*, 8 Eq. 331). As to interest on charges, see *Lippard v. Ricketts* (14 Eq. 291); on debenture bonds, *Price v. G. W. R.* (16 M. & W. 242); on mortgages, *Thompson v. Drew* (20 Beav. 49); *Ashwell v. Staunton* (30 Beav. 52); *Re Roberts* (14 Ch. Div. 49); and on mortgagee's costs, *Eardley v. Knight* (41 Ch. D. 537). Where an annuity is in arrear "the established rule of the court (which, however, is only general and not inflexible) is, that interest cannot be recovered on the arrears" (*Martyn v. Blake*, 3 Dru. & War. 125; *Mansfield v. Ogle*, 4 De G. & J. 41; *Blogg v. Johnson*, 2 Ch. 228; *Wheatley v. Davies*, 24 W. R. 818; *Re Hiscoe, Hiscoe v. Waite*, 1902, W. N. 49). As to the cases in which it has been given, see Seton, 6th ed. 1637. As to interest on arrears of salary, see *Rishton v. Grissell* (10 Eq. 393). Interest was allowed at 5 per cent. where default had been made in the performance of a covenant to pay money (*Knapp v. Burnaby*, 9 W. R. 765; *Re Horner, Fooks v. Horner*, 1896, 2 Ch. 188; see *Re Roberts, Goodchap v. Roberts*, 14 Ch. D. 49; *Mellersh v. Brown*, 45 Ch. D. 228). Where a bond does not specify a day for payment, it is payable on the day of date, and interest runs from that day (*Farquhar v. Morris*, 7 T. R. 124). Where a date is specified, see as to interest after that date, *Cook v. Fowler* (L. R. 7 H. L. 27); *Re Dixon, Heynes v. Dixon* (1900, 2 Ch. 561). It is the general rule both at law (*Brangwin v. Parrot*, 2 W. Bl. 1190; *White v. Sealey*, 1 Dougl. 49), and in equity, to consider the penalty of the bond as the limit of the debt or damages which can be recovered (see *Hatton v. Harris*, 1892, A. C. 547). But there are exceptions to this rule (see the earlier cases collected in C. P. Coop. 209—230; and see *Clarke v. Abingdon*, 17 Ves. 106; *Hughes v. Wynne*, 1 M. & K. 20; *Walter v. Meredith*, 3 Y. & Coll. 264; *Knipe v. Blair*, 1900, 1 Ir. R. 372; and *Mathews v. Keble*, 3 Ch. 691, where the interest allowed, together with the principal, exceeded the penalty).

On securities. As to deducting income tax on payments in respect of interest, see *Crane v. Kilpin* (6 Eq. 334). And as to calculation of interest and apportionment in questions between a tenant for life and remainderman, see *Re Grabowski* (6 Eq. 12); *Cox v. Cox* (8 Eq. 343); *Maclaren v. Stainton* (11 Eq. 382); *Re Moore* (54 L. J. Ch. 432); *Re Foster, Lloyd v. Carr* (45 Ch. D. 629); *Re Hubbuck, Hart v. Stone* (1896, 1 Ch. 754); *Re Bird* (1901, 1 Ch. 916); *Re Alston, Alston v. Houston* (1901, 2 Ch. 584). The rate allowed would probably now be 3 per cent. (see *Goodenough, Marland v. Williams*, 1895, 2 Ch. 537; *Re Cleveland, Hay v. Wolmer, ib.* 542).

On arrears of annuity. The Civil Procedure Act, 1833, s. 28, applies to calls made in winding up

On money due under covenant. Bonds.

Interest in

a company where the notice of call states that interest will be charged (*Barrow's case*, 3 Ch. 784). But provisions in articles as to interest on calls do not apply to calls made by liquidators (*Re Welsh Flannel, &c. Co.*, 20 Eq. 360). As regards debts due from a company where under the act interest would be payable, it may be claimed in a winding-up (*Times Assurance Co.'s case*, 2 H. & M. 722). The rule in the compulsory winding up of an insolvent company is that creditors whose debts carry interest get dividends on what was due for principal and interest at the winding-up, but no subsequent interest except there be a surplus (*Warrant Finance Co.'s case*, 4 Ch. 643). The same rule applies in a voluntary winding up (*Re Salt*, 98 L. T. 558). As to the application of the above rule where a creditor has security or a right of proof against another company, see *Warrant Finance Co.'s case* (No. 2) (5 Ch. 86); *Quartermaine's case*, 1892, 1 Ch. 639; and compare *Ex p. Findlay* (17 Ch. Div. 334). Creditors whose debts do not carry interest are not allowed interest in a winding-up (*Re Hatfield Co.*, 11 W. R. 971). But a demand in writing for payment may be made under the act so as to entitle the creditor to interest (*Re East of England Co.*, 4 Ch. 14; but see *Re Herefordshire Co.*, 4 Eq. 250). As to the interest now allowed in the case of a company wound up by the court, see the Companies Winding-up Rules, 1909, rule 97.

In administration, where a debt of the deceased carries interest, interest is paid accordingly, and where it does not carry interest, interest is paid at the rate of 4l. per cent. from the date of judgment out of assets remaining after satisfaction of the costs, debts, and interest in respect of debts carrying interest (R. S. C., Ord. 55, rr. 62, 63). Where the estate is insolvent, interest on a debt carrying interest is calculated up to judgment, and a dividend paid on that amount (*Re Summers, Boswell v. Gurney*, 13 Ch. D. 136; see *Re London, &c. Hotels Co.*, 1892, 1 Ch. 639; *Re Whitaker, Whitaker v. Palmer*, 1904, 1 Ch. 299). Interest at 4 per cent. was allowed on a debt claimed against the insolvent estate of a lunatic under a contract of indemnity given by him (*Re Hunt, Harvey's claim*, 1902, 2 Ch. 318).

As to what interest can be claimed on a writ specially indorsed under R. S. C., Ord. 3, r. 6, see *Wilks v. Wood*, 1892, 1 Q. B. 684; *London Bank v. Clancarty*, *ib.* 689; *Lawrence v. Willcocks*, *ib.* 696; *Gold Ores Co. v. Parr*, 1892, 2 Q. B. 14; *Hamilton v. Brogden*, 60 L. J. Ch. 88; see R. S. C., Ord. 14, r. 1 (b). Specially indorsed writ.

Where execution has been delayed by appeal, interest will be allowed (R. S. C., Ord. 58, r. 19; see Civil Proc. Act, 1833, s. 30; *Garland v. Carlisle*, 5 Cl. & F. 355; *Langridge v. Levy*, 4 M. & W. 337; *Hooper v. Lane*, 6 H. L. C. 443; *Tyne Commissioners v. General Steam Co.*, 15 W. R. 875). Where money is paid under an order which is subsequently reversed on appeal, it must be repaid with interest at 4l. per cent. (*Rodgers v. Comptoir D'Escompte*, L. R. 3 P. C. 465; *Merchant Banking Co. v. Maude*, 18 Eq. 659). Interest in the case of appeals.

As to interest on costs, see note to Judgments Act, 1838, s. 17, *post*. Costs.

E. Time not enlarged by *Express Trusts*.

R. P. Lim. Act, 1874, s. 10.

10. After the commencement of this act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, or to recover any arrears of rent or of interest in respect of any sum of money or legacy so charged or payable and so secured, or any damages in respect of such arrears, except within the time within which the same would be recoverable if there were not any such trust. Time for recovering charges and arrears of interest not to be enlarged by express trusts for raising same.

37 & 38 Vict.
c. 57, s. 10.

By sect. 9 of this act (*ante*, p. 184) the provisions of R. P. Lim. Act, 1833 (except the repealed sections but including the provisions substituted for such repealed sections), are to be construed together with this act. The present section must accordingly be construed with especial reference to R. P. Lim. Act, 1874, s. 8 (substituted for R. P. Lim. Act, 1833, s. 40), and R. P. Lim. Act, 1833, s. 42.

Effect of
section on
cases within
R. P. Lim.
Act, 1833,
s. 40,

Under R. P. Lim. Act, 1833, s. 40, it was held that in a number of cases (*ante*, p. 191) an express trust prevented the section from operating as a bar. By the present section an express trust will make no difference in this respect. A conveyance of a term on trust for raising money was held to be such an express trust (*Williams v. Williams*, 1900, 1 Ch. 152). See further the cases as to express trust quoted *ante*, pp. 162, 191, 201. It has been said that simple contract debts, secured by a trust in a will to pay the same out of real estate, may be barred in twelve years (*Re Stephens, Warburton v. Stephens*, 43 Ch. D. 39). This section prevented a trust to pay debts in a will from keeping alive a claim on a bond (*Fearnside v. Flint*, 22 Ch. D. 579).

Legacies not charged upon or payable out of land or rent, which were within R. P. Lim. Act, 1833, s. 40, and are within R. P. Lim. Act, 1874, s. 8, are not within the present section. In the case of such legacies, accordingly, an express trust would seem to prevent time running (see *Playfair v. Cooper*, 17 Beav. 187; see further the notes *ante*, pp. 191, 201, and *post*, p. 250). The ordinary implied trust which affects personal estate held by an executor for the benefit of legatees, does not prevent time running (*Re Davis, Evans v. Moore*, 1891, 3 Ch. 124; see *Re Barker, Buxton v. Campbell*, 1892, 2 Ch. 491). As to arrears of interest on a legacy, see *Blachford v. Worsley* (27 Ch. D. 676).

or within R.
P. Lim. Act,
1833, s. 42.

Again, under R. P. Lim. Act, 1833, s. 42, it was held, that in a number of cases (*ante*, p. 201) an express trust prevented the section from operating as a bar. By the present section an express trust will make no difference as regards arrears.

Annuity
charged on
land.

In the case of an annuity charged on land and secured by an express trust (there being no covenant), the rule of limitation now applicable depends on whether such annuity should (1) be considered as a whole, and dealt with as one "rent" within sect. 1 of the R. P. Lim. Act, 1874, and sect. 25 of the R. P. Lim. Act, 1833 (see the note *ante*, p. 121, *Dower v. Dower*, 15 L. R. Ir. 273; *Re Nugent*, 19 L. R. Ir. 140; and the argument for the annuitant in *Hughes v. Coles*, 27 Ch. D. 234); or should (2) be considered as a series of "sums of money charged upon land" within the earlier words of the above sect. 10 (see *Hughes v. Coles*, 27 Ch. D. 235; *Edwards v. Warden*, 9 Ch. 505; *Hanly v. Carroll*, 1907, 1 I. R. 171, 176). In the first view, time would not commence to run against the annuitant until the trustee alienated for value (R. P. Lim. Act, 1833, s. 25; the earlier words of the above sect. 10 not applying). In the second view, each instalment of the annuity must it seems be dealt with separately, and time runs against its recovery on its becoming payable but not before. As regards arrears they would in either view seem to be limited to six years (R. P. Lim. Act, 1833, s. 42, read in connection with the later words of the above sect. 10). In one case it was held that where apart from a trust the annuity would have been barred as a whole, no arrears were recoverable (*Hughes v. Coles*, *sup.*; but see *Dower v. D.*, 15 L. R. Ir. 264). Where an annuity charged on land is secured by covenant, the rule applicable is stated, *ante*, p. 198.

Jud. Act,
1875, s. 25.

As regards the matters especially mentioned in it, this section appears to control Jud. Act, 1873, s. 25, sub-s. 2, which provides generally that no claim of a *cestui que trust* against his trustee for any property held on an express trust, or in respect of any breach of such trust, should be barred by any Statute of Limitations. Compare 40 & 41 Vict. c. 57, sect. 28 (2); *Hanly v. Carroll*, 1907, 1 I. R. 172.

Trustee Act,
1888.

In the case of proceedings against trustees and persons claiming through them commenced after 1st January, 1890, regard must be had to the Trustee Act, 1888, *post*, p. 243.

3 & 4 Will. 4,
c. 42, s. 2.III. OF THE LIMITATION OF ACTIONS BY OR AGAINST
EXECUTORS IN RESPECT OF INJURIES TO PROPERTY.

THE CIVIL PROCEDURE ACT, 1833.

3 & 4 WILL. IV. c. 42, s. 2.

2. And whereas there is no remedy provided by law for injuries to the real estate (*a*) of any person deceased committed in his lifetime, nor for certain wrongs done by a person deceased in his lifetime to another, in respect of his property, real or personal; for remedy, therefore, be it enacted, that an action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased, for any injury to the real estate of such person, committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months before the death of such deceased person, and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person (*b*); and an action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person (*c*).

Executors may bring actions for injuries to the real estate of the deceased, and actions may be brought against executors for injuries to property, real or personal, by their testator.

(*a*) It was doubted whether this includes leasehold interests (*Adam v. Bristol*, 2 Ad. & Ell. 389).

(*b*) An executor was held entitled to recover damages for an obstruction to the light of a house of his testatrix. It was said that the damages would be confined to damages arising within six months before the death (*Jones v. Simes*, 43 Ch. D. 607).

(*c*) According to the rule of common law, executors could not be sued for a wrong committed by their testator for which only unliquidated damages could be recovered (*Kirk v. Todd*, 21 Ch. D. 489; see *Phillips v. Homfray*, 24 Ch. D. 439; *Twycross v. Grant*, 4 C. P. D. 45; *Re Duncan, Terry v. Sweeting*, 1899, 1 Ch. 387, and the notes to *Wheatley v. Lane*, 1 Wms. Saund. 239).

As an exception to the above rule, this section permits executors to be sued for wrongs committed by their testator in respect of property, provided the injury has been committed not more than six months before his death (*Kirk v. Todd, sup.*). Trespass was maintained against an administrator for coal wrongfully taken from the plaintiff's land by the intestate within six months before his death (*Powell v. Rees*, 7 Ad. & Ell. 426). And the section has been applied in the case of continuing wrongs, *e.g.*, wrongs arising from

3 & 4 Will. 4, c. 42, s. 2. obstruction of light (*Jenks v. Clifden*, 1897, 1 Ch. 694, where the obstructing building was completed more than six months before the death); or from not repairing (*Woodhouse v. Walker*, 5 Q. B. D. 408; in which case the instrument under which possession was taken imposed an express duty to repair).

It seems that a claim under the section may be made more than six months after the death, but within six months from probate (*Re Williams, Andrew v. Williams*, 52 L. T. 41). Under this section an action of tort was maintained against the executors of an innkeeper within six months after his death for the property of a traveller lost in his house (*Morgan v. Ravey*, 30 L. J. Ex. 131). But a claim for negligence brought against the executors of a deceased landlord more than six months after the death was too late (*Erschine v. Adeane*, 8 Ch. 760).

Law independently of the act.

The rule *actio personalis moritur cum personâ* was never extended to such personal actions as were founded upon any obligation, contract, debt, covenant or any other duty to be performed (*Wheatley v. Lane*, 1 Wms. Saund. 240; *Finlay v. Chirney*, 20 Q. B. Div. 502; *Formby v. Barker*, 1903, 2 Ch. 550). Thus executors were held entitled to sue for a cause of action which arose out of a statutory duty to the deceased (*Peebles v. Oswaldtwistle*, 1896, 2 Q. B. 159; *Darlington v. Roscoe*, 1907, 1 K. B. 219). In the case of non-repair, damages are, independently of the above section, recoverable from the estate of a former possessor of land, where an obligation to repair arises either from the terms of the instrument under which possession was taken (*Re Williams, Andrew v. Williams*, 52 L. T. 41; 54 L. T. 405; *Re Bradbrook*, 56 L. T. 106; compare *Dingle v. Coppen*, 1899, 1 Ch. 726), or from the local law (*Batthyany v. Walford*, 33 Ch. D. 624; 36 Ch. Div. 269), or from the custom of the manor (*Blackmore v. White*, 1899, 1 Q. B. 293). In the last-mentioned cases the nature of the obligation to repair was said to be contractual. In the earlier case, however, of *Woodhouse v. Walker* (*sup.*), the neglect to repair was said to amount to a tort.

IV.—OF THE LIMITATION OF ACTIONS ON SPECIALTIES, ETC.

THE CIVIL PROCEDURE ACT, 1833.

3 & 4 WILL. IV. C. 42, SS. 3—7.

§ 3. *Limitation of Actions on Specialties, and some other Debts and Penalties*...210.

§ 4. *Persons under Disability*...213.

§ 5. *Acknowledgment in Writing or by Part Payment*...214.

§ 6. *Limitation after Judgment reversed, &c.*...216.

§ 7. *Meaning of Beyond the Seas*...217.

Limitation of action of debt on specialties, &c.

3. That all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or *scire facias* upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any *feri facias*, and all actions for penalties, damages or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of parliament, shall be commenced and sued within the time and limitation hereinafter

expressed, and not after; that is to say, the said actions of debt ^{3 & 4 Will. 4, c. 42, s. 3.} for rent upon any indenture of demise or covenant, or debt upon any bond or other specialty, actions of debt or *scire facias* upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after: provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited. (As to Ireland, see 16 & 17 Vict. c. 113, s. 20.)

The reasons which led to this enactment are discussed by *Lindley*, M.R. (*Thomson v. Clannorris*, 1900, 1 Ch. 725).

To an action of covenant six years is not a good plea of limitation (*Harts-Covenants horn v. Watson*, 4 Bing. N. C. 178). Where a purchaser covenanted to pay or bonds purchase-money by promissory notes of even date, an action could be brought on the covenant after six years (*Dixon v. Holroyd*, 7 Ell. & Bl. 703). The section applied even where the bond was executed in India, where the limitation is shorter (*Alliance Bank v. Carey*, 5 C. P. D. 429).

As regards rent reserved, an action on a covenant may be brought to Covenants recover an instalment within twenty years from the date limited by the above securing section. In *Paget v. Foley* (2 Bing. N. C. 679), *Tindal*, C.J., said, "If the rent re-42nd section of R. P. Lim. Act, 1833, is a general enactment the subsequent served. declaration that an action of covenant may be commenced during a longer period is virtually an exception out of the former: we are to reconcile the two enactments if it be possible, but if it be not, the affirmative and negative cannot co-exist, and the action of covenant must be taken as an exception (see *Paddon v. Bartlett*, 3 Ad. & Ell. 895; *Wilson v. Jackson*, 2 Ir. L. R. 1). The R. P. Lim. Act, 1874, has made no difference in this respect (*Darley v. Tennant*, '53 L. T. 257; *Donegan v. Neill*, 16 L. R. Ir. 309).

In the case of an annuity charged on land by deed and also secured by Annuities. covenant, it was decided before 1879 that an action of covenant might be brought for an instalment within the twenty years limited by the above section (*Strachan v. Thomas*, 12 Ad. & Ell. 558); even where the annuity as a charge on land had become extinguished by non-payment for thirty-three years (*Manning v. Phillips*, 10 Exch. 59). For the present law, see *ante*, pp. 198, 199.

As regards principal money secured by mortgage, the personal remedy of Mortgage a mortgagee to obtain payment from the mortgagor, is now, by R. P. Lim. debts. Act, 1874, s. 8, barred after twelve years, whether the action be on a collateral bond (*Fearnside v. Flint*, 22 Ch. D. 579), or on the mortgagor's covenant in the mortgage deed (*Sutton v. Sutton*, 22 Ch. D. 511); which section applies even where the property charged is a reversionary interest in land which has not fallen in (*Kirkland v. Peatfield*, 1903, 1 K. B. 756).

Before this Act it had been held that satisfaction of money secured on bonds Old rule as to would be presumed after twenty years (*Humphreys v. H.*, 3 P. Wms. 396; 2 the presump- Atk. 144; *Morley v. Morley*, 5 D. M. & G. 610). But such presumption might tion of pay- have been rebutted, as if interest were proved to have been paid (8 Mod. ment of bonds. 278; 2 Ld. Raym. 1370; 3 Br. P. C. 535; 2 Str. 827; 2 Cox, 118); or if the obligor had had no opportunity or means of paying (*Fladong v. Winter*, 19 Ves. 196); or had been abroad (*Newman v. Newman*, 1 Stark. N. P. C. 101). See further as to the presumption of payment of bonds, *Barrington v. Searle* (3 Br. P. C. 535); *Glyn v. Bank of England* (2 Ves. sen. 43); *Oswald v.*

3 & 4 Will. 4, *Legh* (1 T. R. 271); *Colsell v. Budd* (1 Camp. 27); *Middleton v. Melton* (10 c. 42, s. 3. B. & C. 317); *Gleadow v. Atkin* (1 C. & M. 410); *Sanders v. Meredith* (3 M. & R. 116; 1 Phil. Ev. 7th ed. 255). No presumption of the discharge of a bond arose from the fact of its being in the obligor's possession at his death (*Re Dixon, Heynes v. Dixon*, 1900, 2 Ch. 561).

Other specialties.

Specialty liabilities of shareholders and contributions.

In the winding up of a company established by a deed of settlement, the liability of a shareholder was a liability by way of specialty within this section (*Re Portsmouth Banking Co.*, 2 Eq. 167). By the Companies Act, 1862, s. 75, the liability to contribute under a winding-up order created a specialty debt, even though the company was not registered under that act (*Muggeridge v. Sharp*, 10 Eq. 443); and the specialty was one which bound the heirs of the contributory (*Buck v. Robson*, 10 Eq. 629). In the case of companies formed and registered under that act, the liability of a member in a winding-up was a specialty (Companies Act, 1862, sects. 75, 90, 134). So also was the liability of a member under the articles (sect. 16). See now Companies Consolidation Act, 1908, sects. 14 and 125. A specialty debt was not created by a call made by a company established under the old Joint Stock Companies Winding-up Acts (*Robinson's Executors' case*, 6 D. M. & G. 572), or under a colonial statute (*Welland R. Co. v. Blake*, 30 L. J. Ex. 161).

Dividends.

Claims by shareholders for dividends were held to fall within the above section, both in the case of preference shares (*Smith v. Cork Ry.*, 1 R. 5 Eq. 65), and ordinary shares (*Re Drogheda Co.*, 1903, 1 I. R. 512; *Re Artisans Corporation*, 1904, 1 Ch. 796); the share certificates in each case being under the seal of the Co., and referring to the articles. Compare *Re Severn R. Co.*, 1896, 1 Ch. 559. Time ran from the date of the declaration of the dividend. The section also applied to a shareholder's claim for money repayable on a reduction of capital; time running from the order (*Re Artisans Corporation, sup.*).

Debt upon statute.

An action upon statute is an action upon a specialty (*Cork R. Co. v. Goode*, 13 C. B. 826). So the following were within the section, viz., an action by a company for calls under 8 & 9 Vict. c. 16 (*ib.*); an action for shipping duties (*Shepperd v. Hills*, 11 Exch. 55); an action by solicitors for expenses (*Nichols v. Regent's Canal Co.*, 63 L. J. Q. B. 641); a claim under warrants for interest on debenture stock issued under the Companies Clauses Act, 1863 (*Re Cornwall R. Co.*, 1897, 2 Ch. 74); an action to recover the price of seed from an occupier of land in Ireland (*Magherafelt v. Gribben*, 24 L. R. Ir. 520). But not a claim by a borough authority against a county authority for expenses which would be payable out of a particular fund and recoverable by action on the case (*Salford v. Lancashire*, 25 Q. B. D. 384). See as to the recovery of paying expenses under the Metrop. Management Acts, *Hampstead v. Caunt*, 1903, 2 K. B. 1. The liability of a lunatic to repay to guardians the cost of his maintenance (treated as a statutory liability) was held to fall within Lim. Act, 1623, and not within this section (*Re Newbegin, Eggleton v. Newbegin*, 36 Ch. D. 477; *Re Watson, Stamford Union v. Bartlett*, 1899, 1 Ch. 72; *Re Taylor, Edmonton Union v. Deeley*, 1901, 1 Ch. 480; see *Re Clabbon*, 1904, 2 Ch. 465).

Judgments.

Judgments, although specialties, are not within this section (*Jay v. Johnstone*, 1893, 1 Q. B. 30, 190).

Awards.

Under this section an action for debt on an award, where the submission is not by specialty, must be brought within six years. An action of debt on an award under seal was held not to fall within Lim. Act, 1623 (*Hodsden v. Harridge*, 2 Wms. Saund. 150).

Fines

A lord's right to a fine on admittance was barred by this section, time running from the admittance (*Monckton v. Payne*, 1899, 2 Q. B. 603).

Penalties.

The words "actions for penalties, damages, or sums of money given to the party grieved by any statute," do not include an action for penalties by an officer of the Goldsmiths' Company, mentioned in 7 & 8 Vict. c. 22 (*Robinson v. Currey*, 7 Q. B. Div. 465); or an action by a shareholder against directors for misrepresentation under the Directors' Liability Act, 1890 (*Thomson v. Clanmorris*, 1900, 1 Ch. 718). See Comp. Consol. Act, 1908, sect. 84.

In the case of *post obit* bonds, time does not begin to run until the death (3 & 4 Will. 4, c. 42, s. 3.) (*Tuckey v. Hawkins*, 4 C. B. 655; see *Barber v. Shore*, 1 Jebb & S. 610). On a bond conditioned to pay an annuity, the non-payment of each instalment is a distinct breach, and the statute begins to run against each as it becomes due (*Amott v. Holden*, 18 Q. B. 593); where Lord Campbell, C. J., said (p. 603): "It is admitted that, since *Sanders v. Coward* (15 M. & W. 48), and *Blair v. Ormond* (17 Q. B. 423), where a bond is conditioned for the performance of a series of acts at stated times, though there may have been a forfeiture, by reason of the non-performance of the first act in that series, yet if default be made in the performance of subsequent acts, a new cause of action arises upon each default, and the statute runs from that" (see *Higgs v. Mortimer*, 1 Exch. 711). If a bond with a penalty were given to secure a duty which is to be performed during a period of twelve years, the bond would be forfeited by a delinquency in the first year, but the obligee might elect not to act on it until the delinquency in the twelfth year (*per Bramwell*, B., 7 L. T. 792). Where the breach is a continuing breach, a fresh cause of action arises at every moment of the time during which the breach continues (*Maddock v. Mallet*, 12 Ir. C. L. R. 193). But the true inference from long acquiescence in breaches may be that the covenant is released (*Gibbon v. Payne*, 23 T. L. R. 250).

When time begins to run under this section,

The breach of a covenant for good right to convey, occasioned by the existence of a right of way, is not a continuing breach. Time ran from the delivery of the deed (*Turner v. Moon*, 1901, 2 Ch. 828; *Spoor v. Green*, L. R. 9 Ex. 110. See, however, the judgment of *Kelly*, C. B., L. R. 9 Ex. 116).

In the case of a present debt and covenant to pay on demand, a demand is not a condition precedent to an action; *secus*, in the case of a covenant to pay a collateral sum on demand; and time runs accordingly (*Re Brown*, 1893, 2 Ch. 300).

A deed of settlement of a company exonerated the transferor of shares from all liabilities subsequently to transfer. In winding-up time ran from the date of the transfer (*Re Portsmouth Banking Co.*, 2 Eq. 167).

Courts of equity adopted many of the provisions of this statute (*Hyde v. Courts of Price*, 8 Sim. 578). In administration suits specialty debts were held barred under it (*Spickernell v. Hotham*, Kay, 669). But where a settlor had constituted himself a trustee of a covenant, time was no bar (*Stone v. Stone*, 5 Ch. 74). A covenant to pay a mortgage debt was held to remain in force for more than twenty years by reason of the pendency of a trust (*Bennett v. Cooper*, 9 Beav. 252). See, further, the note as to courts of equity and the statutes of limitation, p. 247, *post*.

the statute.

4. That if any person or persons that is, or are, or shall be entitled to any such action or suit, or to such *scire facias*, is, are, or shall be, at the time of any such cause of action accrued, within the age of twenty-one years, *feme covert*, *non compos mentis*, or beyond the seas, then such person or persons shall be at liberty to bring the same actions, so as they commence the same within such times after their coming to or being of full age, *discovert*, of sound memory, or returned from beyond the seas, as other persons having no such impediment should, according to the provisions of this act, have done; and that if any person or persons against whom there shall be any such cause of action, is, or are, or shall be at the time such cause of action accrued, beyond the seas, then the person or persons entitled to any such cause of action shall be at liberty to bring the same against such person or persons within such times as are before limited after the return of such person or persons from beyond the seas.

Remedy for infants, *femes coverts*, &c.

Absence of defendants beyond seas provided for.

3 & 4 Will. 4, c. 42, s. 4. This provision as to disabilities has been altered by Merc. Law Amdt. Act, 1856, s. 10 (p. 240, *post*), which enacts that the absence beyond seas of the person entitled to the action shall be no disability. As to the meaning of "beyond seas," see sect. 7 of this statute (p. 217, *post*). See further the cases quoted under Limitation Act, 1623, s. 7 (p. 228, *post*), the law as to disabilities under both these sections being now the same. In cases within M. W. P. Act, 1882, s. 1, sub-s. 2, coverture has ceased to be a disability (*Lowe v. Fox*, 15 Q. B. Div. 676; *Weldon v. Neal*, 51 L. T. 289).

Proviso in case of acknowledgment in writing, or by part payment.

5. That if any acknowledgment shall have been made, either by writing signed by the party liable by virtue of such indenture, specialty or recognizance, or his agent, or by part payment or part satisfaction on account of any principal or interest being then due thereon, it shall and may be lawful for the person or persons entitled to such actions to bring his or their action for the money remaining unpaid, and so acknowledged to be due, within twenty years after such acknowledgment by writing or part payment or part satisfaction as aforesaid; or in case the person or persons entitled to such action shall at the time of such acknowledgment be under such disability as aforesaid, or the party making such acknowledgment be, at the time of making the same, beyond the seas, then within twenty years after such disability shall have ceased as aforesaid, or the party shall have returned from beyond seas, as the case may be; and the plaintiff or plaintiffs in any such action on any indenture, specialty or recognizance, may, by way of replication, state such acknowledgment, and that such action was brought within the time aforesaid, in answer to a plea of this statute (see 16 & 17 Vict. c. 113, s. 23, as to Ireland).

(1.) *Acknowledgment by Writing*...214.

(2.) *Acknowledgment by Payment*...215.

Since *Sutton v. Sutton* (22 Ch. D. 511), a mortgagee's action on covenant to recover principal money secured by a mortgage of land falls within sect. 8 of the R. P. Lim. Act, 1874. And in the note to that section (*ante*, p. 194) the decisions as to acknowledgments thereunder are collected. Before *Sutton v. Sutton*, such an action fell within the Civ. Proc. Act, 1833 (*Hunter v. Nockolds*, 1 Mac. & G. 640), and accordingly some of the decisions referred to below were in actions relating to mortgages. It has been said that for the purpose of acknowledgments there is no practical distinction between the two statutes (*Re Lacey*; *Howard v. Lightfoot*, 1907, 1 Ch. 345).

(1)
Acknowledgment in writing.

By whom it may be made.

An acknowledgment may be made by writing or payment. A written acknowledgment may be sufficient, though it came into existence accidentally and without the intention of the party making it (*Read v. Price*, 1909, 1 K. B. 50). And if lost, parol evidence of the contents of the writing may be admitted (S. C. 1909, 2 K. B. 724). The writing is to be signed by the party liable by virtue of such specialty. In the case of several persons who are liable under specialty jointly but not severally, a written acknowledgment may be made by such persons or any of them (*Read v. Price*, 1909, 1 K. B. 585). Where one of five persons jointly and severally liable on a bond died, a written acknowledgment signed by his executor was an acknowledgment of the several liability of the deceased obligor and not of the joint liability of the surviving obligors, and did not take the case out of the statute as

against them (*Read v. Price*, 1909, 1 K. B. 577; see *Slater v. Lawson*, 3 & 4 Will. 4, 1 B. & Ald. 396). c. 42, s. 5.

The written acknowledgment need not be made to the person entitled, or amount to a promise to pay (*Read v. Price*, 1909, 1 K. B. 588). Therefore, the admission of a bond debt, contained in an answer of the executors of the obligor in a suit to which the obligee was not a party, was sufficient (*Moodie v. Bannister*, 4 Drew. 433). A conveyance on trust to sell and pay off mortgages was not an acknowledgment within the section of a particular mortgage (*Howcutt v. Bonner*, 3 Exch. 491; see *Forsyth v. Bristowe*, 8 Exch. 716). As to pleading acknowledgments under the section, see *Kempe v. Gibbon* (9 Q. B. 609; 12 Q. B. 662).

The case of disability at the time of the acknowledgment existing on the part of the person entitled to the action, or on the part of the person making the acknowledgment, is provided for at the end of this section. See the joint effect of this provision and Merc. Law Amdt Act, 1856, s. 11, explained Darb. & Bos. Stat. Lim. 161.

The acknowledgment may also be made by payment; which must be made by a party interested, for the legislature could not mean to give any right against the debtors by the mere act of a stranger (*Roddam v. Morley*, 1 De G. & J. 18). The payment of interest to a mortgagee by the assignee of the equity of redemption was payment by the agent of the mortgagor within the section (*Forsyth v. Bristowe*, 8 Exch. 716; compare *Newbould v. Smith*, 33 Ch. Div. 127); so payment by the tenant for life of an equity of redemption (*Dibb v. Walker*, 1893, 2 Ch. 429). Payments made by a receiver in a suit, but which were not authorized by the order appointing him, did not take the case out of this statute (*Whitley v. Lowe*, 25 Beav. 421; 2 De G. & J. 704; see *Re Hale*, *Lilley v. Foad*, 1899, 2 Ch. 107). Where the same bond secured payment of different sums to different persons, payment of one sum was held no acknowledgment in respect of the other sum (*Ashlin v. Lee*, 23 W. R. 458).

(2)
Acknowledg-
ment by
payment.

Where a devisee for life paid interest on a specialty of his testator's, in which the heirs were bound, this was sufficient to preserve the right of action not only against the payor, but also against all remaindermen (*Roddam v. Morley*, 1 De G. & J. 1). "If the payment is made by one only of several persons liable, as, for instance, by a person having only a life interest as devisee, who is affected by the payment? Does it operate against the party only by whom the payment is made, or does it affect all the other parties liable? Does it merely enable the creditor to sue the party by whom the payment was made, or does it set free the action generally? I have come to the conclusion that when a part payment or payment of interest has been made, which has the effect of preserving any right of action, that right will be saved not only against the party making the payment, but also against all other persons liable on the specialty" (*per Lord Cranworth*, *Ib.* 18). Where several liable.

Roddam v. Morley was subsequently followed in *Pears v. Laing*, 12 Eq. 41; *Re Hollingshead*; *H. v. Webster*, 37 Ch. D. 651; *Dibb v. Walker*, 1893, 2 Ch. 429; *Leahy v. De Moleyns*, 1896, 1 Ir. 206; *Re Chant*; *Bird v. Godfrey*, 1905, 2 Ch. 225. In *Re Lacey*; *Howard v. Lightfoot* (1907, 1 Ch. 339, 355), the C. A. considered *Dickenson v. Teasdale* (1 D. J. & S. 52) and *Coope v. Cresswell* (2 Ch. 112); decisions apparently inconsistent with *Roddam v. Morley*. But in preference they adopted the latter case, the principle of which they applied to a payment treated as an acknowledgment under sect. 8 of the R. P. Lim. Act, 1874. The meaning of the section in the case where more persons than one are liable by virtue of the specialty is now settled by *Roddam v. Morley* (*Read v. Price*, 1909, 1 K. B. 585). And in such a case an acknowledgment in writing stands on the same footing as payment (S. C. 1909, 2 K. B. 735).

Where a person indebted on a specialty dies having left personal estate, and real estate devised for payment of debts, and also real estate devised beneficially, it was said by *Kindersley*, V.-C., "There are three parties,

3 & 4 Will. 4, c. 42, s. 5. each of whom is liable to the claims of a specialty creditor—the executor in respect of the personality, the trustees in respect of the real estate devised for payment of debts, and the beneficial devisee in respect of the real estate beneficially devised. . . . If any one of these parties makes the payment or gives the acknowledgment, it is a payment or acknowledgment by the party liable by virtue of the specialty” (*Coope v. Cresswell*, 2 Eq. 117, in which case the V.-C. held, that payment of interest on a specialty debt of a testator by his personal representatives who were also trustees of real estate devised for payment of debts, took the debt out of the statute as against a beneficial devisee). This holding was reversed by Lord *Chelmsford* (2 Ch. 112). But the last-mentioned decision has been disapproved in C. A. (*Re Lacey, Howard v. Lightfoot*, 1907, 1 Ch. 351).

As regards acknowledgments within the present statute by payment of principal or interest, in the case of several parties being liable (whether jointly only or jointly and severally), it has now been provided by Merc. Law Amdt. Act, 1856, s. 14, that payments by one co-debtor shall not prevent time running under this statute in favour of another co-debtor (see *post*, p. 241).

What amounts to payment.

Same hand to pay and receive.

Where a settlement (under which the husband took the first life interest) comprised stock covenanted to be transferred by him, and the stock was not transferred, time ran in favour of the husband from the execution of the settlement. It could not be assumed that a person had been paying himself the interest of a non-existing fund (*Spickernell v. Hotham, Kay*, 669; see also *Stone v. Stone*, 5 Ch. 74). But where a settled fund, the income of which the settlor was entitled to receive until insolvency, was lent to him, and judgment was entered against him to secure repayment, time did not run against the judgment until the insolvency (*Re Keay*, I. R. 3 Eq. 659). And where a settlement (under which the husband took the first life interest) comprised money secured by a bond of the husband time did not run against the obligee until his death, he being the person who was both bound to pay the interest on the bond, and entitled to receive the interest under the settlement (*Mills v. Borthwick*, 35 L. J. Ch. 31; 13 W. R. 707). So where the wife took the first life interest, and she lived with her husband in amity (*Re Dixon, Heynes v. Dixon*, 1900, 2 Ch. 561). The principle was applied where the same person was entitled to receive the rents of mortgaged land and the interest on the mortgage (*Topham v. Booth*, 35 Ch. D. 607), and also where the husband was mortgagor and the wife mortgagee (*Re Hawes, Burchell v. Hawes*, 62 L. J. Ch. 463; see *Re Dixon, sup.*). Where money settled to the separate use of a wife was lent to her husband, and she, with his consent, gave formal receipts for the income, but no money passed, this was payment of interest within the section (*Amos v. Smith*, 1 H. & C. 238; *Re Dixon, Heynes v. Dixon, sup.*). See *Re England, Steward v. England*, 1895, 2 Ch. 820, where the money was charged on land; and also the cases quoted *ante*, pp. 175, 194.

A payment upon one of several judgments obtained upon one joint and several bond will prevent recovery upon another of such judgments from being barred (*Re Kingston*, I. R. 3 Eq. 485; see *Brew v. Brew*, 1899, 2 I. R. 163).

A bond conditioned for the replacing of stock in specie is not such an instrument as comes within the 5th section of Civil Proc. Act, 1833. The payment of sums of money in lieu of dividends which would have been payable if the stock had remained in the name of the obligee, is not payment of interest, neither is any sum of money thereby acknowledged to be due (*Blair v. Ormond*, 17 Q. B. 436, 437).

As to the proof of payment by indorsements on a bond, see 1 Taylor, Ev. 605, 611, 8th ed.

The limitation after judgment reversed.

6. And nevertheless be it enacted, if in any of the said actions judgment be given for the plaintiff, and the same be reversed by error, or a verdict pass for the plaintiff, and upon

matter alleged in arrest of judgment the judgment be given against the plaintiff, that he take nothing by his plaint, writ or bill, or if in any of the said actions the defendant shall be outlawed, and shall after reverse the outlawry, that in all such cases the party plaintiff, his executors or administrators, as the case shall require, may commence a new action or suit from time to time within a year after such judgment reversed, or such judgment given against the plaintiff, or outlawry reversed, and not after (16 & 17 Vict. c. 113, s. 21, Ireland).

See *Tynte v. The Queen* (7 Q. B. 216). Outlawry has been abolished in civil cases by Civil Proc. Acts Repeal Act, 1879, s. 3.

7. That no part of the United Kingdom of Great Britain and Ireland, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of the dominions of his Majesty, shall be deemed to be beyond the seas within the meaning of this act, or of the act passed in the 21st year of the reign of King James the First, intituled "An Act for Limitation of Actions, and for avoiding of Suits in Law."

No part of the United Kingdom, &c. to be deemed beyond the seas within the meaning of this act.

The act 4 Anne, c. 16, s. 19, was omitted from this section, and the consequence was to make Ireland a place beyond the seas within the meaning of 4 Anne, c. 16, s. 19, notwithstanding the Act of Union (*Lane v. Bennett*, 1 M. & W. 70; *Battersby v. Kirk*, 2 Bing. N. C. 603). But see now Merc. Law Amdt. Act, 1856, s. 12, *post*, p. 241.

No part of the United Kingdom, nor the islands of Man, Guernsey, Jersey, Alderney and Sark, nor any islands adjacent to any of them, being part of the dominions of her Majesty, are to be deemed to be beyond the seas within the meaning of the act 3 & 4 Vict. c. 105, or of the Irish Statute of Limitations, 10 Car. 1, st. 2, c. 6 (3 & 4 Vict. c. 105, s. 36, which is repealed by 16 & 17 Vict. c. 113, s. 3).

Beyond the seas within the Irish acts.

V.—OF THE LIMITATION OF ACTIONS ON SIMPLE CONTRACT DEBTS, ETC.

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THE LIMITATION ACT, 1623.

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§ 3. *Limitation of Actions on simple Contracts, and certain Personal Actions...*217.

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3. That all actions of trespass *quare clausum fregit*, all actions of trespass, detinue, action sur trover, and replevin for taking away of goods and cattle, all actions of account, and upon the

Limitation of certain personal actions.

21 Jac. 1,
c. 16, s. 3.

case, other than for such accounts as concern the trade of merchandize between merchant and merchant, their factors or servants, all actions of debt grounded upon any lending or contract without specialty; all actions of debt for arrearages of rent, and all actions of assault, menace, battery, wounding, and imprisonment, or any of them which shall be sued or brought at any time after the end of this present session of parliament, shall be commenced and sued within the time and limitation hereafter expressed, and not after, (that is to say) the said actions upon the case (other than for slander) and the said actions for account, and the said actions for trespass, debt, detainue, and replevin for goods or cattle, and the said action of trespass *quare clausum fregit*, within three years next after the end of this present session of parliament, or within six years next after the cause of such actions or suit, and not after; and the said actions of trespass, of assault, battery, wounding, imprisonment, or any of them, within one year next after the end of this present session of parliament, or within four years next after the cause of such actions or suit, and not after; and the said actions upon the case for words, within one year after the end of this present session of parliament, or within two years next after the words spoken, and not after. See as to Ireland, 16 & 17 Vict. c. 113, s. 20.

(1) *Statute does not extinguish the Debt*...218.

(2) *Application of the Act*...219.

(3) *When Time begins to run*...222.

(4) *Continuous running of Time and Actions by and against Executors*...226.

(1)
Statute does
not extin-
guish debt,
but merely
bars remedy.

This statute does not extinguish the debt, but merely bars the remedy by action (*Smith v. Betty*, 1903, 2 K. B. 322; see *Courtenay v. Williams*, 15 L. J. Ch. 204; *Curwen v. Milburn*, 42 Ch. Div. 434; *Re Hancock, Hancock v. Berrey*, 59 L. T. 199; *Re Hepburn*, 14 Q. B. D. 400, where it was said that for the purpose of proving in bankruptcy the remedy by action can alone be looked at). On the above principle, a creditor whose action is barred may avail himself of any other means of recovering his debt he may possess (*Re Abrahams, A. v. A.*, 1908, 2 Ch. 73).

An executor may out of money coming to one of the testator's debtors from the testator's estate retain a barred debt (see cases quoted *post*, p. 252). If a debtor pay money to a creditor without appropriation, the creditor may apply it in payment of a barred debt (*Mills v. Powke*, 5 Bing. N. C. 455; see *Friend v. Young*, 1897, 2 Ch. 434). A solicitor recovered by his lien barred costs (*Higgins v. Scott*, 2 B. & Ad. 413; *Re Murray*, 1867, W. N. 190; *Re Carter*, 1885, W. N. 184; see *Re Brockman*, 1909, 2 Ch. 170; *Spears v. Hartley*, 3 Esp. 81). Statute-barred items were held taxable under an order directing taxation of a trustee's costs as between him and his *cestui que trust* (*Budgett v. Budgett*, 1895, 1 Ch. 202); but they are not taxable under the common order as between a client and his solicitor (*Re Brockman*, 1909, 2 Ch. 175), nor can they be recovered under the submission to pay (*Ib.*). As to a client recovering from his solicitor (under the summary jurisdiction) money the claim to which is statute-barred, see *Sittingbourne Co. v. Lawson*, 1886, W. N. 76.

Set-off.

Set-off, however, is within sect. 3 of the Lim. Act, 1623 (Stat. Frauds Amend. Act, 1828, s. 4, *post*, p. 239); therefore, a debt barred by the

statute cannot be set off (*Remington v. Stevens*, 2 Str. 1271; *Rawley v. R.*, 1 Q. B. D. 460; *Smith v. Betty*, 1903, 2 K. B. 323). The set-off must have been barred before the commencement of the suit in order to support a replication of the statute (*Walker v. Clement*, 15 Q. B. 1046; *Re Ballard, Lovell v. Forester*, 1890, W. N. 64). A claim to retain a barred loan was disallowed as being in the nature of set-off (*Dingle v. Coppen*, 1899, 1 Ch. 726). As to replying the statute to part of the claim of set-off, see *Mead v. Bashford*, 5 Ex. 336; see also *Fairthorne v. Donald*, 13 M. & W. 424; and see R. S. C., Ord. 19, r. 15.

21 Jac. 1,
c. 16, s. 3.

(2)
Cases within this section.
An action of debt for a penalty incurred under a bye-law, made by virtue of a royal charter under the great seal is an action of debt grounded upon a contract without speciality within this section (*Tobacco-pipe Makers v. Loder*, 16 Q. B. 765). The liability of an equitable assignee of leaseholds in respect of the covenants in the lease is that of simple contract within the statute (*Saunders v. Benson*, 4 Beav. 351; see *Moore v. Greg*, 2 Phil. 717). So an action in an English court to recover a simple contract debt for which judgment had been recovered in a foreign court was barred in six years (*Dupleix v. De Roven*, 2 Vern. 540; compare *Wilson v. Dunsany*, 18 Beav. 293). When by an instrument not under seal, A. agrees to repay an advance and execute a mortgage, this statute would at the end of six years bar an action to recover the advance or for breach of the contract to execute the mortgage (*Firth v. Slingsby*, 58 L. T. 483). The section applies to the personal remedy, even where the simple contract debt is charged on land (*Barnes v. Glenton*, 1899, 1 Q. B. 885). An action *in rem* in the Admiralty Court to recover damages for collision is not within this act (*Kong Magnus*, 1891, P. 223).

Money placed with a banker to current account in the ordinary way is *Banker and money lent* to the banker with a superadded obligation that it is to be paid *customer*. when called for by cheque; and if it remain in the banker's hands for six years, without any payment by him of the principal or allowance of interest, the statute is a bar to its recovery (*Pott v. Clegg*, 16 M. & W. 324; distinguish money paid to a deposit account, *Re Tidd, Tidd v. Overell*, 1893, 3 Ch. 156). The relation between a banker and his customer is that of debtor and creditor, and not trustee and *cestui que trust* (*Foley v. Hill*, 1 Phil. 399; 2 H. L. Ca. 28; and see *Morson v. Bright*, 4 Ch. 294). But, where a fund was standing to the account of two trustees, and the bankers, who had notice that it was a trust fund, transferred it to the account of the tenant for life, and thereby obtained payment of a debt due from him to them, the trustees had a right to compel the bankers to replace the fund, and the statute was inapplicable (*Bridgman v. Gill*, 24 Beav. 302; see *Foxton v. Manchester Banking Co.*, 44 L. T. 406; *Coleman v. Bucks Bank*, 1897, 2 Ch. 243). As to the parties to actions against bankers, and the practice of the common law courts in allowing amendments to avoid the effect of the statute, see *Crawford v. Cocks* (20 L. J. Ex. 169); *Corne v. Malins* (*Ib.* 434).

The statute bars a solicitor's action for costs (*Coburn v. Colledge*, 1897, 1 Q. B. 702). As to the effect of a solicitor's lien, see cases quoted *supra*, p. 218; and as to the running of time in the case of actions for costs, see p. 225, *post*. In the absence of fraud, the statute bars a client's action to recover money received by a solicitor as his client's agent (*Re Hindmarsh*, 1 Dr. & Sm. 129; *Crawford v. Crawford*, 16 W. R. 411; *Watson v. Woodman*, 20 Eq. 721). But where a solicitor was dealing for his own benefit with his client, the client was entitled to open accounts settled more than six years before action (*Cheese v. Keen*, 1908, 1 Ch. 245), and the statute did not apply where a solicitor received money of which he knew his client was an express trustee (*Re Bell, Lake v. Bell*, 34 Ch. D. 462; see *Blyth v. Fladgate*, 1891, 1 Ch. 337; *Soar v. Ashwell*, 1893, 2 Q. B. 390); nor where a solicitor received his client's money under a special power of attorney, which was held to create a trust (*Burdick v. Garrick*, 5 Ch. 233; *Gray v. Bateman*, 21 W. R. 137). See now Trustee Act, 1888, s. 8, *post*. No trust, however, is created where a solicitor is employed to invest in a particular mortgage, or

Solicitor and client.

- 21 Jac. 1, c. 16, s. 3.** to find securities to be approved by the client and then invest, and the client does approve the security; in such a case the statute will bar an action for negligence (*Dooby v. Watson*, 39 Ch. D. 178; see *Hughes v. Twisden*, 54 L. T. 570; *Mara v. Browne*, 1896, 1 Ch. 199). See also *Smith v. Pockocke*, 2 Drew. 197.
- Master and steward.** Where during his life a master had permitted his steward to retain his salary out of moneys in his hands, the steward, in accounting after the master's death, was allowed his salary for twenty years, the statute not applying (*Hawkins v. Hawkins*, 28 W. R. 240).
- Principal and agent.** An action by a principal for an account against his agent is, generally speaking, within the statute, time not commencing to run until the agency is terminated (*Re Sharpe, Masonic Co. v. Sharpe*, 1892, 1 Ch. 166; see *Burdick v. Garrick*, 5 Ch. 233; *Friend v. Young*, 1897, 2 Ch. 421).
- Account.** Before the Stat. Frauds Amdt. Act, 1828, it was held, that in the case of open accounts between persons other than merchants, the statute did not begin to run so long as the account was continued (see *Foster v. Hodgson*, 19 Ves. 185). The effect, however, of that act in the case of actions of debt or assumpsit was, that although there might be a mutual open running account, the existence of items not barred was not sufficient to take items which were barred out of the statute (*Williams v. Griffiths*, 2 C. M. & R. 45; *Cottam v. Partridge*, 4 M. & G. 271; see *Jackson v. Ogg*, Johns. 397).
- Merchants' accounts.** Merchants' accounts were excepted from the Lim. Act, 1623 (see as to the exception, *Robinson v. Alexander*, 2 Cl. & Fin. 717); but this exception has been repealed by the M. L. A. Act, 1856, s. 9 (*post*, p. 239), and merchants' accounts now stand upon the same footing as other accounts. The statute bars an action by a merchant against his factor (*Friend v. Young*, 1897, 2 Ch. 431).
- Partnership accounts.** In the case of partnership accounts it is settled that, after a partnership has ceased, any claim on simple contract by one partner against the others in respect thereof is *prima facie* subject to be barred after six years (*Know v. Gye*, L. R. 5 H. L. 656; in which case a suit for an account by the executors of a deceased partner instituted against the surviving partner more than six years from the death, was barred, although the business had been carried on and assets got in by the defendant during the six years; see also *Chan Kit San v. Ho Fung Hang*, 1902, A. C. 257, where time ran against the estate of the deceased partner from the grant of administration). In another case an action for an account brought more than six years after a dissolution was barred (*Noyes v. Crawley*, 10 Ch. D. 31, where *Miller v. Miller*, 8 Eq. 499, was treated as overruled). On the other hand, "while a partnership is continuing there is no authority for suggesting that a claim between the partners is affected by the statute, and the opinion of *Lindley, L. J.* (Partnership, 7th ed. 553), is to the contrary" (*Barton v. N. Stafford Co.*, 38 Ch. D. 463; see *The Pongola*, 73 L. T. 512). The statute was no bar where the accounts of an old partnership had been carried on into a new partnership without interruption or settlement (*Betjemann v. Betjemann*, 1895, 2 Ch. 474). A partner is entitled to rely on the good faith of his co-partner, and concealed fraud (even where due caution would have discovered it) will prevent the statute applying (*Ib.*).
- Companies.** An action by a shareholder against a company for unpaid dividends appears to be within the section (*Re Severn R. Co.*, 1896, 1 Ch. 559; see cases quoted, *ante*, p. 212). Where an action was brought to compel a company to replace stock transferred on a forgery, time ran from the refusal of the company after notice of the forgery to treat the plaintiff as owner (*Barton v. N. Stafford Co.*, 38 Ch. D. 458).
- Fraud, breach of duty.** A shareholder's action against directors under sect. 3 of the Directors' Liability Act, 1890 (see Comp. Consol. Act, 1908, sect. 84), is within the section (*Thomson v. Clanmorris*, 1900, 1 Ch. 718); so an action based on concealed fraud (*e.g.*, to recover a bribe secretly received by a director) is within the section, time running from the discovery of the fraud (*Metropolitan Bank v. Heiron*, 5 Ex. D. 319; *Re Fitzroy Bessemer Co.*, 50 L. T. 144; see *Re Cape Breton Co.*, 29 Ch. Div. 810).

Compare the case of a claim against directors for improperly paying dividends, which was a claim for a breach of trust, and was not then capable of being barred, *Fitcroft's case* (21 Ch. D. 519); and see the principle stated by *Cotton*, L. J. (5 Ex. D. 325). Where an auditor was guilty of a breach of duty to the company, the plea of the statute was admitted without argument (*Leeds Co. v. Shepherd*, 36 Ch. D. 809). In an action for damages arising from fraudulent misrepresentation, time ran from the discovery of the fraud (*Gibbs v. Guild*, 9 Q. B. Div. 59; compare *Moore v. Knight*, 1891, 1 Ch. 547; *Rawlins v. Wickham*, 3 D. G. & J. 304, and the other cases cited *post*, p. 248). As to an action to rescind a contract on the ground of fraud, see *Redgrave v. Hurd*, 20 Ch. D. 13; *Molloy v. Mutual Reserve Co.*, 22 T. L. R. 525. And as to an injunction in aid of an action of deceit, see *Fullwood v. Fullwood* (9 Ch. D. 176).

21 Jac. 1,
c. 16, s. 3.

The statute applies to Chancery proceedings in respect of trespass unless some equitable grounds repel it (*Trotter v. Maclean*, 13 Ch. D. 584). Where for years coal was furtively taken from a mine by a wilful and secret underground trespass, the statute did not apply (*Bulli Co. v. Osborne*, 1899, A. C. 351). To avoid the defence of the statute in such a case it is not necessary to show active concealment (*Ib.* 363). But breaking bounds into a neighbouring colliery is not *per se* fraudulent (*Bulli Co. v. Osborne*, *sup.*; disapproving *Ecc. Commrs. v. N. E. R.*, 4 Ch. D. 845); and the fact that the defendants kept a map, in which they omitted to mark their workings into the plaintiff's mine, was not sufficient to establish fraud (*Daws v. Bagnall*, 23 W. R. 690). Where the wrongful working of the defendant was with the knowledge of the plaintiff, it was treated as inadvertent, and an account was only directed for six years (*Trotter v. Maclean*, 13 Ch. D. 574; see the cases classified, *ib.* 586; and see *Dean v. Thwaite*, 21 Beav. 61).

As to waste, see *post*, p. 249.

A person injured by a devastavit is but a simple contract creditor of the executor (*Charlton v. Low*, 3 P. W. 331). And in general his claim is barred by this statute when six years have elapsed from the act constituting the devastavit (*Thorne v. Kerr*, 2 K. & J. 54; *Re Gale, Blake v. Gale*, 22 Ch. D. 820; *Re Hyatt, Bowles v. Hyatt*, 38 Ch. D. 618). The rule was applied where the devastavit consisted of parting with assets without providing for a contingent claim, and the action was brought within six years after the contingency had ripened into a certain claim (*Lacons v. Warmoll*, 1907, 2 K. B. 350; see *Re Croydon, Hincks v. Roberts*, 125, L. T. Jo. 282).

Devastavit.

Where a pauper lunatic becomes entitled to property, the guardians can only recover six years' arrears in respect of his maintenance either from himself (*Re Newbegin, Eggleton v. Newbegin*, 36 Ch. D. 477; see *Re Weaver*, 21 Ch. Div. 615) or from his representatives (*Re Watson, Stamford v. Bartletti*, 1899, 1 Ch. 72; *Re Taylor, Edmonton v. Deeley*, 1901, 1 Ch. 480). *Secus* where payments on account had been made by a receiver appointed in the lunacy (*Wandsworth v. Worthington*, 1906, 1 K. B. 420) or where the claim was by the Crown for the maintenance of a criminal lunatic (*Re J.*, 1909, 1 Ch. 574).

Arrears of
pauper
lunatic's
maintenance.

Prior to 1859 this statute extended to India (*Buckmaboye v. Mottichund*, 8 Moore, P. C. 4; but see now *Re Peat*, 7 Eq. 302). In the construction of a contract, the question whether there has been a contract made at all is to be governed by the law where the contract was made, but the remedy is to be according to the law where the contract is sought to be enforced (*Ex p. Melbourne*, 6 Ch. 69). Therefore a debt contracted abroad can only be enforced in England within the time limited by the English statutes (*Huber v. Steiner*, 2 Bing. N. C. 202; see *Harris v. Quine*, L. R. 4 Q. B. 653; *Pardo v. Bingham*, 4 Ch. 738; *Finch v. Finch*, 35 L. T. 235; *Alliance Bank v. Carey*, 5 C. P. D. 429). But where a debt was disallowed as barred in an English administration action, and the creditor afterwards obtained in Scotland a judgment which he registered in England under 31 & 32 Vict. c. 54, he was restrained from enforcing his judgment only on the terms of being admitted to prove (*Re Low, Bland v. Low*, 1894, 1 Ch. 147).

India.
Foreign
contracts.

21 Jac. 1,
c. 16, s. 3.

(3)
When time
begins to run.
Cause of
action from
which time
runs.

There cannot be a cause of action within the meaning of the statute from which time will run unless there be not only a person in existence capable of suing (*Murray v. East India Co.*, 5 B. & Ald. 214; *Chan Kit San v. Ho Fung Hang*, 1902, A. C. 257), but also a person who can be sued (*Douglas v. Forrest*, 4 Bing. 704; see *Musurus Bey v. Gadban*, 1894, 2 Q. B. 358). An ambassador cannot be sued either while he is accredited, or during such reasonable period afterwards as he requires for preparing to return home; and time does not run against his creditors until the expiration of such period (*Musurus Bey v. Gadban*, *sup.*), and see the cases as to executors and administrators, *post*, p. 227.

- (a) *Actions ex Delicto*...222.
- (b) *Actions ex Contractu*...223.
- (c) *Effect of Fraud*...225.
- (d) *Costs*...225.

(a)
Running of
time in
actions *ex
delicto*.
Case.

In an action on the case for negligence (*e.g.*, against a solicitor), where the plaintiff alleges a breach of duty, and a special consequential damage, the cause of action is the breach of duty and not the consequential damage; and the statute runs from the time when the breach of duty is committed, and not from the time when the negligence was discovered, or when the consequential damage accrued (*Howell v. Young*, 5 B. & C. 259; *Smith v. Fox*, 6 Hare, 386; *Hughes v. Twisden*, 54 L. T. 570. Compare the rule in assumpsit, *Short v. McCarthy*, 5 B. & Ald. 626, *post*, p. 223). Concealment of the negligence without fraud would make no difference (*Armstrong v. Milburn*, 54 L. T. 247, 723). There is no duty on the part of the solicitor to disclose his negligence (*Wood v. Jones*, 61 L. T. 551). Time runs against a shareholder's right to sue directors for compensation under sect. 3 of the Directors' Liability Act, 1890 (see Comp. Consol. Act, 1908, s. 84), from the subscription for the shares (*Thomson v. Clanmorris*, 1900, 1 Ch. 718). In actions on the case for injury to real property, where the ground of the action is the consequential damage, time runs from the actual damage, and not from the wrongful act (*Bonomi v. Backhouse*, 9 H. L. C. 503; an action for negligently working mines, where the working which caused the thrust was more than six years before action brought, but the actual damage did not commence till within six years). In the case of a further subsidence, time commences to run from such subsidence (*Darley Main Co. v. Mitchell*, 11 App. Cas. 127, overruling *Lamb v. Walker*, 3 Q. B. D. 389; see *Crumbie v. Wallsend Board*, 1891, 1 Q. B. 503, and *West Leigh Co. v. Tannicliffe*, 1908, A. C. 27).

Trover.

In trover, time runs from the conversion (*Denys v. Shuckburgh*, 4 Y. & C. 42). A's furniture having been seized under an execution, and then purchased by his friends, was left in A.'s possession for more than six years. After A.'s death the furniture was claimed by his friends, and adversely by his administratrix: it was held that the rights of the former were not barred by the statute, which could only apply from six years from a conversion (*Edwards v. Clay*, 28 Beav. 145). Where once there has been a complete cause of action arising out of contract or tort, the statute begins to run, and subsequent circumstances, which would but for the prior wrongful act or default have constituted a cause of action, are disregarded (*Wilkinson v. Verity*, L. R. 6 C. P. 209). In the case of tort this principle only applies where the defendant is the sole wrongdoer (*Miller v. Dell*, 1891, 1 Q. B. 470). Where an action of detinue is founded upon a bare taking and withholding of the property of another, without any circumstances to show a trust for the owner, or to found an option to sue, either for the wrong or for the breach of the original terms of deposit, time will run from the period at which the property was first wrongfully dealt with (*Wilkinson v. Verity*, L. R. 6 C. P. 206; see *Hinchcliffe v. Sharpe*, 77 L. T. 714). Where A.'s lease was deposited fraudulently with B. to secure a loan, and the mortgage debt and lease were afterwards transferred to C., both B. and C. being ignorant of the fraud, and C. having refused to return the lease, A. brought detinue against him, the statute ran from the time when A. first had a complete cause

Detinue.

of action against C. by reason of his refusal, irrespective of the existence of any previous cause of action against B. (*Miller v. Dell*, 1891, 1 Q. B. 468; *Spackman v. Foster*, 11 Q. B. D. 99). It was doubted whether the statute would prevent a person rightfully in possession of land from recovering title deeds more than six years after their conversion (1891, 1 Q. B. 472). In an action for detention of title deeds, time does not begin to run so long as the deeds are in the possession of the person enjoying the land, although such enjoyment be wrongful (*Plant v. Cotterell*, 5 H & N. 430).

As to the running of time in the cases of concealed fraud, see the cases on Fraud. p. 248.

As to when time runs in the case of an action for false imprisonment, see *Violett v. Simpson* (8 El. & Bl. 344; 6 W. R. 12).

False imprisonment.

(b)

The time limited by the statute does not begin to run until there be a full and complete cause of action (see *Musurus Bey v. Gadban*, 1894, 2 Q. B. 358). Where the cause of action does not arise until after request made, the statute will only run from the time of such request (*Gould v. Johnson*, 2 Salk. 422; 2 Saund. 63 b, n.). If the contract be to pay money at a future period, or upon the happening of a certain event, the statute does not begin to run until that specified period or that event (*Fenton v. Imbers*, 1 W. Bl. 354; 3 Burr. 1278). If goods be consigned to a factor for sale, an action does not lie against him for not accounting for them, until after a demand made of an account; and the statute, therefore, in such case runs only from the time of such demand (*Topham v. Braddick*, 1 Taunt. 572). On a sale of goods on credit, the statute begins to run from the time when credit has expired (*Helps v. Winterbottom*, 2 B. & Ad. 431). In general, the day on which the cause of action accrued is to be included (Hob. 109; 4 Moore, 465).

In actions *ex contractu* time only runs from complete cause of action,

The statute runs from the earliest time at which an action can be brought (*Jeeves v. Butcher*, 1891, 2 Q. B. 511; see *Barker's claim*, 1894, 3 Ch. 290). In assumpsit the statute begins to run from the breach of the promise, and not from the consequential damage. In an action against an attorney for an omission to make a search, which took place upwards of six years before, the statute was a bar, though the omission was not discovered till within the six years (*Short v. McCarthy*, 3 B. & Ald. 626; *Brown v. Howard*, 2 Brod. & B. 73; *Battley v. Faulkner*, 3 B. & Ald. 288). Compare the rule in an action on the case (*Howell v. Young*, 5 B. & C. 259, ante, p. 222). As regards the liability of a husband for his wife's ante-nuptial debts under sects. 14, 15 of M. W. P. Act, 1882, time runs in favour of the husband from the date of the cause of action against the wife, not from marriage (*Beck v. Pierce*, 23 Q. B. Div. 323). The defendant gave a warrant of attorney to secure a debt payable by instalments, the plaintiff to be at liberty, in case of default, to have judgment for the whole. The fact that the first default was made more than six years before action was a defence, not only as to instalments due more than six years ago, but also as to those due within that period (*Hemp v. Garland*, 4 Q. B. 519). If any one of the securities for an annuity are set aside, the grantee may recover back the purchase-money on the ground of failure of consideration, and the statute runs from the time when the security is set aside (*Huggins v. Coutes*, 5 Q. B. 432; *Cowper v. Godmond*, 9 Bing. 748; see *Churchill v. Bertrand*, 3 Q. B. 568).

but runs from earliest time.

On the construction of a guarantee for a current account given to a bank, time ran against the bank's right to sue on the guarantee as regards each item of the account as it became due. The bank, however, recovered interest which had accrued within six years, although the principal was barred (*Parr's Bank v. Yates*, 1898, 2 Q. B. 460). An action on a guarantee was held barred (*Henton v. Paddison*, 68 L. T. 405). The points from which time runs in an action on a warranty and in an action on a contract of indemnity are different. And the difference may be material in considering which should be implied (*Sheffield v. Barclay*, 1903, 2 K. B. 596; 1905, A. C. 404).

Guarantees.

In the case of a present debt and promise to pay on demand, the demand Debt payable on demand.

21 Jac. 1,
c. 16, s. 3.

is not a condition precedent to an action: *secus*, in the case of a promise to pay on demand a collateral sum—e.g., by a surety (*Re Brown*, 1893, 2 Ch. 300; see *Birks v. Trippet*, 1 Wms. Saund. 38). Where money was advanced to a firm to be repaid on demand, with compound interest: the statute ran from the date of the advance (*Jackson v. Ogg*, Johns. 397); in which case it was also held that entries in the books of the firm, crediting the lender with interest, did not affect the operation of the statute. Compare the cases as to a mortgagee's accounts, *ante*, p. 172. Where the plaintiff advanced 5,000*l.* to assist an undertaking, and the defendant was not to be personally liable, but the plaintiff was to be paid out of the profits, the statute did not run until after the plaintiff's first demand. A distinction was drawn between debts payable on demand, and debts recoverable on demand (*Knox v. Gye*, 15 W. R. 628). In an action to recover paying expenses under the Metrop. Man. Acts, time did not run against the vestry until demand (*Hampstead v. Caunt*, 1903, 2 K. B. 5). The defendant, drawer of two bills of exchange of which the plaintiff was holder, gave him a written promise to pay the bills, "whenever my circumstances may enable me to do so, and I may be called upon for that purpose." The statute ran from the time of the defendant becoming able to pay, though the plaintiff had made no demand, and had no knowledge of such ability (*Waters v. Thanet*, 2 Q. B. 757; see *Hammond v. Smith*, 33 Beav. 452; *Bethell v. Bethell*, 34 Ch. D. 561). A promissory note being given to a banker by A. and a surety, and a contemporaneous agreement being executed showing the note to be given as a security for A.'s banking account, the statute did not run from the time when A. became indebted to the bank, but from the time when the balance was struck (*Hartland v. Jukes*, 32 L. J. Exch. 162). Time runs without demand in the case of money paid into a bank on current account (*Pott v. Clegg*, 16 M. & W. 32, see *ante*, p. 219); but a demand is necessary in the case of an ordinary deposit account (*Re Tidd*, *Tidd v. Overell*, 1893, 3 Ch. 154); also in the case of money entrusted to another for safe custody (*Ib.*); also in the case of a loan to a building society on the terms that the same should be repayable on notice (*Atkinson v. Bradford Society*, 25 Q. B. D. 377). But time ran from the date of an advance, notwithstanding that the lender was authorised to sell bonds deposited as security, and the borrower undertook to pay the difference (*Re McHenry*, *McDermott v. Boyd*, 1894, 3 Ch. 290).

Bills and
notes.

In the case of a note, payable on demand, the statute runs from the date of the note (*Christie v. Fonsick*, 1 Selw. N. P. 301, 13th ed.; *Re George*, *Francis v. Bruce*, 44 Ch. D. 627). So in the case of a cheque given for a pre-existing debt (*Bethell v. Bethell*, 34 Ch. D. 566). It makes no difference that the note is payable with interest (*Norton v. Ellam*, 2 M. & W. 461). Where, upon a loan, the borrower, before the advance was made, gave to the lender a promissory note payable on demand, it was said that time ran from the giving of the note, not from the date of the advance (*Buccleuch v. Eden*, 61 L. T. 360). Where in form a note is payable twenty-four months after demand, the cause of action on the note does not accrue, and the statute does not begin to run until twenty-four months after demand made (*Thorpe v. Boothe*, 1 Ry. & Moo. 388). Payment of interest upon a promissory note payable on demand, although there be no independent evidence that any demand of payment of the note has been made, is of itself evidence of a demand (*Bamfield v. Tupper*, 7 Exch. 27; *Re Rutherford*, *Brown v. Rutherford*, 14 Ch. Div. 687). Where a note is payable after sight, the statute runs only from the time of presentment (*Holmes v. Kerrison*, 2 Taunt. 323; and see *Savage v. Aldred*, 2 Stark. 232). As to when bills and notes are to be deemed payable on demand, see Bills of Exchange Act, 1882, ss. 10, 11, 88.

Where the statutory period for suing on a note expired on a Sunday, and a writ was issued on Monday, the action was held barred, R. S. C. Ord. 64, r. 3, not applying (*Morris v. Richards*, 45 L. T. 210). Where a debtor draws a bill to be applied in part payment of the debt, and the bill is paid when due by the drawee to the creditor, it operates as a part payment to

defeat the statute only from the time of the delivery of the bill by the debtor, not from the time of its payment (*Irving v. Veitch*, 3 M. & W. 90). The defendant gave his acceptance in blank on a bill to S., who filled up the same long afterwards. The defendant being sued on the bill, and having pleaded the statute, the statute ran from the time the bill became due as filled up, and not from the time it would have become due if completed when it was accepted in blank (*Montague v. Perkins*, 22 L. J. C. P. 187). In the case of a bill of exchange drawn on a bank, time did not commence to run against the holder's right to sue the drawer until presentation to the bank for payment (*Re Boyse, Crofton v. Crofton*, 33 Ch. D. 612). In the case of a bill of exchange drawn at so many months after sight, and refused acceptance, the cause of action is complete, and the statute begins to run upon the refusal of acceptance, and no new cause of action arises upon refusal of payment (*Wilkinson v. Verity*, L. R. 6 C. P. 209; see *Whitehead v. Walker*, 9 M. & W. 506). K. being indebted to the plaintiffs and to the defendant, and also to a banking company, it was agreed between all the parties that to secure K.'s debt to the company the defendant should draw upon K. three bills of exchange, payable to the plaintiffs, and that the plaintiffs should indorse them to the company. The bills became due in 1843, and were dishonoured. In 1847 the company sued the plaintiffs on the bills, and the plaintiffs, in 1851, paid the amount: it was held, in 1852, that the plaintiffs were barred by the statute from suing the defendant as drawer of the bills (*Webster v. Kirk*, 17 Q. B. 944).

Where a bill is drawn payable at a future period for a sum lent by payee to drawer at the time of drawing the bill, the payee may recover in an action for money lent at any time within six years from the time when the bill became due (*Wintersheim v. Carlisle*, 1 H. Bl. 631). Where an advance was made by the lender giving to the borrower a cheque which was subsequently paid, time ran against the lender, in an action for money lent, from the payment not the giving of the cheque (*Garden v. Bruce*, L. R. 3 C. P. 300).

As to actions for contribution, see *post*, p. 250.

Contribution.

Before the Jud. Acts it was held that it was no answer at law to a plea of the statute that the plaintiff was prevented by the defendant's fraud from knowing of the cause of action until after the time of limitation had expired (*Imperial Gas Co. v. London Gas Co.*, 10 Exch. 39; *Hunter v. Gibbons*, 1 H. & N. 459). The rule was different in equity where time ran from the discovery of the fraud (*Blair v. Bromley*, 2 Phil. 354). The rule in equity now prevails, at least in cases where before the Jud. Acts there was a concurrent remedy both in law and equity (*Gibbs v. Guild*, 9 Q. B. Div. 59; *Re Crosley, Munns v. Burn*, 35 Ch. Div. 266). As to purely common law actions, where there was no such concurrent remedy, see *Armstrong v. Milburn*, 54 L. T. 247, 723; *Barber v. Houston*, 18 L. R. Ir. 475. In cases falling within the Trustee Act, 1888, s. 8, the rule in *Blair v. Bromley* is not affected by that section (*Moore v. Knight*, 1891, 1 Ch. 547). Concealment of a cause of action without fraud makes no difference (*Armstrong v. Milburn*, 54 L. T. 723). Where fraud or non-discovery of fraud is relied on as taking a case out of the statute, it must be the fraud of the person who invokes the statute (*Thorn v. Heard*, 1895, A. C. 495).

The cause of action in respect of a solicitor's costs arises when the work is completed, from which time the statute runs, and not from a month after delivery of bill (*Coburn v. Colledge*, 1897, 1 Q. B. 702). In the case of bills of costs items dated more than six years before action will be barred, where the work was miscellaneous (*Beck v. Pierce*, 23 Q. B. Div. 323), or the employment not continuous (*Phillips v. Broadley*, 9 Q. B. 744). Where, however, the employment was continuous and lasted till within the six years, such items will not be barred (*Harris v. Quine*, L. R. 4 Q. B. 653). As where a solicitor is retained to conduct an action; in which case he cannot, as a rule, sue for his costs until the termination of the action or of his

21 Jac. 1,
c. 16, s. 3.

(c)
Effect of
fraud.

(d)
Actions for
costs.

21 Jac. 1,
c. 16, s. 3.

retainer (*Harris v. Osbourn*, 2 C. & M. 629; *Nicholls v. Wilson*, 11 M. & W. 106; see *Underwood v. Lewis*, 1894, 2 Q. B. 306; *Court v. Berlin*, 1897, 2 Q. B. 396). So costs incurred in conducting a suit in which no final decree had been made were held not to be barred, though no steps had been taken in the suit for ten years prior to action brought (*Whitehead v. Lord*, 7 Exch. 691; see *Stokes v. Trumper*, 2 K. & J. 232; *Baile v. Baile*, 13 Eq. 497). The statute will, as a rule, run from the date of the judgment in the action for which the retainer was given (*Rothery v. Munnings*, 1 B. & Ad. 15); but when an appeal is brought, the employment will be considered continuous as from the commencement of the action (*Harris v. Quine*, L. R. 4 Q. B. 657). During the course of the action the solicitor may give reasonable notice to the client to supply him with funds, and on refusal sue for costs. The retainer will also be determined by the death of the client (*Whitehead v. Lord*, 7 Exch. 691). As to part payment in the case of bills of costs, see *Morley v. Finney* (1870, W. N. 82). And as to taxation where some of the items of a bill are barred, see *Curwen v. Milburn* (42 Ch. D. 424); *Budgett v. Budgett* (1895, 1 Ch. 202); *Re Brockman* (1909, 2 Ch. 170).

Costs in
lunacy.

Costs incurred by solicitors in prosecuting a commission in lunacy, and subsequently acting on behalf of the committee, were held (at the lunatic's death) not barred by the lapse of six years during his life; for any action for the recovery of the claim would have been restrained (*Stedman v. Hart*, Kay, 607). See the cases as to a lunatic's maintenance, *post*, p. 256.

When costs were incurred in obtaining an act for a railway, subsequently abandoned, time did not commence to run until the company had assets (*Re Kensington Station*, 20 Eq. 197).

Costs
incurred by a
company
which is
afterwards
wound up.

Where solicitors delivered to a liquidator papers, on which they had a lien upon his undertaking in writing to pay out of the first funds available, the statute had no application (*Re Gloucester R. Co.*, 2 Giff. 47). A solicitor's right to have a call made for his payment may be lost by laches (*Ex p. A'Beckett*, 2 Jur. N. S. 684; see *Re Gloucester R. Co.*, *sup.*).

(4)

Continuous
running of
time.

Effect of
winding-up
order.

Under the Winding-up Acts of 1848-49, an order to wind up a company did not stop time from running against a right of action accrued previously to the order (*Ex p. Forest*, 2 Giff. 42). But the carrying in a claim under the winding-up did so (*Wryght's Case*, 5 De G. & Sm. 244). Under the Companies Consol. Act, 1908, a winding-up order stops the running of time (*Re General Rolling Stock Co.*, 7 Ch. 646). Compare the similar effect of judgment in an administration action, *post*, p. 254.

Inability to
sue, &c.

It was formerly laid down that when once time had begun to run, no subsequent disability or inability to sue would stop it (*Rhodes v. Smethurst*, 4 M. & W. 42). But it has since been held, that where a debtor takes out administration to his creditor, the running of time will be suspended during the administration (*Seagram v. Knight*, 2 Ch. 628).

Where a testator appointed as executors several persons of whom one was indebted to him, and the others proved at once but the debtor did not prove for more than six years, he could not then set up the statute, the act of proving having relation to the testator's death (*Ingle v. Richards*, 28 Beav. 366). See as to a creditor appointing his debtor to be executor, *Re Bourne, Davey v. Bourne*, 1906, 1 Ch. 708; Wms. Exors., 10th ed. 1056.

The rule as to the continuous running of time in the case of claims to land is stated *ante*, p. 137.

A mere letter of licence by a creditor to his debtor does not suspend the operation of the statute (*Fuller v. Redman*, 26 Beav. 614). But a covenant not to sue for a certain period will prevent time running until the expiration of that period (*Iven v. Elwes*, 3 Drew. 25; see *O'Brien v. Osborne*, 10 Hare, 92). Where under a composition deed a debtor makes default in payment of a composition, a fresh promise to pay the original debt at that time is implied, and time begins to run accordingly (*Irving v. Veitch*, 3 M. & W. 107; *Re Stock*, 66 L. J. Q. B. 146; *Macdonnell v. Broderick*, 1896, 2 I. R. 136).

Where the creditor becomes bankrupt, time runs against the bankruptcy

trustee as against the bankrupt (*Ex p. Norton*, 1892, W. N. 32). Where the creditor dies, the cause of action having accrued to him in his lifetime, his executor cannot sue after the time limited by the statute has expired (*Penny v. Brice*, 18 C. B. N. S. 393; 13 W. R. 342). But if time has not begun to run during the lifetime of an intestate, it does not run against the administrator until administration has been taken out (*Burdick v. Garrick*, 5 Ch. 241; *Chan Kit San v. Ho Fung Hang*, 1902, A. C. 257). Where there is no evidence to show whether the intestate died before or after the cause of action accrued, time does not run against the administrator until administration is taken out (*Atkinson v. Bradford Society*, 25 Q. B. Div. 377). In an action by an administrator against the acceptor of a bill payable to the testator, but accepted after his death, time ran from the grant of administration, there being no cause of action until there was a party capable of suing (*Murray v. East India Co.*, 5 B. & Ald. 204; and see *Pratt v. Swaine*, 8 B. & C. 285; *Perry v. Jenkins*, 1 M. & C. 118; *Hyde v. Price*, 1 C. P. Coop. 196; *Freaker v. Cranefeldt*, 3 M. & C. 499; *Houlitt v. Lambert*, 1 Cr. Eq. R. 263; *Fergusson v. Fyffe*, 8 Cl. & Fin. 121; *Musurus Bey v. Gadban*, 1894, 2 Q. B. 358).

21 Jac. 1,
c. 16, s. 3.

Bankruptcy
or death of
creditor.

When the debtor becomes bankrupt before the right of action is complete, it would seem that time does not commence to run until the close of the bankruptcy (see *Re Crossley*, *Munns v. Burn*, 35 Ch. Div. 266).

Where the debtor dies, and time has once begun to run against the debt in the debtor's life, it does not afterwards cease to run during the period which may elapse between his death and the time at which a personal representative to him is constituted (*Freaker v. Cranefeldt*, 3 M. & C. 499; *Boatwright v. Boatwright*, 17 Eq. 71; see *Martin v. Beauchamp*, 1888, W. N. 247). But where an action was brought in time and the defendant died, the plaintiff had a right to bring a new action against the executor or administrator within a reasonable time (*Sturgis v. Darell*, 6 H. & N. 120; see sect. 4, *post*). This rule was applied where the second action was commenced within a year from the proof of the will by the executor (*Swindell v. Bulkeley*, 18 Q. B. Div. 250).

Death of
debtor.

Where time had not commenced to run against a debt during the debtor's life, the statute was not a good plea where an executor had not proved, because no laches could be imputed to a plaintiff for not suing whilst there was no executor against whom he could bring his action (*Jolliffe v. Pitt*, 2 Vern. 694; Coop. Eq. Pl. 233; 1 Eq. Cas. Abr. 305; see *Douglas v. Forrest*, 4 Bing. 686; *Musurus Bey v. Gadban*, 1894, 2 Q. B. 532). But where the defendant acts, and might be sued, as executor *de son tort*, time runs from his so acting, and not from probate (*Flood v. Patterson*, 29 Beav. 299; *Webster v. Webster*, 10 Ves. 93).

As to actions by or against executors for injuries to property, see *ante*, p. 209.

By sect. 4, if judgment is given for the plaintiff and reversed by error or arrested, or if the defendant is outlawed and the outlawry reversed, a new action may from time to time be commenced within a year afterwards by the plaintiff, his heirs, executors or administrators.

Limitation
after judg-
ment or
outlawry
reversed.

Within the equity of this section the courts permitted an executor, within a year, or within a reasonable time after the death of the testator, to renew a suit commenced by the testator, and *vice versa* (*Curler v. Mornington*, 7 E. & B. 283; see 15 & 16 Vict. c. 76, ss. 135 *et seq.*; *Swindell v. Bulkeley*, 18 Q. B. Div. 250).

7. Provided nevertheless, and be it further enacted, that if any person or persons that is, or shall be, entitled to any such action of trespass, detinue, action sur trover, replevin, actions

Infants, femes
coverts, &c.
excepted.

21 Jac. 1,
c. 16, s. 7.

of accounts, actions of debt, actions of trespass, for assault, menace, battery, wounding or imprisonment, actions upon the case for words, be or shall be, at the time of any such cause of action, given or accrued, fallen or come, within the age of twenty-one years, feme covert, non compos mentis, imprisoned or beyond the seas, that then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited, after their coming to or being of full age, discover, of sane memory, at large, and returned from beyond the seas, as other persons having no such impediment should have done.

Infancy.

A case of infancy occurred in *Dashwood v. Magniac*, 1891, 3 Ch. 387.

Coverture.

From the time when the M. W. P. Act, 1882, enabled a married woman to sue, she became discover within the above section; so held in the case of an action for slander (*Weldon v. Neal*, 51 L. T. 289; 32 W. R. 828), and for assault (*Lowe v. Fox*, 15 Q. B. Div. 676). Neither the imprisonment of the plaintiff nor his absence beyond the seas now constitute a disability (Merc. Law Amdt. Act, 1856, s. 10, *post*). During the absence of a defendant beyond the seas the running of time is suspended by 4 Anne, c. 16, s. 19 (see *Forbes v. Smith*, 11 Ex. 161); and the right of the plaintiff to sue after the defendant's return is not affected by R. S. C. Ord. 11, giving leave to serve out of the jurisdiction (*Musurus Bey v. Gadban*, 1894, 2 Q. B. 352). As to the meaning of "beyond seas" in these acts, see Civil Proc. Act, 1833, s. 7 (p. 217, *ante*); and Merc. Law Amdt. Act, 1856, s. 12 (*post*, p. 241); and see, as to the effect of the proviso relating to plaintiffs beyond the seas, *Perry v. Jackson* (4 T. R. 516); *Lafond v. Ruddock* (13 C. B. 813; 2 Atk. 610—614); *Strithorst v. Græme* (3 Wils. 145); *Le Veux v. Berkeley* (5 Q. B. 836); *Townsend v. Deacon* (3 Exch. R. 706); *Smith v. Hill* (1 Wils. 134; 4 T. R. 311); *Denys v. Shuckburgh* (4 Y. & Coll. 47).

One of several
under dis-
ability.

Under 4 Anne, c. 16, s. 19, if a right of action accrued against several persons, one of whom was beyond seas, the statute did not run until his return, though the others had never been absent from the kingdom (*Fannin v. Anderson*, 7 Q. B. 811; *Towns v. Mead*, 16 C. B. 123; see M. L. A. Act, 1856, ss. 10, 11, *post*, p. 240).

Representa-
tives of per-
sons dying
under dis-
ability.

Where a person died abroad, to whom a right of action had accrued during his residence there, and he never returned to this country, his executors could sue for it, although more than six years had elapsed since it accrued. It was unnecessary to consider the question whether the executor could maintain the action after the expiration of six years from the death; *Parke, B.*, inclining to the opinion that the executor was under no restraint; but *Rolfe, B.*, thinking it would be more reasonable to consider the right of action as accruing to the executor at the death of the testator, and to limit the right of action accordingly (*Townsend v. Deacon*, 3 Exch. 706). A person gave his creditor a bill, and, before the bill arrived at maturity, went to India, whence he never returned. As soon as circumstances would permit after his death in India, his will was proved in England. A creditor's bill filed within six years after his death was held not barred (*Story v. Fry*, 1 Y. & Coll. C. C. 603; see *Williams v. Jones*, 13 East, 439; and *Flood v. Patterson*, 29 Beav. 295).

EXPRESS ACKNOWLEDGMENTS.

9 Geo. 4,
c. 14, s. 1.

THE STATUTE OF FRAUDS AMENDMENT ACT, 1828, ss. 1, 3, 4.

9 GEO. 4, c. 14.

*An Act for rendering a Written Memorandum necessary to the
Validity of certain Promises and Engagements.*

[19th May, 1828.]

§ 1. *No Acknowledgment sufficient unless in Writing or by Payment...*229.

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The stat. 9 Geo. 4, c. 14, recites the stat. 21 Jac. 1, c. 16, s. 3, and the Irish stat. 10 Car. 1, sess. 2, c. 6, and that various questions had arisen in actions founded on simple contracts, as to the proof and effect of acknowledgments and promises offered in evidence, for the purpose of taking cases out of the operation of the said enactments; and that it was expedient to prevent such questions, and to make provision for giving effect to the said enactments, and to the intention thereof; and enacts (sect. 1).

In actions of debt or upon the case grounded upon any simple contract, no acknowledgment or promise, by words only, shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of the said enactments, or either of them, or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some writing to be signed by the party chargeable thereby; and that, where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, executor or administrator, shall lose the benefit of the said enactments, or either of them, so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them: provided always, that nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever: provided also, that in actions to be commenced against two or more such joint contractors, or executors or administrators, if it shall appear at the trial or otherwise that the plaintiff, though barred by either of the said recited acts or this act as to one or more of such joint contractors, or executors or administrators, shall nevertheless be entitled to recover against any other or others of the defendants by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against

In actions of debt or upon the case no acknowledgment shall be deemed sufficient, unless it be in writing or by part payment.

Proviso for case of joint contractors.

9 Geo. 4,
c. 14, s. 1.

the plaintiff. See as to Ireland, 16 & 17 Vict. c. 113, ss. 24, 25, and 26.

Old law.

Before the above Act the plaintiff was permitted, although the time limited by the Lim. Act, 1623, had elapsed, to prove an acknowledgment, or "promise to pay, within six years, which was sufficient to entitle him to recover (*Willis v. Newham*, 3 Y. & Jerv. 522). To provide a remedy against vague verbal promises, this Act was passed (*Towler v. Chatterton*, 6 Bing. 264).

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(1)

ACKNOWLEDGMENTS
IN WRITING.

The intention of the Act was not to make any alteration in the legal construction to be put upon acknowledgments or promises made by debtors, but to require a different mode of proof; substituting the certain evidence of writing, signed by the party chargeable, for the insecure testimony derived from the memory of witnesses (*Haydon v. Williams*, 7 Bing. 163; see *Courtenay v. Williams*, 3 Ha. 549; *Moodie v. Bannister*, 4 Drew. 440; *Emery v. Day*, 1 C. M. & R. 245).

Parol
evidence.

Where a written promise to pay a debt barred by the statute has been lost, parol evidence is admissible of the contents of the writing (*Haydon v. Williams*, 7 Bing. 163; see *Read v. Price*, 1909, 2 K. B. 724). It is also admissible to connect two letters relied on as an acknowledgment (*M'Guffie v. Burleigh*, 78 L. T. 264). But it is doubtful whether the date of the written acknowledgment can be supplied by oral evidence (*Edmunds v. Downes*, 2 C. & M. 459). It is not necessary that the writing should specify the debt or the matter out of which it arose (*Whitcombe v. Steere*, 19 Times L. R. 697. See *Spickernell v. Hotham*, Kay, 699; *Kennett v. Milbank*, 8 Bing. 38).

When acknowledgment must be made.

An acknowledgment made within six years before action brought is sufficient, although it be made more than six years after the original cause of action (*Spickernell v. Hotham*, Kay, 669; see *Re Lane*, 23 Q. B. D. 74). Compare the rule on this point as to land, *ante*, p. 180, and as to money charged on land, *ante*, p. 195. An acknowledgment made after action brought cannot be used to take a case out of the statute (*Bateman v. Pinder*, 3 Q. B. 574).

Acknowledgments by agent.

Previously to the M. L. A. Act, 1856, it was held, under 9 Geo. 4, c. 14, that an acknowledgment signed by an agent of the debtor would not revive a debt barred by the Lim. Act, 1623, but that it must have been signed by the debtor himself (*Hyde v. Johnson*, 2 Bing. N. C. 776; *Clark v. Alexander*, 8 Scott, N. R. 165; see *Swift v. Winterbotham*, L. R. 8 Q. B. 249; and *Williams v. Mason*, 21 W. R. 386). An acknowledgment signed by an agent is now sufficient (see M. L. A. Act, 1856, s. 13, *post*, p. 241). Thus an acknowledgment by a solicitor bound his client (*Curwen v. Milburn*, 42 Ch. D. 432). And an acknowledgment by one partner would probably be regarded as an acknowledgment by the firm (*Lindley, Partnership*, 7th ed. 295). Compare the case of payments by one partner (*Watson v. Woodman*, 20 Eq. 730; *Re Tucker, T. v. T.*, 1894, 3 Ch. 429). Where a debt due from a company to L. was barred, and the board of directors, of whom L. was one, passed a resolution in reference to the debt, it was said, that even if the resolution had been a sufficient acknowledgment, it would not have bound the company (*Loundes v. Garnett*, 33 L. J. Ch. 418).

By one of several executors.

Since 9 Geo. 4, c. 14, one of several executors can bind the estate by an acknowledgment or promise (*Re Macdonald, Dick v. Fraser*, 1897, 2 Ch. 187), and after the death of the promisor payment of the debt may be ordered out of assets in hands of the surviving executors (*Ib.*). See before 9 Geo. 4, c. 14, *Tulloch v. Dunn*, 1 Ry. & M. 416; *Scholey v. Walton*, 12 M. & W. 514.

By infants.

A written acknowledgment of a debt by an infant is sufficient if the debt was for necessities (*Willins v. Smith*, 4 Ell. & Bl. 180). Note, however, that it is provided by Infants' Relief Act, 1874, s. 2, that no action shall be

brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age. 9 Geo. 4, c. 14, s. 1.

An acknowledgment made to a third party will not take the case out of the statute (*Moodie v. Bannister*, 4 Drew. 439; *Fuller v. Redman*, 26 Beav. 619; *Grenfell v. Girdlestone*, 2 Y. & Coll. Exch. 676; *Tanner v. Smart*, 6 B. & C. 603; *Stamford Banking Co. v. Smith*, 1892, 1 Q. B. 765; *Rogers v. Quin*, 26 L. R. Ir. 136. But an acknowledgment to the agent of the creditor to an agent will be sufficient (*Edmonds v. Goater*, 15 Beav. 415). Acknowledgment to a third party:

An admission by a bankrupt in his balance-sheet will not, as between the creditor and the bankrupt's assignees, take a debt out of the statute (*Pott v. Clegg*, 16 M. & W. 321); where it was also held that an admission in an unsigned letter, written and sent by direction of the assignees of a bankrupt, by an accountant employed by them to wind up the affairs of the bankrupt estate, would not take a debt of the bankrupt out of the statute (see *Everett v. Robertson*, 1 Ell. & Ell. 16, and *Ex p. Topping*, 34 L. J. Bk. 44). An advertisement under Law of Prop. Amendt. Act, 1859; s. 29, Advertise-ment to creditors to bring in their claims will not take a debt out of the statute (*Re Stephens, Warburton v. Stephens*, 43 Ch. D. 43). So in the case of advertisements before that act (*Scott v. Jones*, 4 Cl. & Fin. 382). But an admission in cross-examination, and appearing in a signed deposition, may amount to an acknowledgment (*Re Beynon*, 1873, W. N. 186). So also a statement by the debtor in an affidavit for probate (*Re Emmett, Jenkins v. Affidavit. Emmett*, 1906, W. N. 201; see *Smith v. Poole*, 12 Sim. 17; *Maniram v. Seth*, 22 T. L. R. 619). Bankrupt's balance sheet. Deposition.

To prevent the right to have an account from being barred by the statute, it is not necessary to have an acknowledgment that a debt is actually due, but it is sufficient that there should be an acknowledgment that the account is pending, and a promise to pay the balance if it should be found to be against the accounting party (*Prance v. Sympson*, Kay, 678; see *Langrish v. Watts*, 1903, 1 K. B. 636; *Maniram v. Seth*, 22 T. L. R. 619). If, since the stat. 9 Geo. 4, c. 14, a defendant, by letter, admits a balance to be due, without stating the amount, this will take the case out of the statute, but the damages will be nominal unless the amount be proved at the trial (*Dickenson v. Hatfield*, 5 C. & P. 46; *Bird v. Gammon*, 3 Bing. N. C. 833; *Archer v. Leonard*, 15 Ir. Ch. Rep. 67, a promise to pay a solicitor an amount to be ascertained by taxation; *Chestyn v. Dalby*, 4 Y. & C. 238, where the recitals of a deed amounted to a promise to pay an amount to be ascertained as mentioned in the deed; *Dodson v. Mackey*, 8 Ad. & El. 225, n.; *Dabbs v. Humphries*, 10 Bing. 446; *Lechmere v. Fletcher*, 1 C. & M. 623; *Waller v. Lacy*, 1 Scott, N. R. 186). Amount need not be stated.

The legal effect of an acknowledgment of a debt, barred by the Statute of Limitations, is that of a promise to pay the old debt, and for this purpose the old debt may be said to be revived. It is revived as a consideration for a new promise. But the new promise, and not the old debt, is the measure of the creditor's right. If a debtor simply acknowledges an old debt, the law implies from that simple acknowledgment a promise to pay it, for which promise the old debt is a sufficient consideration. But if the debtor promises to pay the whole debt when he is able, or by instalments, or in two years, or out of a particular fund, the creditor can claim nothing more than the promise gives him (*Philips v. Philips*, 3 Hare, 299; since adopted, *Buckmaster v. Russell*, 10 C. B. N. S. 749; *Chasemore v. Turner*, L. R. 10 Q. B. 505; *Lusher v. Hassard*, 20 T. L. R. 563; compare *Re Wheeler, Hankinson v. Hayter*, 1904, 2 Ch. 70). On this principle a mere acknowledgment of a debt, accompanied with a proposal to pay part, which has not been acceded to, is not sufficient to take the case out of this statute (*Francis v. Hawkesley*, 1 Ell. & Ell. 1052). Effect of an acknowledgment.

The construction of an acknowledgment is a question for the court, not the jury, except where the document is connected with other evidence affecting the construction (*Morrell v. Frith*, 3 M. & W. 402; *Bird v. Gammon*, ledgment.

9 Geo. 4,
c. 14, s. 1.

3 Bing. N. C. 883; *Power v. Barham*, 4 Ad. & Ell. 473; *Smith v. Thorne*, 18 Q. B. 140).

What a sufficient acknowledgment.

There must be —(a) acknowledgment, or (b) unconditional promise, or (c) conditional promise and evidence of condition performed.

Instances of sufficient acknowledgments.

On the construction of acknowledgments the following principles have been laid down. A mere acknowledgment is not sufficient to take a case out of the statute, unless there be a promise to pay; upon a general acknowledgment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where the party guards his acknowledgment, an implication will not arise (*Tanner v. Smart*, 6 B. & C. 602). A statement of inability to pay does not *per se* exclude the implication of a promise (*Firth v. Slingsby*, 58 L. T. 485), nor the expression of a hope to pay (*Whitcombe v. Steere*, 19 Times L. R. 697; *Cooper v. Kendall*, 1909, 1 K. B. 405). In *Smith v. Thorne* (18 Q. B. 134, 139), *Parke, B.*, said, "the acknowledgment must be consistent with an intention to pay, either on request, or else (which practically comes to the same thing) at the end of a particular period which has elapsed, or on some condition which has been fulfilled" (see *Everett v. Robertson*, 1 Ell. & Ell. 20). "There must be, in order to take the case out of the statute, one of the three following things: either there must be an acknowledgment of the debt from which a promise to pay it must be implied: or secondly, there must be an unconditional promise to pay the debt: or thirdly, there must be a conditional promise to pay the debt in writing, and evidence that that condition has been performed" (*Mitchell's Claim*, 6 Ch. 828).

The following letters by debtors have been held sufficient acknowledgments from which a promise to pay must be implied:—"In regard to your statement of account received, I am ashamed the account has stood so long, I must beg to trespass on your kindness a short time longer" (*Cornforth v. Smithard*, 1 H. & N. 13). "It is my wish to settle your account immediately, but being at a distance I wish everything very explicit and correct. I have asked Mrs. H. (Defendant's agent) to mark the agreements, and send them to me, and I will return them by first post, with instructions to pay, if correct" (*Sidwell v. Mason*, 2 H. & N. 306; see *Whitcombe v. Steere*, 19 T. L. R. 697). "When the policy is paid on the 29th October, I hope that you will have whole of your account ready for me as I hope to be with you on that day": followed by a second letter, "Oct. 25, Mr. V., when here on Saturday, stated that the amount due against me was about 280*l.*; of course this includes the 10*l.* and interest that I had some years since, and the 40*l.* promissory note that I jointly signed with the late Mr. B." (*Godwin v. Culley*, 4 H. & N. 373). "I am sure that I am anxious to get out of your debt. I will endeavour to send you a little next week" (*Lee v. Wilmot*, L. R. 1 Ex. 364). "I shall be obliged to you to send in your account made up to Christmas last. I shall have much work to be done this spring, but cannot give further orders till this be done": followed by another letter, "I again beg of you to send in your account" (*Quincey v. Sharpe*, 1 Ex. D. 72). A request for the delivery of "any unsettled bill" (*Curwen v. Milburn*, 42 Ch. D. 424). The submission, formerly inserted in a petition for taxation, to pay what shall be found due (*Re Margetts*, 1896, 2 Ch. 263; see now *Re Brockman*, 1909, 2 Ch. 170). An indorsement by the maker of a promissory note, with his name, together with the date, upon the note (*Bourdin v. Greenwood*, 13 Eq. 281). So where a first mortgagee who had sold the property, wrote to the second mortgagee enclosing account showing balance after payment of first mortgage, and offered explanation (*Banner v. Berridge*, 18 Ch. D. 254, see 274). S. borrowed of J. 200*l.* upon promissory notes, and a year afterwards remitted to J. 10*l.* on account of the interest due, and sent him a bill of 17*l.* for goods. J. wrote, acknowledging the 10*l.* and bill and stated that he placed both sums to the credit of S., and requested S. to receipt the bill and return. In an action for the 17*l.*, it was held, that the above letter took the case out of the statute (*Evans v. Simon*, 9 Exch. 282).

Unconditional promises.

The following were held to be unconditional promises to pay:—"I hope to be in H. very soon, when I trust everything will be arranged with Mrs. W. agreeable to her wishes" (*Edmonds v. Goater*, 15 Beav. 415; see *Fuller v.*

Redman, 26 Beav. 620). "I shall repeat my assurance to you of the certainty of your being repaid your generous loan. Let matters remain as they are a short time and all will be right" (*Collis v. Stack*, 1 H. & N. 605, in which case it was said that the question in these cases is, whether the statement as to the time of payment is merely an excuse, or the condition on which payment is to be made). "I shall be taking some money next month, and will then try to settle with you" (*Pryke v. Hill*, 79 L. T. 738). "Show this letter to Mrs. W., and tell her the claim has not been forgotten by me, and shall be liquidated at the earliest opportunity" (*Wilby v. Elgee*, L. R. 10 C. P. 497).

9 Geo. 4,
c. 14, s. 1.

Where a debtor says he does not owe the amount claimed, but that if Conditional vouchers are furnished he will pay what is due, there is a conditional promise promises. (*Langrish v. Watts*, 1903, 1 K. B. 641; see *Skeet v. Lindsay*, 2 Ex. D. 314). So where the debtor wrote, "The old account between us, which has been standing over so long, has not escaped our memory, and as soon as we can get our affairs arranged, we will see you are paid" (*Chasemore v. Turner*, L. R. 10 Q. B. 500). The following is an instance of a conditional promise Condition to pay, the condition having been performed. A debtor wrote to his creditor, performed. "I will pay you as soon as I get it in my power: before I cannot." Held, that time commenced to run when the debtor became of ability to pay, and not before (*Hammond v. Smith*, 33 Beav. 452; see *Waters v. Thanet*, 2 Q. B. 757; *Buckleigh v. Eden*, 61 L. T. 360).

See also *Archer v. Leonard* (15 Ir. Ch. R. 267); *Leland v. Murphy* (16 Ir. Ch. R. 500); *Burrows v. Baker* (1 R. 3 Eq. 596); *Fiske v. Mitchell* (19 W. R. 798).

An acknowledgment, accompanied with what is a contradiction of any Instances of promise to pay, is not sufficient (*Linsell v. Bonsor*, 2 Bing. N. C. 241). If insufficient the acknowledgment does not amount to a new promise, it is not sufficient acknowledgments. (*Fearn v. Lewis*, 6 Bing. 349; *Scales v. Jacob*, 3 Bing. 638; *Ayton v. Bolt*, 4 Bing. 105). Therefore a letter acknowledging that the plaintiff made a demand, but not acknowledging the propriety of the demand, and denying all liability, was insufficient (*Brigstock v. Smith*, 1 C. & M. 483). So where the debtor expressed a hope that the creditor would name some figure less than the principal and interest (*Mowbray v. Appleby*, 80 L. T. 805). The following letters written by debtors have been held not to be sufficient:—"I am happy to say that by that time both the principal and interest will have been paid in full" (*Green v. Humphreys*, 26 Ch. Div. 474). "A paper has been received purporting to be a memorandum of account between you and this company, which is altogether incorrect, omitting all deductions and credits, which would leave a balance considerably in their favour. The company are still willing to have all accounts decided by arbitration" (*Mitchell's Claim*, 6 Ch. 822). "I am in hopes that I shall be able to transfer the mortgage to enable me to clear off the whole that may be standing against me" (*Smith v. Thorne*, 18 Q. B. 134). "I give the above accounts to you, so you must collect them and pay yourself, and I will then be clear" (*Routledge v. Ramsey*, 8 Ad. & Ell. 221). "I have been in almost daily expectation of being enabled to give a satisfactory reply to your application. I will call upon you (the plaintiff's solicitor) to-morrow on the matter" (*Morrell v. Frith*, 8 C. & P. 246). "I am not conscious of ever having had this bill put before me till now, nor did I know it was owing. I am much annoyed that it should have been so long unsettled" (*Collinson v. Margetson*, 27 L. J. Ex. 305). "I never shall be able to pay you in cash, but you may have any of the goods we have at the pantechicon by paying the expenses incurred thereon, as before agreed" (*Cawley v. Furnell*, 12 C. B. 291). "I do not wish to avail myself of the Statute of Limitations to refuse payment of the debt. I have not the means of payment, and must crave a continuance of your indulgence. In time an augmentation of salary may enable me to propose some satisfactory arrangement" (*Rackham v. Marriott*, 2 H. & N. 196). "It is agreed that Mr. H. in his general account shall give credit to Dr. H. for 17*l.*, being for bricks delivered to the trustees of Y. P. chapel in 1834" (*Hughes v. Paramore*, 7 D. M. & G. 229). "I

9 Geo. 4,
c. 14, s. 1.

Instances of
insufficient
acknowledg-
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have no wish to have anything to do with the lawyers, much less do I wish to deny a just debt. I cannot, however, get rid of the notion that my account with you was settled when I left the army. But as you declare it was not settled, I am willing to pay you 10% per annum until it is liquidated" (*Buckmaster v. Russell*, 10 C. B. N. S. 745). "I will not fail to meet the plaintiff on fair terms, and have now a hope, before perhaps a week from this date, I shall have it in my power to pay him at all events a portion of the debts, when we shall settle about the liquidation of the balance" (*Hart v. Pendergast*, 14 M. & W. 745; see *Gardner v. M'Mahon*, 3 Q. B. 561; *Fuller v. Redman*, 26 Beav. 620). A letter in which the defendant stated "that family arrangements have been making to enable him to discharge the debt; that funds have been appointed for that purpose, of which A. is trustee; and that the defendant has handed the plaintiff's account to A.; and that some time must elapse before payment, but that the defendant is authorized by A. to refer the plaintiff to him for any further information" (*Whippy v. Hillary*, 3 B. & Ad. 399).

The renewal of former promissory notes by a debtor cannot be considered as a promise rendering a party liable to pay original debts, but only that the party intended to give a fresh security limited to the new notes (*Foster v. Dawber*, 6 Exch. 839). A deed of composition was not evidence of a promise nor an acknowledgment, for the debt acknowledged remained to be made out by parol evidence (*Kennett v. Milbank*, 8 Bing. 38). P., indebted to the executors of C. in 1,100*l.* to which A. was beneficially entitled, wrote to A.:—"I have sent you a note for the money due to you, which your mother left for you." Inclosed was a promissory note insufficiently stamped. The letter was not a sufficient acknowledgment, it being impossible to refer to the note (*Parmiter v. Parmiter*, 3 D. F. & J. 461). See the cases as to parol evidence above.

Improvement commissioners appointed a committee, who made a report with schedule of liabilities, including arrears of salary due to a clerk. The commissioners' entry in their minute book accepted the report. Held, no sufficient acknowledgment of the debt (*Bush v. Martin*, 2 H. & C. 311; 11 W. R. 1078; see *Re Severn R. Co.*, 1896, 1 Ch. 559; see also *Emery v. Day*, 1 C. M. & R. 245; *Lowndes v. Garnett*, 33 L. J. Ch. 418; 12 W. R. 573). In *Williams v. Griffith* (3 Exch. 335), letters were not sufficient to take the plaintiff's claim, nor an account and affidavit sufficient to take the defendant's set-off, out of the statute. An admission of a debt made to a person, who at the same time signed a paper purporting to be a discharge of the debt, is not a sufficient acknowledgment though the discharge was inoperative in itself, and was given upon a consideration which the debtor failed to observe (*Goate v. Goate*, 1 H. & N. 29). A debtor with a view to an arrangement inserted the debt in the account of his debts, and his proposal was, that "for the future payment or compromise of such debts and engagements," he proposed to assign all his estate, &c.: held, not a sufficient acknowledgment (*Everett v. Robertson*, 1 Ell. & Ell. 16). An account stated between the defendant, a part owner and ship's husband, and his co-owners, in which the items of the plaintiff's account for work done and money advanced are included, is not a sufficient acknowledgment (*Nash v. Hill*, 1 F. & F. 198). Where the defendant and H. gave to the plaintiff a joint and several promissory note, and after time had run the defendant wrote to the plaintiff, "I hereby consent to your receiving the dividend under H.'s assignment, and agree that your so doing shall not prejudice your claim upon me for the same debt." Held not a sufficient acknowledgment (*Cockrill v. Sparke*, 1 H. & C. 699). In *Cassidy v. Firman* (1 R. 1 C. L. 8), and *Crawford v. Crawford* (1 R. 2 Eq. 166) acknowledgments were held to be insufficient. See further Darb. & Bos. Stat. Lim. 2nd ed. 81—91.

Conditional
promises.
Condition not
performed.

The following have been held to be conditional promises, the conditions of which were not shown to have been performed:—"I will send it as soon as possible, send your account next week" (*Bethell v. Bethell*, 34 Ch. D. 561); "I shall be glad as soon as my position becomes somewhat better to begin again my instalments" (*Meyerhoff v. Froehlick*, 4 C. P. Div. 63);

"I cannot pay the debt at present, but I will pay it as soon as I can" (*Tanner v. Smart*, 6 B. & C. 602); "If in funds I would immediately pay the money and take the bill out of your hands" (*Richardson v. Barry*, 29 Beav. 22); "I shall be happy to pay you both principal and interest as soon as convenient, I shall pay no more interest till we have a fair settling" (*Edmunds v. Downes*, 2 C. & M. 459). An agreement to pay the amount found due by Arbitration, where the arbitration proved ineffective (*Fenner v. Lord*, 14 Times L. R. 450). "I cannot pay off anything of my account at present. As soon as I have the money, I shall forward you a cheque" (*Lusher v. Hassard*, 20 Times L. R. 563). "In the event of my selling my shares in the A. Co. I will pay the calls on such shares and the balance in settlement of my account" (*Barrett v. Davies*, 91 L. T. 736).

9 Geo. 4,
c. 14, s. 1.

No memorandum or other writing made necessary by 9 Geo. 4, c. 14, shall be deemed to be an agreement within the meaning of any statute relating to the duties of stamps (9 Geo. 4, c. 14, s. 8; 16 & 17 Vict. c. 113, s. 27, Ir.). Under this section the following memorandum:—"I acknowledge to owe to M. 36*l.*, which I agree to pay him as soon as circumstances will permit," is exempt from stamp duty, as a writing made necessary by that statute, provided it be put in for the mere purpose of barring the statute, the debt itself being proved by other evidence (*Morris v. Dixon*, 4 Ad. & Ell. 845). When the parties mean to make an instrument solely to prevent the operation of 9 Geo. 4, c. 14, they must take care not to import into it terms which will make it liable to stamp duty as a promissory note. A promissory note, improperly stamped, is not admissible as a memorandum to take a case out of the statute under the 9 Geo. 4, c. 14, s. 8; that section applies only to instruments which might be stamped with an agreement stamp (*Jones v. Ryder*, 4 M. & W. 32; see also *Purmiter v. Parmiter*, 3 D. F. & J. 461).

Acknowledgment exempted from stamp duty.

9 Geo. 4,
c. 14, s. 8.

In addition to written acknowledgments, a creditor may, for the purpose of taking a case out of the statute, rely on the act of part payment (*Emery v. Day*, 1 C. M. & R. 249). This is the result not of the statute, but of judicial decision grafted on the statute (*Re Hollingshead, Hollingshead v. Webster*, 37 Ch. D. 657). The payment is sufficient even though at the time the debt is barred (*Re Lane*, 23 Q. B. D. 74); and even if the payment could be recovered back as *pro tanto* a fraudulent preference (*Ib.*).

(2)

ACKNOWLEDGMENT BY PAYMENT.

In order to take a case out of the statute by a part payment it must appear, in the first place, that the payment was made on account of a debt; secondly, that the payment was made on account of the debt for which the action is brought; and thirdly, that the payment was made as part of a greater debt; because the principle upon which a part payment takes a case out of the statute is, that it admits a greater debt to be due at time of the payment (*Tippets v. Heane*, 1 C. M. & R. 252; see *Wainman v. Kynman*, 1 Exch. R. 118; *Waugh v. Cope*, 6 M. & W. 829). Part payment to come within the statute must be a payment from which a promise may be inferred to pay the remainder (*Stamford Banking Co. v. Smith*, 1892, 1 Q. B. 769; *Foster v. Dawber*, 6 Exch. 839; *Marrecco v. Richardson*, 1908, 2 K. B. 588. See *Sims v. Brutton*, 5 Exch. 802; *Re Somerset, Somerset v. Poulett*, 1894, 1 Ch. 268; *Friend v. Young*, 1897, 2 Ch. 421). The reason why the effect of such a payment is not lessened by the act 9 Geo. 4, c. 14, is, that it is not a mere acknowledgment by words, but it is coupled with a fact (*Waters v. Tompkins*, 2 C. M. & R. 726; see *Morgan v. Rowlands*, L. R. 7 Q. B. 493).

Part payment of principal.

Payment of interest upon a promissory note payable on demand will take the principal sum secured by the note out of the statute, although there be no independent evidence of any demand having been made (*Bamfield v. Tupper*, 7 Exch. 27; *Beally v. Greenslade*, 2 C. & J. 61; *Wyatt v. Hodson*, 8 Bing. 309). But the payment of interest must be such that a promise to pay the principal can be inferred (*Morgan v. Rowlands*, L. R. 7 Q. B. 498). Accordingly, payment under compulsion of law is not enough (*Ib.*). And payment by trustees to a tenant for life of interest on a mortgage debt was not an acknowledgment of their liability to pay the principal in the investing of which a breach of trust had been committed (*Re Somerset, Somerset v.*

Payment of interest.

- 9 Geo. 4, c. 14, s. 1. *Poulett*, 1894, 1 Ch. 231; *Re Fountaine*, *Fountaine v. Amherst*, 1909, 2 Ch. 382). As to whether a part payment of principal will take a claim for interest out of the statute, see *Collyer v. Willcock*, 4 Bing. 313; Darb. & Bos. Stat. Lim. 108.
- Insufficient payments. A debt will not be kept alive by payment into court (*Long v. Greville*, 3 B. & C. 10; distinguish *Re Dennis*, 1895, 2 Q. B. 630); nor by the payment of a dividend under an insolvency (*Davies v. Edwards*, 7 Exch. 22; *Taylor v. Hollard*, 1902, 1 K. B. 676), or under an inspectorship deed (*Ex p. Topping*, 34 L. J. Bank. 44). The effect of a payment may be qualified by words used at the time, but the jury must judge the truth of statements accompanying the admission of a previous payment (*Baildon v. Walton*, 1 Exch. 617; see *Trentham v. Deverill*, 3 Bing. N. C. 397). Where payment was relied upon as taking a debt out of the statute, it was for the jury to judge whether such payments were made in respect of interest or in respect of an annuity (*Baildon v. Walton*, *sup.*). As to the effect of payments by guardians of one union to those of another, see *Wycombe Union v. Eton Union* (1 H. & N. 687).
- Appropriation. Where, several debts being due of which some are barred and some not barred, the debtor pays a sum without appropriating it to any debt, such payment will not, in the absence of evidence, be appropriated so as to revive the debts barred (*Mills v. Fowkes*, 5 Bing. N. C. 455). *Semble*, the creditor cannot, without the consent of the debtor, appropriate the payment, so as to entitle himself to sue for the balance of a barred debt (*Nash v. Hodgson*, 6 D. M. & G. 490; see, however, the judgment of *Knight-Bruce*, L. J., *S. C.*). And such consent will not be inferred from the debtor omitting to question an account sent to him which shows the appropriation (*Re McHenry*, *McDermott v. Boyd*, 71 L. T. 146). The creditor, however, may appropriate the payment towards satisfaction of such debt (*Mills v. Fowkes*, *sup.*; distinguish *Friend v. Young*, 1897, 2 Ch. 421). The creditor may appropriate up to the very last moment (*The Mecca*, 1897, A. C. 294; *Seymour v. Pickett*, 1905, 1 K. B. 715). But his right of appropriation was held to have ceased (*Smith v. Betty*, 1903, 2 K. B. 317). It may, of course, be shown that the debtor has himself appropriated the payment to any particular debt (*Gwynn v. Gwynn*, 41 L. T. 610). Where neither party has made any appropriation, the appropriation which the law will make as between items barred and not barred is discussed *Re Boswell*, *Merritt v. Boswell*, 1906, 2 Ch. 366.
- Payment "on account." Payment by an agent to a principal of 300*l.* "on account" was an acknowledgment that there was an account between them on which more than 300*l.* would be payable, from which a promise to pay that balance must be inferred (*Friend v. Young*, 1897, 2 Ch. 436; see *Walker v. Butler*, 6 E. & B. 506).
- Proof of payment—by parol evidence; Part payment of principal or payment of interest on account of a debt is not affected by the 9 Geo. 4, c. 14, and therefore a *parol acknowledgment* of payment within six years before the action brought will take the case out of the statute (*Cleave v. Jones*, 6 Exch. 573; 20 L. J. Exch. 238; *Edwards v. Janes*, 1 K. & J. 534; *Bevan v. Gething*, 3 Q. B. 740). A witness, who said he settled all kinds of accounts for the defendant, admitted that an account containing a memorandum of a payment was in his own handwriting, but could not recollect the fact of payment: held, sufficient evidence to go to the jury, as to the fact of payment (*Trentham v. Deverill*, 3 Bing. N. C. 397; see further, as to parol evidence of part payment, *Morley v. Finney*, 1870, W. N. 82). A letter not in itself sufficient as a written acknowledgment may form part of the evidence for deciding the question whether there has been a payment (*Collinson v. Margesson*, 27 L. J. Ex. 305).
- by indorsements on bills and notes. Indorsements on bills and notes treated as evidence of payment are dealt with by sect. 3, *post*.
- Entries in debtor's books. See as to admitting in evidence entries in a deceased's books, on the ground that they were against interest, *Taylor v. Witham* (3 Ch. D. 605); *Newbould v. Smith* (29 Ch. D. 882).
- To constitute a payment sufficient to take a debt out of the statute it is not essential that money should pass between the parties. Thus there was a

sufficient payment where the creditor gave a receipt (*Maber v. Maber*, L. R. 2 Ex. 153); and where a debtor supported a creditor's child (*Bodger v. Arch*, 10 Exch. 333). Anything received upon an agreement, in reduction of a debt, is a payment within 9 Geo. 4, c. 14, s. 1, sufficient to take the debt out of the statute (*Hooper v. Stephens*, 4 Ad. & Ell. 71). If the parties to a bill of exchange agree that goods shall be supplied in part payment, and they are supplied and taken accordingly, that is sufficient part payment (*Hart v. Nash*, 2 C. M. & R. 337); but in order to make a delivery of goods operative, there must be some evidence of an agreement that such delivery shall be deemed equivalent to payment (*Cottam v. Partridge*, 4 Scott, N. R. 819). The stat. 9 Geo. 4, c. 14, does not apply to the fact of an account stated, where there are items on both sides; but the going through an account with items on both sides and striking a balance converts the *set-off* into *payments* (*Ashby v. James*, 11 M. & W. 342; *Worthington v. Grimsditch*, 7 Q. B. 484; *Clark v. Alexander*, 8 Scott, N. R. 165; *Amos v. Smith*, 1 H. & Colt. 238). See *Williams v. Griffiths* (2 C. M. & R. 45); *Hughes v. Paramore* (7 D. M. & G. 229). In *Scholey v. Walton* (12 M. & W. 510), the setting-off a sum of money in an account stated and settled was held to be a payment within the statute (see *Stewart v. Connick*, L. R. 5 C. L. 562). In another case a transaction in the nature of set-off was not a payment (*Re Boswell, Merritt v. Boswell*, 1906, 2 Ch. 368). The going through an account where there are items on one side only does not alter the situation of the parties at all (*Smith v. Forty*, 4 C. & P. 126; *Jones v. Ryder*, 4 M. & W. 32; *Mills v. Fowkes*, 5 Bing. N. C. 455).

9 Geo. 4,
c. 14, s. 1.

Modes in
which pay-
ment can be
made.

Payment
—by delivery
of goods;
—by settle-
ment of
accounts.

Set-off.

Where a bill is given in payment on account of a debt in such a manner as to raise an implication of a promise to pay the balance, this is sufficient part payment (*Turney v. Dodwell*, 3 Ell. & Bl. 136; *Irving v. Veitch*, 3 M. & W. 90). The promise is to be implied at the time when the bill is given (*Gowan v. Foster*, 3 B. & Ad. 513), and where a cheque was given in part payment, it being at the time verbally agreed that the cheque should not be presented until a later date, the only date at which the promise could be implied was the giving of the cheque, and time ran accordingly (*Marrecco v. Richardson*, 1908, 2 K. B. 584. See *Sparkes v. Restall*, 22 Beav. 587, where a second note was given as a new security).

Payment
—by giving
note or bill.

Payment may be made to an agent of the creditor (*Evans v. Davies*, 4 Ad. & Ell. 840). The payment of interest to a *cestui que trust* was held to keep alive the right of the trustee to maintain an action on a promissory note (*Meggison v. Harper*, 2 C. & M. 322). Payment to a husband of interest on a promissory note given to his wife before marriage, was held sufficient payment (*Hart v. Stephens*, 6 Q. B. 937).

Payment to
an agent;

Payment to a stranger is not sufficient (*Stamford Banking Co. v. Smith*, —to a 1892, 1 Q. B. 765). Unless possibly where the payment is made to a person filling a representative capacity, or who was believed to fill that capacity, when the payment might enure for the benefit of the persons for whom it was believed to be made (*Ib.* 769; *Clark v. Hooper*, 10 Bing. 480).

Before M. W. P. Act, 1882, an acknowledgment or part payment by a woman before marriage kept her debt alive, both as against herself and her after-taken husband. But similar acts by her after marriage were of no avail either against herself or as against her husband (*Pittam v. Foster*, 1 B. & C. 248; *Neve v. Hollands*, 18 Q. B. 262). The M. W. P. Act, 1882, enables a wife to keep alive her liabilities in respect of her separate estate by an acknowledgment or part payment, or by suffering judgment to be obtained against her. But such acts do not affect her husband (*Beck v. Pierce*, 23 Q. B. Div. 322).

Payment by
her a wife;

The words of the act, that "nothing herein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever," can never mean a payment made by a stranger, and without authority, but payment made by the principal debtor or someone acting by his authority (*Linsell v. Bonsor*, 2 Bing. N. C. 245; *Homan v. Andrews*, 1 Ir. Ch. R. 106). In *Jones v. Hughes* (5 Exch. 104), where money was advanced on a promissory note signed by the defendant thus:

—by an
agent;

9 Geo. 4.
c. 14, s. 1.

"I. H., churchwarden, J. E., overseer, or *others for the time being*," it was a question for the jury, whether the defendant had not constituted the parish officers for the time being his agents for payment of interest (see *Rew v. Pettet*, 1 Ad. & E. 196). As to whether payments by a company affect a director who has guaranteed the company's debt, see *Re Wolmershausen* (62 L. T. 541). In paying interest on a second mortgage a solicitor was held not to be the agent of the first mortgagee for whom he had previously acted on a sale (*Thorne v. Heard*, 1893, 3 Ch. 530). Payment of part of a debt by

—by receiver;

a receiver of a business (appointed under a power in a mortgage) kept alive the debt against the estate of the owner of the business (*Re Hale, Lilley v. Food*, 1899, 2 Ch. 107; compare *Whitley v. Lowe*, 2 De G. & J. 704). So payments by a receiver in lunacy towards the support of a lunatic maintained by poor law guardians (*Wandsworth v. Worthington*, 1906, 1 K. B. 420).

—by one of
a number of
joint con-
tractors, &c.

As to payments by one of a number of joint contractors, executors, or partners, see *Merc. Law Amdt. Act*, 1856, s. 14, *post*, p. 241. The case of payments by one of a number of persons bound by several promises is dealt with in *Re Wolmershausen* (62 L. T. 541). Payments having been made to residuary legatees by the executors, it was held that such payments whilst the debts of the testator remained unpaid were a breach of trust, and that the debts having been kept alive against the executors, the statute was no bar to the claim of the creditor as against the residuary legatees to the extent of their interest in the residue, and they must therefore refund the moneys they had received on account of the estate (*Fordham v. Wallis*, 10 Hare, 226; see *Re Brogden, Billing v. Brogden*, 38 Ch. D. 546). A claim by a creditor to make legatees refund was held barred by lapse of time and acquiescence (*Blake v. Gale*, 32 Ch. Div. 571).

Payment by
executors;
effect in
keeping alive
right to make
legatees
refund;

effect
against bene-
ficial devisee.

It was held under 47 Geo. 3, c. 74, that a payment by the executrix of a trader would not take a debt out of the statute, so as to enable the creditor to claim payment out of the real estate in the hands of a devisee (*Putnam v. Bates*, 3 Russ. 188; *conf. Wilson v. Leonard*, 3 Beav. 373, where a devisee was held not bound by the amount of a claim substantiated against the executor in an action at law to which he was not a party). And it has since been held under Administration of Estates Act, 1833 (*post*), that the payment of interest on a debt of the testator by the executors, they being also trustees of his real estate not subjected by the will to debts, did not necessarily keep the debt alive as against such real estate; for although the executors and trustees were the same persons, they filled different characters, and where the payments were made by them in the character of executors only, the real estate was not affected by it (*Fordham v. Wallis*, 10 Hare, 230; compare *Astbury v. Astbury*, 1898, 2 Ch. 119, where *Stirling, J.*, held that an acknowledgment which might have bound personal estate did not bind real estate; and see *Re England, Steward v. England*, 1895, 2 Ch. 109).

Where execu-
tor is bene-
ficial devisee.

Where execu-
tor is trustee.

Payment of interest on a testator's simple contract debt made by a party filling the two characters of beneficial devisee and executor, will be attributed to both characters, and not to one only, for the moral obligation does not attach more to one character than to the other. But it is otherwise where the characters held by the party are entirely distinct, as where he is personally liable as debtor, and is answerable also in the character of trustee of another; for he then represents two persons, and the question in such a case is by whom the promise is made and not what is its extent or effect (*Fordham v. Wallis*, 10 Hare, 225; compare *Brown v. Gordon*, 16 Beav. 302).

Consider now in connection with the last two paragraphs the effect of L. T. Act, 1897, sec. 1, *post*.

Right to
marshal.

The demand of a simple contract creditor as against the real estate of the testator, which would otherwise be barred by the statute, is not kept alive by the effect of any right to have the assets marshalled (*Fordham v. Wallis, sup.*; see, however, *Darb. & Bos. Stat. Lim.* 2nd ed. 130).

Payments
by devisees.

Having regard to the Debts Recovery Act, 1830 (*post*), several devisees

of distinct estates are jointly liable to a specialty creditor of their testator, and are "co-debtors" within sect. 14 of the M. L. A. Act, 1856 (*Re Lacey, Howard v. Lightfoot*, 1907, 1 Ch. 349). Their liability in respect of his simple contract debts appears to be similar (see the words of the Administration of Estates Act, 1833, *post*). If so, payment by one such devisee would not affect another. It has been held, however, that payment of interest on a simple contract debt by a devisee for life of the debtor's real estate will keep the creditor's right of action alive against all parties interested in such real estate in remainder (*Re Hollingshead, Hollingshead v. Webster*, 37 Ch. D. 651). It was said in one case that such a payment would operate to prevent time running as regards the testator's real estate only (*Boatwright v. Boatwright*, 17 Eq. 74).

9 Geo. 4,
c. 14, s. 3.

See further as to the acknowledgment of a simple contract debt by payment, *Whitcomb v. Whiting* (1 Smith, L. C.); and see the cases quoted under R. P. Lim. Act, 1874, s. 8 (*ante*, p. 193), and Civil Proc. Act, 1833, s. 5 (*ante*, p. 215).

3. That no indorsement or memorandum of any payment, written or made after the time appointed for this act to take effect, upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made, shall be deemed sufficient proof of such payment, so as to take the case out of the operation of either of the said statutes.

Indorsements
of payments.

As to this section, see *Bradley v. James*, 13 C. B. 822; *Briggs v. Wilson*, 5 D. M. G. 12.

4. That the said recited acts and this act shall be deemed and taken to apply to the case of any debt on simple contract, alleged by way of set-off on the part of any defendant, either by plea, notice, or otherwise.

Simple
contract
debts alleged
by way of
set-off.

See *ante*, p. 218.

VI.—THE MERCANTILE LAW AMENDMENT ACT, 1856.

19 & 20 VICT. c. 97, ss. 9—14.

An Act to amend the Laws of England and Ireland affecting Commerce. [29th July, 1856.]

§ 9. *Actions on Merchants' Accounts to be commenced within six years...*239.

§ 10. *Absence beyond seas and imprisonment of creditor not to be disability...*240.

§ 11. *Joint Debtors beyond seas...*240.

§ 12. *Definition of "beyond seas"...*241.

§ 13. *Acknowledgments by agents...*241.

§ 14. *Part payment by one co-contractor...*241.

9. All actions of account or for not accounting, and suits for such accounts, as concern the trade of merchandize between merchant and merchant (*a*), their factors or servants, shall be commenced and sued within six years after the cause of such actions or suits, or when such cause has already arisen then

19 & 20 Vict.
c. 97, s. 9.

Limitation of
actions for
"merchants'
accounts."

19 & 20 Vict.
c. 97, s. 10.

within six years after the passing of this act; and no claim in respect of a matter which arose more than six years before the commencement of such action or suit shall be enforceable by action or suit by reason only of some other matter of claim comprised in the same account having arisen within six years next before the commencement of such action or suit.

(a) *Ante*, p. 220.

Absence
beyond seas
or imprison-
ment of a
creditor not
to be a dis-
ability.

10. No person or persons who shall be entitled to any action or suit with respect to which the period of limitation within which the same shall be brought is fixed by the act of the twenty-first year of the reign of King James the First, chapter sixteen, section three (b), or by the act of the fourth year of the reign of Queen Anne, chapter sixteen, section seventeen, or by the act of the fifty-third year of the reign of King George the Third, chapter one hundred and twenty-seven, section five (c), or by the acts of the third and fourth years of the reign of King William the Fourth, chapter twenty-seven, sections forty, forty-one and forty-two (d), and chapter forty-two, section three (e), or by the act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty (f), shall be entitled to any time within which to commence and sue such action or suit beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some one or more of such persons, being at the time of such cause of action or suit accrued beyond the seas, or in the cases in which by virtue of any of the aforesaid enactments imprisonment is now a disability, by reason of such person or some one or more of such persons, being imprisoned at the time of such cause of action or suit accrued.

(b) *Ante*, p. 217.

(e) *Ante*, p. 210.

(c) *Ante*, p. 197.

(f) *Ante*, p. 211.

(d) *Ante*, pp. 186, 196.

This section was retrospective, and included causes of action accrued before the statute was passed (*Pardo v. Bingham*, 4 Ch. 755; see *Cornill v. Hudson*, 8 El. & Bl. 429).

Period of
limitation to
run as to joint
debtors in the
kingdom,
though some
are beyond
seas.

11. Where such cause of action or suit with respect to which the period of limitation is fixed by the enactments aforesaid or any of them lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas; and such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time the cause of action or suit

Judgment
recovered
against joint
debtors in the
kingdom to

accrued after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid.

19 & 20 Vict.
c. 97, s. 11.

be no bar to proceeding against others beyond seas after their return.

See *ante*, p. 228.

12. No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of her Majesty, shall be deemed to be beyond seas within the meaning of the act of the fourth and fifth years of the reign of Queen Anne, chapter sixteen, or of this act.

Definition of "beyond seas," within 4 & 5 Anne, c. 16, and this act.

See R. P. Lim. Act, 1833, s. 19, *ante*, p. 157; Civil Proc. Act, 1833, s. 7, *ante*, p. 217. This section of the act is not retrospective (*Flood v. Patterson*, 29 Beav. 295). A testator in Jersey appointed his Jersey wife executrix. She proved in Jersey, but not in England; and, though she had been three weeks in England after the death, she did not act there as executrix: held, that she could not be sued in England, and therefore that time did not run in favour of her testator's estate (*Ib.*).

13. In reference to the provisions of the acts of the ninth year of the reign of King George the Fourth, chapter fourteen, sections one and eight (*i*), and the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, sections twenty-four and twenty-seven (*k*), an acknowledgment or promise made or contained by or in a writing signed by an agent of the party chargeable thereby, duly authorized to make such acknowledgment or promise, shall have the same effect as if such writing had been signed by such party himself.

Provisions of 9 Geo. 4, c. 14, ss. 1 and 8, and 16 & 17 Vict. c. 113, ss. 24 and 27, extended to acknowledgments by agents.

(*i*) *Ante*, pp. 229.

(*k*) *Ante*, pp. 229, 230.

14. In reference to the provisions of the acts of the twenty-first year of the reign of King James the First, chapter sixteen, section three (*l*), and of the act of the third and fourth years of the reign of King William the Fourth, chapter forty-two, section three (*m*), and of the act of the sixteenth and seventeenth years of the reign of her present Majesty, chapter one hundred and thirteen, section twenty (*n*), when there shall be two or more co-contractors, or co-debtors, whether bound or liable jointly only or jointly and severally, or executors, or administrators of any contractor, no such co-contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest or other money, by any other or others of such co-contractors or co-debtors, executors or administrators.

Part payment by one contractor, &c. not to prevent bar by certain Statutes of Limitations in favour of another contractor, &c.

(*l*) *Ante*, p. 217.

(*m*) *Ante*, p. 210.

(*n*) *Ante*, p. 211.

19 & 20 Vict.
c. 97, s. 14.

Old law as to
payments by
one of several
joint con-
tractors.

Before this act payment of interest by one of the makers of a joint or joint and several promissory note took the case out of the Statute as against the other maker (*Whitcomb v. Whiting*, 2 Doug. 652), although such payment was made after the statute had run (*Channell v. Ditchburn*, 5 M. & W. 494; *Goddard v. Ingram*, 3 Q. B. 839; see *Atkins v. Tredgold*, 2 B. & C. 23; *Slater v. Lawson*, 1 B. & Ad. 396; *Burleigh v. Stott*, 8 B. & C. 36; *Munderston v. Robertson*, 4 M. & R. 140. The doctrine of *Whitcomb v. Whiting* was applied to the case of one of the co-contractors jointly liable being a principal and the other a surety (*Perham v. Raynall*, 2 Bing. 306; *Wyatt v. Hodson*, 8 Bing. 309).

But the doctrine was limited to cases where a joint liability existed, and was never applied where the liability arose from promises which were several only (*Re Wolmershausen*, 62 L. T. 544); even where one of the promisors was a principal mortgaging real estate and another a surety for him (*Ib.*). So where a joint contract was severed by the death of one of the contractors, nothing could be done by his personal representatives to take the debt out of the statute as against the survivor (*Slater v. Lawson*, 1 B. & Ad. 396; see *Read v. Price*, 1909, 1 K. B. 577), nor by the survivor so as to affect the deceased (*Atkins v. Tredgold*, 2 B. & C. 23).

Payments
after death of
one of several
joint con-
tractors.

Partners :
payments
after death of
one of several;

So also payments of interest on a partnership debt by surviving partners have not the effect of taking the debt out of the statute as against the real or personal estate of a deceased partner (*Way v. Basset*, 5 Hare, 55). See the doubts previously expressed as to this, *Winter v. Innes* (4 M. & Cr. 111); *Braithwaite v. Britain* (1 Keen, 221). Even where payments are made by a surviving partner, who is also executor of the deceased partner, the presumption seems to be that the payments are made in the character of surviving partner, and not as executor (*Thompson v. Walthman*, 3 Drew. 628; *Brown v. Gordon*, 16 Beav. 302).

payments
after dissolu-
tion.

Where a partnership continues, and all the partners are living, it has been decided, since 19 & 20 Vict. c. 97, that the above section does not apply to a payment made by one partner on account of a debt due by the firm, such a payment being considered as a payment of the firm itself (*Goodwin v. Parton*, 42 L. T. 91; see *Watson v. Woodman*, 20 Eq. 730). But where a partner retires, and the retirement is publicly announced, part payment by a continuing partner cannot be set up against the retiring partner as an answer to the statute (*Watson v. Woodman*, 20 Eq. 721; *Bristow v. Miller*, 11 Ir. L. R. 461). *Secus* where the retirement is secret (*Re Tucker*, 1894, 3 Ch. 429).

Executors.

For the effect before the M. L. A. Act, 1856, of a payment by one of several executors as regards his co-executors, see *Atkins v. Tredgold* (2 B. & C. 23); *Scholey v. Walton* (12 M. & W. 512). The effect since the act of one of several executors paying interest on a simple contract debt of his testator is discussed, *Re Hollingshead*, *Hollingshead v. Webster* (37 Ch. D. 658). See *Re Macdonald*, *Dick v. Fraser*, 1897, 2 Ch. 181.

Devises.

Where a specialty debtor dies having devised distinct estates to several persons, the devisees are "co-debtors" (within this section) in respect of their testator's specialties (*Re Lacey*, *Howard v. Lightfoot*, 1907, 1 Ch. 349). It seems that the tenant for life and remainderman of a single estate would not be co-debtors (*Ib.*; *Re Hollingshead*, *Hollingshead v. Webster*, 37 Ch. D. 657).

Other cases
on the
section.

Under the above section (which was held not retrospective as regards the date of the payment, *Jackson v. Woolley*, 8 E. & B. 784), part payment by one of two makers of a joint and several promissory note did not take the case out of the statute as against the other (*Cockrill v. Sparkes*, 1 H. & C. 699).

The section does not apply in the case of payments under R. P. Lim. Act, 1874, s. 8, *ante*, p. 193 (*Re Frisby*, *Allison v. Frisby*, 43 Ch. Div. 106). As to the effect of a mortgagor's payment of interest where by a separate instrument a surety had guaranteed the mortgage debt, see *Re Powers*, *Lindsell v. Phillips* (30 Ch. Div. 291, a separate bond); *Re Wolmershausen* (62 L. T. 541, a separate promissory note). And as to the effect of the section on the right of contribution between codebtors, see *Gardner v. Brooke*, 1897, 2 I. R. 6.

16. In citing this act it shall be sufficient to use the expression "The Mercantile Law Amendment Act, 1856." 19 & 20 Vict.
c. 97, s. 16.

Short title.

17. Nothing in this act shall extend to Scotland.

Extent of act.

VII.—THE TRUSTEE ACT, 1888.

51 & 52 VICT. C. 59, ss. 1, 8, 12.

An Act to amend the Law relating to the Duties, Powers, and Liability of Trustees. [24th December, 1888.]

1.—(1.) This act may be cited as the Trustee Act, 1888.

Short title,
extent, and
definition.

(2.) This act shall not extend to Scotland.

(3.) For the purposes of this act, the expression "trustee" shall be deemed to include an executor or administrator, and a trustee whose trust arises by construction or implication of law, as well as an express trustee, but not the official trustee of charitable funds.

(4.) The provisions of this act relating to a trustee shall apply as well to several joint trustees as to a sole trustee.

It is doubtful whether an executor, merely as such, comes within the above definition (*Iacons v. Warmoll*, 1907, 2 K. B. 362, 364). As regards moneys of a company under their control, directors are trustees within this section (*Re Lands Allotment Co.*, 1894, 1 Ch. 616; *National Bank of Wales*, 1899, 2 Ch. 629, 663; see *Re Kingston Cotton Co.*, 1896, 1 Ch. 347; *Whitwam v. Watkin*, 78 L. T. 188); but not a trustee in bankruptcy (*Re Cornish*, 1896, 1 Q. B. 99; see *Re Gallard*, 1897, 2 Q. B. 8). The word "trustee" included a husband who had seized his wife's separate estate (*Wassell v. Leggatt*, 1896, 1 Ch. 554); or property in which she had a separate life interest (*McArdle v. Gaughran*, 1903, 1 I. R. 106).

As to the cases of constructive trust in which independently of this act lapse of time would be a defence, see the note, *post*, p. 251.

8.—(1.) In any action or other proceeding against a trustee or any person claiming through him, except where the claim is founded upon any fraud or fraudulent breach of trust to which the trustee was party or privy, or is to recover trust property, or the proceeds thereof still retained by the trustee, or previously received by the trustee and converted to his use, the following provisions shall apply:—

Statute of
Limitations
may be
pleaded by
trustees.

(a.) All rights and privileges conferred by any statute of limitations shall be enjoyed in the like manner and to the like extent as they would have been enjoyed in such action or other proceeding if the trustee or person claiming through him had not been a trustee or person claiming through him:

(b.) If the action or other proceeding is brought to recover money or other property, and is one to which no existing statute of limitations applies, the trustee or

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c. 59, s. 8.

person claiming through him shall be entitled to the benefit of and be at liberty to plead the lapse of time as a bar to such action or other proceeding in the like manner and to the like extent as if the claim had been against him in an action of debt for money had and received, but so nevertheless that the statute shall run against a married woman entitled in possession for her separate use, whether with or without a restraint upon anticipation, but shall not begin to run against any beneficiary unless and until the interest of such beneficiary shall be an interest in possession.

(2.) No beneficiary, as against whom there would be a good defence by virtue of this section, shall derive any greater or other benefit from a judgment or order obtained by another beneficiary than he could have obtained if he had brought such action or other proceeding and this section had been pleaded.

(3.) This section shall apply only to actions or other proceedings commenced after the first day of January one thousand eight hundred and ninety, and shall not deprive any executor or administrator of any right or defence to which he is entitled under any existing statute of limitations.

As to the application (independently of the present act) of the Statutes of Limitation to proceedings against trustees, see in the case of land sect. 25 of the R. P. Lim. Act, 1833, *ante*, p. 162; in the case of money, whether charged or not charged on land, the note to sect. 10 of the R. P. Lim. Act, 1874, *ante*, p. 208, and the references there given.

- (1) *Effect of the Section*...244.
- (2) *Point from which Time Runs*...245.
- (3) *Exceptions from the Section*...246.
- (4) *Proceedings and Persons within the Section*...246.

(1)
Effect of
section.

The short effect of sect. 8 is that, except in three specific cases—viz., fraud, retention by a trustee of trust money when an action is commenced against him, and conversion of trust money to his own use—a trustee who has committed a breach of trust is entitled to the protection of the several Statutes of Limitation as if actions and suits for breaches of trust were enumerated in them (*How v. Winterton*, 1896, 2 Ch. 640). In cases where it applies the section appears to control sect. 25 (2) of the Jud. Act, 1873.

Clause (a).

As to clause (a) of sub-sect. (1), *Fry*, L. J., pointed out that there was no right or privilege conferred by any Statute of Limitations in respect of a breach of trust (*Re Bowden*, 45 Ch. D. 450). But this seems to deprive clause (a) of meaning (*How v. Winterton*, 1896, 2 Ch. 639). *Rigby*, L. J., said that the clause dealt with remedies, not with causes of action. The clause supposed the trustee to be guilty of a breach of duty, and provided that he was to be treated as though the breach of trust were nothing more or less than a breach of duty by reason of some act or omission (*Id.* 642). Where, accordingly, an annuitant sued a trustee of a will for breaches of trust consisting of omission to accumulate, clause (a) protected the defendant from demands more than six years before writ (*How v. Winterton*, *sup.*). The same clause barred a second mortgagee's action for an account against a first mortgagee who had sold and received the proceeds (*Thorne v. Heard*, 1894, 1 Ch. 603; 1895, A. C. 495).

In discussing the period prescribed by clause (a) *Rigby*, L. J., said that a

duty might be thrown on a trustee by virtue of his simple contract to undertake the trust, or by reason of a covenant to undertake it, and that you must look to the appropriate Statutes of Limitation under which the periods might be different (*How v. Winterton*, 1896, 2 Ch. 642; see as to this the cases quoted under the Administration of Estates Act, 1833 (*post*)). *Lindley, L. J.*, said that if clause (a) applies to the trustee's accounts at all, it puts them on the same footing as other accounts; as to which (see *ante*, p. 220) the period is six years (1896, 2 Ch. 639). The form of an order for account by trustees protected by the section is given, *Re Davies, Ellis v. Roberts*, 1898, 2 Ch. 142.

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c. 59, s. 8.

As to clause (b). The period prescribed in the case of an action of debt for money had and received is the six years mentioned in the Lim. Act, 1623 (*ante*, p. 217; see *Re Somerset, Somerset v. Poulett*, 1894, 1 Ch. 255; *Ite Timmis, Nixon v. Smith*, 1902, 1 Ch. 184). Clause (b) has been held to bar an action to compel a trustee to make good loss from improper investment (*Re Bowden, Andrew v. Cooper*, 45 Ch. D. 444; *Re Gurney, Mason v. Mercer*, 1893, 1 Ch. 590; *Re Somerset, sup.*), or to make good to the estate income tax overpaid to annuitants (*Re Sharp, Rickett v. Rickett*, 1906, 1 Ch. 793). Also an action by a residuary legatee to recover from a trustee loss from non-realization of residue (*Re Swain, Swain v. Bringemann*, 1891, 3 Ch. 233). The words of the clause are satisfied if the action be one to make the trustee pay money which does not belong to the plaintiff, but is payable into a fund as against which the plaintiff has a claim (see *How v. Winterton*, 1896, 2 Ch. 642). As to whether the clause protects an executor alleged to have wrongfully parted with assets without providing for liability see *Lacons v. Warmoll*, 1907, 2 K. B. 362, 364.

Where a will appointed the same persons executors and trustees, and the executors completed the administration and became trustees of a fund settled by the will, an action to make them liable for improperly paying over the fund was barred by clause (b) as being an action to which no existing Statute of Limitations applied (*Re Timmis, Nixon v. Smith*, 1902, 1 Ch. 174).

The section has not altered the principles determining the time when a cause of action accrues (*Thorne v. Heard*, 1894, 1 Ch. 605). In the case of a breach of trust time runs from the date of the breach (*ib.*; see *Re Somerset, Somerset v. Poulett*, 1894, 1 Ch. 231; *Re Bowden*, 45 Ch. D. 450; *Smith v. Fox*, 6 Hare, 386). Under the concluding words, however, of clause (b), time does not run against a beneficiary until his interest is in possession. Accordingly in an action brought more than six years after a breach of trust infant remaindermen were not barred, although the tenant for life was (*Re Somerset, sup.*; *Re Fountaine, Fountaine v. Amherst*, 1909, 2 Ch. 382; see *Collings v. Wade*, 1896, 1 I. R. 340). So where under a settlement of personal estate a wife took (expressly) an estate during the joint lives of herself and her husband, and (by way of resulting trust) a further estate for life after her husband's death, an action to enforce a breach of trust brought by her within six years after her husband's death was not barred (*Mara v. Browne*, 1895, 2 Ch. 69). In the case of an owner of a deferred annuity suing for previous breaches of trust, time ran against the annuitant from the commencement of her annuity (*How v. Winterton*, 1896, 2 Ch. 637). Inasmuch, however, as during a life tenancy a remainderman can sue to have trust funds properly secured, his action for a breach of trust may, even where not barred under this statute, be barred by laches (*Re Taylor, Atkinson v. Lord*, 81 L. T. 812).

Where fraud as regards a client's money was committed by solicitors in partnership, and was concealed by misrepresentation, time did not run against the client until the discovery of the fraud; an innocent partner being deprived of the benefit of the statute by representations which bound him as a partner (*Blair v. Bromley*, 2 Ph. 354). This decision rests on the law relating to representation and partnership, and not the law relating to trusts; and remains unaffected by the above section (*Moore v. Knight*, 1891,

(2)

Point from
which time
runs.

51 & 52 Vict. 1 Ch. 555). In the last-mentioned case *Stirling, J.*, said that as against a trustee relying on clause (b), the *cestui que trusts* could claim the benefit of *Blair v. Bromley* (*Ib.* 556; see *Whitwam v. Watkin*, 78 L. T. 190).

(3)
Exceptions
from the
section.

Sect. 8 starts by mentioning three exceptions. The intention of the statute was to give a trustee the benefit of the lapse of time when, although he had done something legally or technically wrong, he had done nothing morally wrong or dishonest. It was not intended to protect him where, if he pleaded the statute, he would come off with something he ought not to have (*Re Timmis*; *Nixon v. Smith*, 1902, 1 Ch. 186).

Fraud.

The first exception relates to fraud to which the trustee was party or privy. This means fraud in which the trustee has personally participated. It does not include fraud committed by an agent in his own interest, of which the trustee was ignorant, from which he did not benefit, and which he did not ratify (*Thorne v. Heard*, 1894, 1 Ch. 606, 615; 1895, A. C. 503. Conf. *Ruben v. Great Fingall*, 1906, A. C. 439). The receipt by a promoter of a secret profit may be "fraudulent" (*Re Sale Hotel Co.*, 1897, W. N. 174; 46 W. R. 617; compare *Collings v. Wade*, 1896, 1 I. R. 340).

Trust property
still
retained.

The second exception relates to trust property still retained by the trustee. This is confined to cases in which, at the date of the writ, the trustee has in his hands, or under his control, the property sought to be recovered. It refers to cases where the trustee, or any agent for him, has the property so that he can get it; but not cases where the property has been lost, whether by the trustee's negligence or otherwise (*Thorne v. Heard*, 1894, 1 Ch. 606). The property must be in some sense in his pocket (*Re Timmis*, *Nixon v. Smith*, 1902, 1 Ch. 185). Accordingly a trustee cannot be treated as having trust moneys still in his hands until he can account for their proper application (*How v. Winterton*, 1896, 2 Ch. 634, 638; *Re Tufnell*, 18 T. L. R. 705). Where an executor expended the residue in maintaining the infant residuary legatee, but rendered no account, the legatee's action for account brought more than six years after his majority was barred, the exceptions not applying (*Re Page*, *Jones v. Morgan*, 1893, 1 Ch. 301). But the second exception applied in the case of a husband who had seized his wife's separate estate (*Wassell v. Leggatt*, 1896, 1 Ch. 554), or property in which she had a separate life interest (*McArdle v. Gaughran*, 1903, 1 I. R. 106).

Trust property
converted.

The third exception relates to trust property received by the trustee and converted to his use. The exception did not include the case of trust funds advanced on mortgage, and, with the concurrence of the mortgagor, applied in payment of a debt previously charged on the mortgaged property in favour of a bank in which the trustee was partner (*Re Gurney*, *Mason v. Mercer*, 1893, 1 Ch. 590); but was thought to include the case of money deposited with solicitors for investment, and embezzled by a clerk of the firm (*Moore v. Knight*, 1891, 1 Ch. 553).

(4)
Proceedings
and persons
within the
section.

The section only applies to "proceedings against a trustee," &c. Accordingly where the executors of a deceased trustee took out a summons to ascertain the liability, if any, of the trustees for retaining mortgages, the defence of the section was said not to be available (*Re Chapman*, *Cocks v. Chapman*, 1896, 1 Ch. 326). The words, "any person claiming through" a trustee refer not to *cestui que trusts*, but to such persons as the executors, administrators, and assigns of the trustee (*Leahy v. De Moleyns*, 1896, 1 I. R. 206).

Sub-sect. (2).

In connection with sub-sect. (2) compare the case of creditors claiming in administration actions, *post*, p. 254; and see *Williams v. W.*, 1900, 1 Ch.

(3). 152. As to sub-sect. (3), see *Re Harrison*; *Allen v. Cort*, 1892, W. N. 148.

Application
of act.

12.—(1.) This act shall apply as well to trusts created by instrument executed before as to trusts created after the passing of this act.

(2.) Provided always, that save as in this act expressly

provided, nothing therein contained shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument or instruments creating the trust.

51 & 52 Vict.
c. 59, s. 12.

VIII.—COURTS OF EQUITY AND THE STATUTES OF LIMITATION.

- (1) *The Effect of Lapse of Time in Equity generally*...247.
- (2) *The Effect of Trusts*...250.
- (3) *The Statute in the Administration of Estates*...252.
- (4) *Pendency of Proceedings*...254.
- (5) *Funds in Court*...256.
- (6) *Lunacy*...256.

In the case of suits in courts of equity (before the Judicature Acts) relating to land, rent-charges, church property, advowsons, money charged on land or rent-charges, legacies, and the estates of intestates, provisions in terms affecting such suits occurred in R. P. Lim. Act, 1833 (sects. 24—34, 40—43); R. P. Lim. Act, 1837; Law of Prop. Amendment Act, 1860 (s. 13). See these sections, *ante*. Sects. 2—5, 7—9, 14—22 of R. P. Lim. Act, 1833, applied in terms only to actions at law, although in substance these limitations by virtue of sect. 24, governed suits in equity. All the provisions, however, of R. P. Lim. Act, 1874 (*ante*, p. 183), were so framed as to apply in terms to courts of equity as well as courts of law. In the case of trusts, proceedings in all courts are also affected by Jud. Act, 1873, sect. 25 (2); Trustee Act, 1888, sect. 8.

(1)
Lapse of time
in equity
generally.
Land, money
charged on
land, &c.

In the case of specialty and simple contract debts the statutes which prescribed the periods of limitation for the recovery of such debts did not apply in terms to courts of equity. But it was said before the Judicature Acts that in the case of legal demands those courts acted in obedience to the statutes (*Foley v. Hill*, 1 Ph. 399). Since the Judicature Acts, it has been said that Lim. Act, 1623, s. 3, is binding upon the High Court, and applies to every action properly described by it (*Re Greaves, Bray v. Tofield*, 18 Ch. D. 554; see *Gibbs v. Guild*, 9 Q. B. Div. 67; *Re Sharpe, Masonic Co. v. Sharpe*, 1892, 1 Ch. 154). Again, it has been laid down that in the case of a legal right a court of equity will not refuse relief on the ground of delay unless sufficient to create a statutory bar (*Re Maddever, Three Towns' Co. v. Maddever*, 27 Ch. Div. 532; *Moore v. Marriott*, 7 Ch. D. 546). Thus a less delay did not deprive a plaintiff of his right to an injunction in aid of an action of deceit (*Fullwood v. Fullwood*, 9 Ch. D. 176). So also a deed was set aside under 13 Eliz. c. 5, ten years after the death of the grantor (*Three Towns' Co. v. Maddever, sup.*). And a specialty creditor recovered his debt more than eighteen years after the debtor's death (*Re Baker, Collins v. Rhodes*, 20 Ch. Div. 230). Mere laches does not deprive the creditor of his right to sue an executor for *devastavit* (*Re Birch, Roe v. Birch*, 27 Ch. D. 622).

Legal
demands.

Where a remedy in equity corresponds to a remedy at law which is within the statute, the court of equity acts by analogy to the statute (*Knox v. Gye*, L. R. 5 H. L. 674; see *Bullis Co. v. Osborne*, 1899, A. C. 351). Thus an action against directors for misrepresentation in a prospectus was treated as analogous to an action for deceit, and it was said that no delay short of the statutory period would be a bar (*Peek v. Gurney*, L. R. 6 H. L. 377). So an action to set aside a gift on the ground of undue influence (*Allcard v. Skinner*, 36 Ch. Div. 186). The analogy of the Lim. Act, 1623, was held applicable to an action to recover a debt out of a married woman's

Equitable
demands.
Acting by
analogy.

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separate estate (*Re Hastings, Hallett v. Hastings*, 35 Ch. Div. 105; *Beck v. Pierce*, 23 Q. B. Div. 322), and to an action to set aside a forfeiture of shares (*Rule v. Jewell*, 18 Ch. D. 667). Lapse of time barred the claim of the liquidator to place a name on the list of contributories, the case being specific performance of an agreement to take shares (*Mackenzie's case, Europ. Assur. Arbitration Cases*, 141). Where an action for damages for breach of a contract to execute a mortgage would have been barred by Lim. Act, 1623, it was said that specific performance would not be decreed (*Firth v. Slingsby*, 58 L. T. 483). But courts of equity have refused by analogy to apply to personal estate a statute dealing only with real estate (*Mellersh v. Brown*, 45 Ch. D. 229; *Charter v. Watson*, 1899, 1 Ch. 175; *Re Stuckey, Stuckey v. Kekewich*, 1906, 1 Ch. 72). And the Court of Admiralty refused to apply the analogy of the statute in dealing with arrears of interest in an action *in rem* (*The Kong Magnus*, 1891, P. 223). As to acting by analogy see further the earlier cases quoted under sect. 24 of the R. P. Lim. Act, 1833, *ante*, p. 161.

**Laches and
acquiescence.**

Independently of the statute claims may be barred on the ground of laches; *e.g.* where a dowress neglects for more than twelve years to claim any of her rights (*Williams v. Thomas*, 1909, 1 Ch. 722). Or where the mortgagee of an advowson neglected for forty-eight years to require any payment (*Brooks v. Muckleston*, 1909, 2 Ch. 519). So equitable demands may be barred by laches (*Harcourt v. White*, 28 Beav. 303; *Nutt v. Easton*, 1900, 1 Ch. 29; *Levy v. Stogdon*, 1899, 1 Ch. 5; see *Re Sharpe, Masonic Co. v. Sharpe*, 1892, 1 Ch. 154; and cases quoted *Ib.* p. 168; *Watt v. Assets Co.*, 1905, A. C. 329, 333). In the case of legal demands, relief will not be refused on the ground of delay unless sufficient to create a statutory bar (see above). Acquiescence will also, independently of the statute, prevent the enforcement of demands in equity (*Blake v. Gale*, 32 Ch. Div. 571; *Evans v. Smallcombe*, L. R. 3 H. L. 249; *Allcard v. Skinner*, 36 Ch. D. 163; see *Archbold v. Scully*, 9 H. L. C. 383, where laches and acquiescence are distinguished; and see the cases quoted under R. P. Lim. Act, 1833, s. 27, *ante*, p. 167. Laches and acquiescence will prevent the enforcement of a claim, even in the case of an express trust (*Re Cross, Harston v. Tenison*, 20 Ch. Div. 121; *Bright v. Legerton*, 2 D. F. & J. 606; *McDonnell v. White*, 11 H. L. C. 570).

Fraud.

In actions based on concealed fraud, time in courts of equity always ran from the discovery of the fraud (*Booth v. Warrington*, 4 Bro. P. C. 163; *Hovenden v. Annesley*, 2 Sch. & Lef. 607; *Rolfe v. Gregory*, 4 D. J. & S. 579; see *Gibbs v. Guild*, 9 Q. B. Div. 70; *Re Crossley, Munns v. Burn*, 35 Ch. D. 266). For the operation of the rule as between partners in regard to partnership accounts, see *Betjemann v. Betjemann*, 1895, 2 Ch. 474. The rule was applied where fraud, as regards a client's money, was committed by solicitors in partnership and concealed by misrepresentation (*Blair v. Bromley*, 2 Phil. 354; *Moare v. Knight*, 1891, 1 Ch. 547). In *Blair v. Bromley (sup.)* the defendant was not personally concerned in the fraud, and had ceased to be a partner for six years before action, but was held liable for the fraud of his co-partner, committed in the ordinary course of the partnership business. The defendants were not liable where the fraud was not in such ordinary course (*Hughes v. Twisden*, 54 L. T. 570; compare *Mara v. Browne*, 1896, 1 Ch. 199), nor where fraud was committed not by themselves, but by an agent acting in his own interest (*Thorne v. Heard*, 1894, 1 Ch. 599; 1895, A. C. 495; see *British Co. v. Charnwood Co.*, 18 Q. B. Div. 714). In actions to open accounts, where an item complained of is fraudulent, the accounts will be opened altogether; but where the item is not fraudulent, and the accounts are of some years' standing, the plaintiff will only have liberty to surcharge and falsify (*Gething v. Keighley*, 9 Ch. D. 550; see *Allfrey v. Allfrey*, 1 Mac. & G. 87; *Williamson v. Barbour*, 9 Ch. D. 529). Delay deprives a man of his right to rescind a contract on the ground of fraud or misrepresentation, and the delay counts from the time when by due diligence the fraud or misrepresentation might have been discovered (*Redgrave v. Hurd*, 20 Ch. Div. 13; *Molloy v. Mutual Reserve Co.*, 22 T. L. R. 525).

Mistake.

In the case of mistake, where equitable relief was claimed, time ran from the moment when the plaintiff discovered the mistake, or had reasonable

means of discovery (*Baker v. Courage*, 1910, 1 K. B. 63). Thus, where trustees paid over trust money on a mistake of fact, and within six years from its discovery commenced a suit to compel refunding, they recovered (*Brooksbank v. Smith*, 2 Y. & C. Ex. 58; see *Durrant v. Ecclesiastical Commrs.*, 6 Q. B. D. 234). Where A. and B. being tenants in common of rents, A. under a mutual mistake of fact received more than his share, and B. sued for an account. Held that as B. had the means of discovering the mistake earlier, he was entitled to an account for six years only before bill (*Denys v. Shuckburgh*, 4 Y. & C. Ex. 42). In a common law action to recover money paid under a mistake of fact time ran from payment (*Baker v. Courage*, 1910, 1 K. B. 56). It is not necessary to the cause of action in such a case that the payor should give the payee notice of his mistake and demand the money (*Id.*; see *Freeman v. Jeffries*, L. R. 4 Ex. 200; *Cowper v. Godmond*, 9 Bing. 148; *Leather, &c. Bank v. Merchants' Bank*, 128 U. S. 26; *Bree v. Holbeck*, 2 Doug. 654). As between A. and B., *cestui que trusts*, where trustees by mistake overpaid A., the statute was no defence to a suit by B. brought more than six years after the payment to make A. refund (*Harris v. Harris*, 29 Beav. 110, where it does not appear when the mistake was discovered; see *Prowse v. Spurgin*, 5 Eq. 99; *Re Horne, Wilson v. Cox Sinclair*, 1905, 1 Ch. 76). As between a trustee and a *cestui que trust* who by the trustee's mistake of law has been underpaid, the effect of time is dealt with, *Newton v. Ayscough*, 19 Ves. 534. And see *Hilliard v. Fulford*, 4 Ch. D. 389.

A release to trustees has been set aside after the lapse of more than twenty years, it having been executed under a mistake (*Re Garnett, Gaudy v. Macaulay*, 31 Ch. Div. 1). When property has been long enjoyed by a family in certain shares under a mistake, the court will presume a family arrangement (*Re Peat*, 7 Eq. 302).

A mortgagee of an equitable reversionary interest in personal estate can, on the interest falling into possession, recover the fund from the trustee and pay himself in full, although the debt, to secure which the mortgage was made, is barred (*Re Hancock, Hancock v. Berrey*, 59 L. T. 197; *Re Lake*, 63 L. T. 416; see *Re Stucley, Stucley v. Kekewich*, 1906, 1 Ch. 67; *Jordan v. Young*, 1878, W. N. 229). And inasmuch as sects. 40 and 42 of R. P. Lim. Act, 1833, do not affect mortgages of personal estate (*London and Midland Bank v. Mitchell*, 1899, 2 Ch. 161; *Re Stucley, Stucley v. Kekewich*, 1906, 1 Ch. 67), a mortgagee of personal estate in possession may foreclose after the personal remedy to recover the debt is barred (*London and Midland Bank v. Mitchell, sup.*), and a mortgagee can in an action to foreclose personal estate recover interest for more than six years (*Mellersh v. Brown*, 45 Ch. D. 225; see *Smith v. Hill*, 9 Ch. D. 143). So in an action to enforce a vendor's lien on personal estate, the plaintiff recovered interest for twenty-six years (*Re Stucley, Stucley v. Kekewich, sup.*). As to the right of the trustees of a fund, who have notice of other claims, to refuse to pay over the whole fund to a mortgagee, see *Re Bell, Jeffery v. Sayles*, 1896, 1 Ch. 1; *Hockey v. Western*, 1898, 1 Ch. 350.

Where real and personal estate were comprised in one mortgage, and the right to redeem the land was barred, redemption of the personalty was refused (*Charter v. Watson*, 1899, 1 Ch. 175).

In the case of legal waste by a tenant for life, the period of limitation is six years (*Birch Wolfe v. Birch*, 9 Eq. 692), which period may be extended by infancy (*Dashwood v. Magniac*, 1891, 3 Ch. 386). Time runs against the remainderman from the cutting of the timber (*Seagram v. Knight*, 2 Ch. 628; *Higginbottom v. Hawkins*, 7 Ch. 676; see *Simpson v. Simpson*, 3 L. R. Ir. 314). In the case of equitable waste time runs against the remainderman from the date when his title accrues in possession (*Leeds v. Amherst*, 2 Phil. 117; *Morris v. Morris*, 6 W. R. 427; *Dashwood v. Magniac*, 1891, 3 Ch. 386); and the period of limitation is now twelve years (R. P. Lim. Act, 1833, ss. 2, 3, 24; R. P. Lim. Act, 1874, s. 2; *Leeds v. Amherst, sup.*).

In the case of exclusion of a partner, time runs from the act of exclusion Partners. (*Barton v. N. Stafford Co.*, 38 Ch. D. 463).

Mortgagee of
interests in
personalty.

Waste.

**Courts of
Equity and
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Contribution.

(2)

Trusts.

Trustee Act,
1888, s. 8.

The statute does not begin to run against a surety's right to sue a co-surety for contribution until the time at which the claim of the principal creditor is established against the surety. And during the statutory period computed from that time the surety can sue, although at the time of suing the statute may have run as between the principal creditor and the co-surety (*Wolmerhausen v. Gullick*, 1893, 2 Ch. 514; see *Gardner v. Brooke*, 1897, 2 I. R. 6). The same principle applies to the case of a trustee claiming contribution from his co-trustee (*Robinson v. Harkin*, 1896, 2 Ch. 415).

In the case of proceedings against trustees commenced after 1st January, 1890, regard must be had to sects. 1, 8, and 12 of the Trustee Act, 1888 (*ante*, p. 243).

The following note as to how far the existence of a trust may prevent any Statute of Limitation being set up relates to the law apart from the last-mentioned act.

**Express
trusts.**

Express trusts affecting land or rent were dealt with by R. P. Lim. Act, 1833, s. 25 (*ante*, p. 162), and express trusts affecting money charged upon land by R. P. Lim. Act, 1874, s. 10 (*ante*, p. 207). As to express trusts in the case of legacies payable out of personalty, see *ante*, p. 191.

Jud. Act,
1873, s. 25 (2).

As regards real and personal property generally, it was enacted by the Jud. Act, 1873, s. 25 (2), that no claim of a *cestui que trust* against his trustee for any property held on an express trust or in respect of any breach of such trust, should be barred by any Statute of Limitations; "a statutory declaration of a law which has always been recognized and administered in courts of equity" (*Re Cross, Harston v. Tenison*, 20 Ch. Div. 121). See, as to this law, *Beckford v. Wade* (17 Ves. 97); *Townshend v. Townshend* (1 Bro. C. C. 550); *Wedderburn v. Wedderburn* (4 M. & C. 41); *Stone v. Stone* (5 Ch. 74). So far as regards money charged on land, the last section appears to be subject to 37 & 38 Vict. c. 57, s. 10 (*ante*, p. 207). Compare the Irish Act, 40 & 41 Vict. c. 57, s. 28 (2).

In a case affecting personal estate decided since the Jud. Act, 1873, it was said there might be an express trust without any actual expression in words (*Banner v. Berridge*, 18 Ch. D. 265; but see *Sands v. Thompson*, 22 Ch. D. 617). The first mortgagee of a ship having sold, it was held that there was no express trust of the proceeds; that in the case of an ascertained surplus, the first mortgagee might be constructively trustee of the surplus; but that after six years, evidence could not be adduced to prove a surplus (*Banner v. Berridge, supra*). Where a stranger had assumed to act as a trustee, and had received trust money under a breach in which he concurred, he was treated as if he were an express trustee (*Soar v. Ashwell*, 1893, 2 Q. B. 390; see *Re Dixon, Heynes v. Dixon*, 1900, 2 Ch. 561). Compare the cases as to express trust within R. P. Lim. Act, 1833, s. 25 (*ante*, p. 162).

Where an express trust for the payment of a debt was for the benefit of the debtor only, it did not prevent time running against the creditor (*Henriques v. Bensusan*, 20 W. R. 350).

Where a breach of an express trust relating to personal estate had been committed, it was said that a *cestui que trust* might by his conduct raise a presumption of abandonment of his right of action which would bar subsequent proceedings (*Re Cross, Harston v. Tenison*, 20 Ch. Div. 122). So if there had been a direct and independent dealing between the trustee and *cestui que trust* after the relation had terminated (*Wedderburn v. Wedderburn*, 2 Keen, 749).

**Constructive
trusts:**

As regards constructive trusts, strictly so called, in some cases the statute would be a defence (*Beckford v. Wade*, 17 Ves. 87; *Bonney v. Ridyard*, 17 Ves. 97; see *Soar v. Ashwell*, 1893, 2 Q. B. 395, 400; and compare *Re Davis*, 1891, 3 Ch. 124). In other cases it would not (*Soar v. Ashwell*, 1893, 2 Q. B. 405).

**statute no
defence;**

Thus, solicitors receiving money were held to be trustees who could not set up the statute (*Re Bell, Lake v. Bell*, 34 Ch. D. 462; *Lee v. Sankey*, 15 Eq. 204; *Soar v. Ashwell*, 1893, 2 Q. B. 390). Distinguish the case of solicitors held not to be trustees (*Dooby v. Watson*, 39 Ch. D. 178; *Mara v.*

Browne, 1896, 1 Ch. 199; and compare *Blyth v. Fladgate*, 1891, 1 Ch. 337; *Hughes v. Twisden*, 54 L. T. 570). A person purchasing land on behalf of another was held a trustee of the land unable to set up the statute (*Rochefoucauld v. Boustead*, 1897, 1 Ch. 196; see *Duffy v. D.*, 1906, 1 I. R. 205); and an agent receiving money to purchase land was a trustee of the money (*North American Land v. Watkins*, 1904, 1 Ch. 242). So a husband seizing his wife's separate estate (*Wassell v. Leggatt*, 1896, 1 Ch. 554; see *McArdle v. Gaughran*, 1903, 1 I. R. 106); an agent receiving rents and stating the receipt to be on behalf of another (*Lyell v. Kennedy*, 14 App. Cas. 457). It has been held generally that no lapse of time will bar the right to an account of moneys received by a person standing in a fiduciary position (*Teed v. Beere*, 7 W. R. 394; *James v. Holmes*, 10 W. R. 634; *Burdick v. Garrick*, 5 Ch. 233; *Re Tidd*, *Tidd v. Overell*, 1893, 3 Ch. 154; *Cheese v. Keen*, 1908, 1 Ch. 245. Managers of an annuity fund were held trustees for the members so as to prevent time running (*Edwards v. Warden*, 1 App. Cas. 231). And before the Trustee Act, 1888, the defence of the statute was unsuccessfully raised by the following persons who were held to be trustees: a receiver appointed by the court (*Seagram v. Tuck*, 18 Ch. D. 296; see *Re Gent*, *Gent-Davis v. Harris*, 40 Ch. D. 190; and compare the decisions since the Trustee Act, 1888, as to a trustee in bankruptcy, *Re Cornish*, 1896, 1 Q. B. 99; *Re Gallard*, 1897, 2 Q. B. 8); a director who had paid dividends out of capital (*Flitcroft's case*, 21 Ch. Div. 519; *Re Oxford Society*, 35 Ch. D. 509; *Re Sharpe*, *Masonic Co. v. Sharpe*, 1892, 1 Ch. 154; see *Re Lands Allotment Co.*, 1894, 1 Ch. 616; and compare the case of an action to recover a bribe received by a director, *Metrop. Bank v. Heiron*, 5 Ex. Div. 319); a person who borrowed trust money with notice of the trust (*Ernest v. Croysdill*, 2 D. F. & J. 198; see *Butler v. Carter*, 5 Eq. 276; *Coxwell v. Franklinski*, 12 W. R. 1072; *Re Dixon*, *Heynes v. Dixon*, 1900, 2 Ch. 561).

In other cases, however, accounting parties were held not to be trustees statute a of money received by them (*Phillips v. Homfray*, 44 Ch. D. 694; see *Lister* defence. *v. Stubbs*, 45 Ch. 1). So the fiduciary relation between principal and agent did not prevent the statute from barring an action for balance of account (*Friend v. Young*, 1897, 2 Ch. 432). A company was not made a trustee of a dividend for a shareholder by declarations of the dividend, or by entry thereof in its books, no notice of the entry being given and no assets set aside (*Re Severn R. Co.*, 1896, 1 Ch. 559). A secretary of a company can raise the defence of the statute to a charge of misfeasance (*Municipal Co. v. Pollington*, 63 L. T. 238); and an auditor (*Leeds Co. v. Shepherd*, 36 Ch. D. 787).

Where there was no trust, except such as was created by the decree of the court on setting aside the transaction, time ran from the discovery of circumstances which constituted the right to relief (*Clanricarde v. Henning*, 30 Beav. 175, a purchase by a solicitor from his client; the rules of equity as to such a purchase, and the operation of lapse of time upon the right to relief in such a case, were considered in *Gresley v. Mousley*, 4 De G. & J. 78). In one case the purchase of trust property by trustees for their own benefit was set aside, after a considerable lapse of time and several assignments (*A.-G. v. Dudley*, Coop. C. C. 146; see *Rochefoucauld v. Boustead*, 1897, 1 Ch. 196). But in another case, a bill to set aside a purchase by a trustee for himself and his children was dismissed, merely on the ground of the lapse of eighteen years (*Gregory v. Gregory*, Coop. C. C. 201; see *Champion v. Rigby*, 1 R. & M. 539; *Postlethwaite v. Rickman*, 60 L. T. 514). Damages in respect of a sale at an undervalue were given against a bankruptcy trustee after long delay (*Re Gallard*, 1897, 2 Q. B. 8; compare *Re Cornish*, 1896, 1 Q. B. 99).

Compare with the above the decisions as to the effect of lapse of time in the case of constructive trusts of land, *ante*, p. 163. Constructive trusts are within the Trustee Act, 1888, s. 8 (see sect. 1 of that act).

A claim arising from a breach of trust is, generally speaking, considered Enforcing as a simple contract debt (*Holland v. Holland*, 4 Ch. 449). But it was held breach of that the analogy of the Lim. Act, 1623, could not, in answer to a claim trust against

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estate of deceased trustee.

Testamentary provisions for payments of debts.

Effect as regards debts barred at the death.

Effect as regards debts not barred at the death.

founded on a breach of trust, be set up, either by the executor of the trustee (*Brittlebank v. Goodwin*, 5 Eq. 545; *Cresswell v. Dewell*, 4 Giff. 460; *Woodhouse v. Woodhouse*, 8 Eq. 514; *Smith v. Cork, &c. R. Co.*, 1 R. 5 Eq. 65; *Carroll v. Hargrave, Ib.* 548), or by his heir (*Re Burge, Gillard v. Lawrenson*, 57 L. T. 364). See now Trustee Acts, 1888, s. 8, *ante*, p. 243.

A devise of real estate in trust for the payment of debts generally has been held not to operate for the benefit of a creditor whose debt is barred at the time of the testator's death (*Burke v. Jones*, 2 V. & B. 275). When a man makes a provision for his debts, he makes a provision for those which are not barred, that is to say, for those which in law are deemed debts (*O'Connor v. Haslam*, 5 H. L. C. 181). A direction, however, to pay specific debts may operate for the benefit of a creditor whose debt is barred at the testator's death (*Williamson v. Naylor*, 3 Y. & C. Ex. 308; *Philips v. Philips*, 3 Hare, 281; *Turner v. Martin*, 7 D. M. & G. 429; *Clinton v. Brophy*, 10 Ir. Eq. 139). And a debtor's will has been held to amount to a sufficient acknowledgment within R. P. Lim. Act, 1833, s. 40 (*Millington v. Thompson*, 3 Ir. Ch. Rep. 236; see *Re Hoyle, H. v. H.*, 1893, 1 Ch. 92; *Scott v. Synge*, 27 L. R. Ir. 560).

As regards debts not barred at the testator's death it has been held that a trust for payment of debts generally out of a testator's personal estate does not stop the running of time (*Scott v. Jones*, 4 Cl. & F. 382; *Evans v. Tweedy*, 1 Beav. 55; *Freaker v. Cranefeldt*, 3 My. & Cr. 499). For if a testator merely imposes upon his executors that which it is their regular duty to do, he does not create a trust (*Cadbury v. Smith*, 9 Eq. 42). So where a testator devised real estate on trust for payment of his debts and had in fact no real estate at his death, the devise had no effect on the running of time (*Ex p. Hepburn*, 14 Q. B. D. 394). And the case was the same where debts were charged on property which was described in the will as real estate but was in fact personalty (*Scott v. Jones, sup.*). For the case where real and personal estate are blended in one gift to executors, see *Re Stephens, Warburton v. Stephens*, 43 Ch. D. 46.

On the other hand a provision for payment of debts generally out of real estate (whether in the form of a trust, or a charge) is available for twelve years (*Re Stephens, Warburton v. Stephens*, 43 Ch. D. 46); but no longer (*Fearnside v. Flint*, 22 Ch. D. 582; *Piggott v. Jefferson*, 12 Sim. 26). See the earlier cases decided before the R. P. Lim. Act, 1874, *Moore v. Petchell*, 22 Beav. 172; *Hughes v. Wynne*, T. & R. 307; *Hargreaves v. Michell*, 6 Madd. 326; *Fergus v. Gore*, 1 Sch. & Lef. 107. Notwithstanding the L. T. Act, 1897, s. 2, the above rule applies in the case of a testator who has died since 1897 (*Re Balls, Trewby v. Balls*, 1909, 1 Ch. 791); see *Williams' Executors*, 10th ed. 1656.

A direction in the will of a testator to pay the debts of another person operated for the benefit of those creditors of that other person whose debts were not barred at his death (*O'Connor v. Haslam*, 5 H. L. C. 170).

(3)
The statute in the administration of estates.

Debts due from the testator which are barred.

Debts due to the testator which are barred.

An executor may pay debts due from the testator to a stranger, although barred in testator's lifetime (*Stahlschmidt v. Lett*, 1 Sm. & Giff. 415; *Hunter v. Baxter*, 3 Giff. 214); but not after the defence of the statute has been decided in favour of the estate (*Midgley v. Midgley*, 1893, 3 Ch. 282). An executor may also retain a debt due from testator to himself, although barred (*Hill v. Walker*, 4 K. & J. 166; *Beswick v. Orpen*, 16 Ch. D. 207; see *Coombs v. Coombs*, L. R. 1 P. & M. 288; *Morley v. Saunders*, 8 Eq. 599); but the court will not pay out a fund to an executor, so that he may exercise such right of retainer (*Trevor v. Hutchins*, 1896, 1 Ch. 844). An executor, however, cannot either pay or retain a debt unenforceable by reason of the Statute of Frauds (*Re Rownson, Field v. White*, 29 Ch. Div. 358).

To satisfy a debt due from a legatee to testator, but statute barred at his death, an executor may retain a pecuniary legacy (*Courtenay v. Williams*, 3 Hare, 539; *Coates v. Coates*, 33 Beav. 249. Compare *Re Abrahams, A. v. A.*, 1908, 2 Ch. 69). But there must be a debt for which, apart from the Stat. Lim., the legatee could have been sued (*Re Wheeler, Hankinson v*

Hayter, 1904, 2 Ch. 66). And a legatee could not be compelled to bring into account a debt due to the testator from a stranger under whose will the legatee was executor and residuary legatee (*Re Bruce, Lawford v. Bruce*, 1908, 2 Ch. 682). An administrator may retain the share of a next of kin (*Re Cordwell, White v. Cordwell*, 20 Eq. 644). But there is no such right of retainer as against the heir out of moneys representing undisposed-of real estate (*Re Milnes, Milnes v. Sherwin*, 53 L. T. 534), nor as against a specific devisee of freeholds (*Re Taylor, Taylor v. Wade*, 1894, 1 Ch. 674; *Re Akerman*, 1891, 3 Ch. 212), or a specific legatee of leaseholds or of chattels (*Ib.*). But retainer was allowed against a specific legatee of the profits of a business (*Re Taylor, Taylor v. Wade, sup.*). Trustees can require a barred debt to be brought into account in the division of the proceeds of sale of real and personal residue (*Re Akerman*, 1891, 3 Ch. 212; see *Re Watson, Turner v. Watson*, 1896, 1 Ch. 925). Executors of a tenant for life against whom the remainderman recovered damages for waste could not retain the damages to answer a statute-barred debt (*Dingle v. Coppen*, 1899, 1 Ch. 726). After appropriating assets to meet a legacy, executors cannot retain or impound such assets to meet a debt due from the legatee (*Ballard v. Marsden*, 14 Ch. D. 374). Directions in wills that debts due from beneficiaries are to be deducted from shares bequeathed to them, have been held to include barred debts (*Rose v. Gould*, 15 Beav. 189; *Poole v. Poole*, 7 Ch. 17; see *Mathews v. Keble*, 3 Ch. 691), but not moneys claimed as rent for land to which as against the beneficiary the testator's title was barred (*Re Jolly, Gathercole v. Norfolk*, 1900, 2 Ch. 616).

Lapse of time will not of itself bar an executor of an executor of his right to have an account of the original testator's estate taken, with a view to ascertain such executor's liabilities as an accounting party (*Smith v. O'Grady*, L. R. 3 P. C. 311).

According to decisions before the Trustee Act, 1888, it was settled that in an action on a devastavit, the claim as between the creditor and the executor personally was barred in six years (*Thorne v. Kerr*, 2 K. & J. 54); the executor being at liberty to set up the statute (*Re Hyatt; Bowles v. Hyatt*, 38 Ch. D. 616). But in a creditor's administration action an executor might, in respect of a debt not barred between the creditor and the estate, be made personally liable to the extent of personal assets which the executor had lost or parted with, even though he did so more than six years before action brought (*Re Baker; Collins v. Rhodes*, 20 Ch. Div. 230; *Re Marsden; Bowden v. Layland*, 26 Ch. D. 783); the executor not being at liberty to set up the statute (*Re Hyatt; Bowles v. Hyatt, sup.*; which case see as regards assets claimed from a devisee). Where the executor had parted with assets to a legatee, the legatee might be made to refund (*Fordham v. Wallis*, 10 Hare, 217). But the conduct of the creditor might bar his right against the legatee (*Blake v. Gale*, 32 Ch. Div. 571; *Harrison v. Kirk*, 1904, A. C. 8); and it would seem also against the executor (*Re Birch; Roe v. Birch*, 27 Ch. D. 627; *Re Marsden, sup.*). The above liability of the executor was sometimes placed on the ground of trust (*Re Marsden*, 26 Ch. D. 789; *Fordham v. Wallis*, 10 Hare, 226; see, however, *Re Hyatt*, 38 Ch. D. 619; *Re Davis; Evans v. Moore*, 1894, 3 Ch. 124).

Executor's
liability as
regards
devastavit.

Since the above cases the Trustee Act, 1888, has been passed, which contains provisions protecting a trustee (sect. 8, *ante*, p. 243), and also provides (sect. 1, sub-s. 3) that for the purposes of that Act the expression "trustee" shall include an executor or administrator. In a recent case where a creditor of a testator sought to render an executor liable for wrongfully handing over assets to a beneficiary, the C. A. treated the action as one of devastavit to which the executor had pleaded the statute, and held it barred. It was said by *Moulton, L.J.*, that since the passing of the Trustee Act, 1888, the liability of an executor in respect of moneys honestly paid over by him—as in that case—would be barred in six years from the payment whatever should be the form of proceeding (*Lacons v. Wormoll*, 1907, 1 K. B. 364). See, however, the judgment of *Buckley, L.J.*, who seems to have considered that the old distinction between actions of

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Administration actions.

Who may set up statute.

devastavit and of administration still obtained, and that in the latter case the Trustee Act, 1888, would not apply (*id.*, 1907, 1 K. B. 366, 367).

In administration actions legal demands are decided by courts of equity entirely on legal grounds (*Fuller v. Redman*, 26 Beav. 619). An acknowledgment by an executor after an administration decree will not revive a debt already barred (*Phillips v. Beale*, 32 Beav. 26). Executors in administration actions are not bound to plead the statute (*Ex p. Dewdney*, 15 Ves. 498; *Norton v. Frecker*, 1 Atk. 526; *Castleton v. Fanshaw*, Prec. Ch. 100; *Re Baker, Nicholls v. Baker*, 44 Ch. Div. 270; see *Re Wenham, Hunt v. Wenham*, 1892, 3 Ch. 59). Nor is the court bound to set up the statute on behalf of absent parties (*Alston v. Trollope*, 2 Eq. 205). Where one executor who was also residuary legatee set up the statute, while the other executor desired to pay, the debt was held barred (*Midgley v. M.*, 1893, 3 Ch. 282). A residuary legatee was entitled to insist on the statute being set up where there was no administration judgment, but the executors had issued a summons to determine whether a defendant was a creditor of the estate (*Re Wenham, Hunt v. Wenham*, 1892, 3 Ch. 59). The statute may, where a decree has been obtained, be set up in the proceedings under the decree, by one creditor against another (*Fuller v. Redman*, 26 Beav. 614), and by a residuary legatee or other party interested in the estate against a creditor (*Moodie v. Bannister*, 4 Drew. 432; *Shewen v. Vanderhorst*, 1 Russ. & M. 347; *Beeching v. Morphew*, 8 Hare, 129). The statute cannot be set up against the plaintiff whose debt is the foundation of the decree (*Adams v. Waller*, 14 W. R. 789; *Fuller v. Redman*, *sup.*; see *Re Baker, Nicholls v. Baker*, 44 Ch. Div. 262). But as to this there is, in the administration of real estate, an exception in favour of *c. g. t.*'s of specifically devised land (*Briggs v. Wilson*, 5 D. M. G. 21; *Re Lacy, Howard v. Lightfoot*, 1907, 1 Ch. 331). A residuary legatee has been held to be precluded by his own acts from setting up the statute as against a pecuniary legatee (*Prowse v. Spurgin*, 5 Eq. 99). As to proof in an English action by a creditor who had attached French assets as security for two debts, one of which was barred in England but not in France, see *Re Bowes, Strathmore v. Vane* (1889, W. N. 53); and by a creditor who had recovered judgment in Scotland for a debt barred in England, see *Re Low, Bland v. Low* (1894, 1 Ch. 147).

Judgment in administration action.

The sending in a claim in answer to an executor's advertisement is not such a proceeding as will prevent time running against a debt (*Re Stephens, Warburton v. Stephens*, 43 Ch. Div. 43). But judgment in a legatee's administration action, containing a direction for payment of debts, prevents time running against creditors having then valid claims (*Finch v. Finch*, 35 L. T. 235, where the judgment was within the statutory period from the incurring of the debt; *Re Crossley, Munns v. Burn*, 35 Ch. Div. 266; see *Harrison v. Kirk*, 1904, A. C. 5). Compare the effect of a winding-up order (*Re General Rolling Stock Co.*, 7 Ch. 646). An administration judgment also operates in favour of the estate in regard to a set-off against a creditor's demand (*Re Ballard, Lovell v. Forester*, 1890, W. N. 64).

(4)

Pendency of administration action.

A decree in a creditor's administration suit did not prevent the barring of a debt in respect of which no claim was made under the decree (*Tutam v. Williams*, 3 Hare, 347). On the other hand, claims in actions which enured for the benefit of incumbrancers operated so as to increase the interest allowed (*Archdall v. Anderson*, 25 L. R. Ir. 433; *Greenway v. Bloomfield*, 9 Hare, 201). As to proving in an administration action after a lapse of time where there is a fund in court, see *Harrison v. Kirk*, 1904, A. C. 1. Where a judgment creditor had allowed twenty years to elapse without enforcing his debt, he was not allowed to prove in a suit instituted within the twenty years for the benefit of the specialty creditors of his debtor (*Berrington v. Evans*, 1 Y. & Coll. 434; see also *O'Kelly v. Bodkin*, 3 Ir. Eq. R. 390; *Hutchins v. O'Sullivan*, 11 Ir. Eq. R. 443).

Berrington v. Evans.

Sterndale v. Hankinson.

Before R. P. Lim. Act, 1833, it was held that although a creditor was in strictness barred by the rule of equity, yet that rule would not be applied

against him if he had delayed, relying on the prosecution of an existing suit by another creditor on behalf of himself and other creditors (*Sterndale v. Hankinson*, 1 Sim. 393; *Brown v. Lynch*, 4 Ir. Eq. R. 316; *Carroll v. Darcy*, 10 Ir. Eq. R. 321; *Birmingham v. Burke*, 2 J. & Lat. 714; see *Foster v. Mackenzie*, 17 Beav. 414; *Finch v. Finch*, 35 L. T. 235). Since the Judicature Acts the reasons on which *Sterndale v. Hankinson* was founded no longer apply (*Re Greaves, Bray v. Toft*, 18 Ch. D. 551; where the action was commenced within the statutory period from the incurring of the debt, but the judgment was made after the expiration of that period). Compare *Thompson v. Hurley*, 1905, 1 I. R. 588; *Williams v. Williams*, 1900, 1 Ch. 152. And in actions against trustees or executors, see the language of Trustee Act, 1888, sect. 8, sub-s. 2.

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The institution of a suit to execute the trusts of a will did not preserve the rights of the heir who claimed adversely to the will (*Simmons v. Rudall*, 1 Sim. N. S. 115). The right of a vendor to enforce his lien was not preserved by the existence of a suit by the creditors of the deviser of the estate, under whose will the sale took place, to administer his estate; nor by suits by the residuary devisees and legatees of the purchaser, for the administration of his estate (*Toft v. Stephenson*, 7 Hare, 1). A mortgagee's suit for foreclosure and sale instituted during the debtor's life, did not prevent time running against a judgment creditor of that debtor (*Bennett v. Bernard*, 12 Ir. Eq. R. 229). For the case where a creditor or incumbrancer is made a defendant to the suit, see *Watson v. Birch* (15 Sim. 523), and *Humble v. Humble* (24 Beav. 535). As to relief where time has run pending improper litigation, see *Pultney v. Warren* (6 Ves. 73); *East India Co. v. Campion* (11 Bligh, 158, 186, 187); *Furnival v. Boyle* (4 Russ. 142); *Sirdefield v. Price* (2 Y. & C. 73).

As to the application of the Statutes of Limitation to an order to carry on proceedings made before judgment, see *Perry v. Jenkins* (1 M. & Cr. 118, 121); *Bland v. Davison* (21 Beav. 312); and after judgment, see *Alsop v. Bell* (24 Beav. 451); *Parkinson v. Lucas* (28 Beav. 627, 630); see also *Bampton v. Birchall* (11 Beav. 38; 1 Phil. 568; 5 Beav. 67). Where a defendant was out of the jurisdiction and a bill prayed process against him when he should come within it, the operation of the statute was suspended though he had neither been served nor appeared (*Hele v. Bexley*, 20 Beav. 127).

Although the appointment of a receiver by the court does not prevent the bar under the statute against a stranger, yet it will prevent time running in favour of a stranger to the suit (*Wrixon v. Vize*, 3 Dr. & War. 104, see p. 123; *Parkinson v. Lucas*, 28 Beav. 627). But under special circumstances the possession of a receiver prevented time running against a stranger to the action (*Penney v. Todd*, 26 W. R. 502). The possession of the receiver in a cause in which a trustee of the legal estate is made a party as such, may fairly be treated as the possession of the trustee. For many purposes the possession of the receiver is the possession of the party entitled to the lands, and time will not run against a person in possession (*Gresley v. Adderley*, 1 Swans. 579; *Boehm v. Wood*, T. & R. 345; *Wrixon v. Vize*, 3 Dr. & War. 104; see *Groome v. Blake*, 8 Ir. C. L. R. 428; *Re Butler*, 13 Ir. Ch. R. 453; *Dixon v. Gayfere*, 17 Beav. 421). The appointment of receiver in the matter of an infant will not prevent the operation of the statute on a claim affecting the minor's estate, notwithstanding the fact that the master, in a report ascertaining the nature of the minor's property, has expressly found that the minor's estate was subject to that incumbrance (*Harrison v. Duignan*, 2 Dr. & War. 295; see *Greenway v. Bromfield*, 9 Hare, 203).

Effect of
appointment
of a receiver.

See as to the relief granted by courts of equity where time had run pending an injunction, *Brown v. Newall* (2 M. & Cr. 572); *Anon.* (2 Cas. Ch. 217); *Fyson v. Pole* (3 Y. & C. 273); *Morgan v. Morgan* (2 Dick. 643); *Grant v. Grant* (3 Sim. 364; 3 Russ. 607; *Duval v. Terry* (Show. P. C. 15); *O'Donel v. Browne* (1 Ball & B. 262).

As to the effect of a petition for sale in the Irish Land Court, see *Re Swanton*, 1898, 1 I. R. 157; *Darb. & Bos.* 571; *Lightwood*, Time Limit, 317.

Petition for
sale in Irish
Land Court.

**Courts of
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(5)
Funds in
court;

funds paid
into court
under the
L. C. C. Act.

The claim of an equitable incumbrancer was kept alive by the existence of a fund in court the rights in which had not been ascertained (*Lancaster v. Evans*, 10 Beav. 154). As to proving in an administration action after a lapse of time, where there is a fund in court, see *Harrison v. Kirk*, 1904, A. C. 1. Where in an incumbrancer's suit against a tenant for life rents belonging to the defendant were paid into court by a receiver and so remained 1815—1870, the claim of the remainderman to be recouped out of such rents payments which had subsequently fallen upon him was not barred (*Howlin v. Sheppard*, 6 Ir. Eq. Rep. 38; see *Kirwan v. Kennedy*, 3 I. R. Eq. 472; *Re Slacke*, 1896, 1 I. R. 199). And where lands on which an annuity was charged were sold by the court, the claim of the annuitant to resort for arrears to the corpus of the proceeds which were in court was not barred (*Re Belton*, 1894, 1 I. R. 537). So where to annul a bankruptcy money is paid into court to provide for undisputed debts, time does not run against the creditors (*Re Dennis*, 1895, 2 Q. B. 630). Compare the case of money provided under a scheme to satisfy unascertained bondholders (*Collingham v. Sloper*, 1901, 1 Ch. 779; 1904, A. C. 159). But payment into court under the Trustee Relief Act of a fund on which an annuity was charged did not make the court a trustee or prevent a bar (*Re Nugent*, 19 L. R. Ir. 140; where, however, the annuity was also charged on real estate the remedy against which was held barred).

Where land in the occupation of a trespasser was compulsorily taken under the Lands Clauses Act and the purchase-money paid into court, the trespasser was, after the expiration of the full statutory period (the true owner not claiming), held entitled to the money, although at the date of the purchase his adverse possession had only lasted eighteen years (*Re Evans*, 42 L. J. Ch. 357), or nineteen years and a half (*Ex p. Winder*, 6 Ch. D. 696; see *Ex p. Chamberlain*, 14 Ch. D. 323). It seems that a less period of adverse possession would be sufficient (*Gedye v. Commrs. of Works*, 1891, 2 Ch. 636). And where, at the purchase, land was in occupation of A. who originally entered in respect of a long term, but had continued in occupation after the expiration of the term, the fund was invested and the dividends ordered to be paid to A. until the lapse of twelve years from the end of the term (*Re Harris*, 1901, 1 Ch. 931; see *Ex p. Chamberlain*, 14 Ch. D. 323; *Ex parte Forde*, 1894, 1 I. R. 156). The fund was paid out after possession for fourteen years from the end of the term (*Re Harris*, 1909, W. N. 181). But where at the date of the purchase the land was in the possession of a person claiming in respect of a term which subsequently expired, and twelve years after the expiration of the term the termor claimed payment of a fund which had been paid into court as representing the reversion the claim was dismissed (*Gedye v. Commrs. of Works*, 1891, 2 Ch. 636). Where the land taken was in mortgage, the mortgagee was only allowed six years' interest out of the purchase-money in court (*Re Stead*, 2 Ch. D. 713).

(6)
Lunacy.

Where a creditor cannot recover by reason of the lunacy of the debtor, time will not run (*Stedman v. Hart*, Kay, 607). But where an executor was found lunatic after time had commenced to run against a legatee, time ran during the lunacy (*Boldero v. Halpin*, 19 W. R. 320). Proceedings in lunacy were held not to exclude the operation of the statute on a promissory note (*Roch v. Cooke*, 1 De G. & Sm. 675). A petition in lunacy, after the death of the lunatic, by his committee, and a reference, followed by a report that a sum of money had been expended by the committee in the maintenance of the lunatic, will not take the claim of the committee out of the statute, as against the heir-at-law, who was not a party (*Wilkinson v. Wilkinson*, 9 Hare, 204). Where funds in the hands of a lunatic executrix were under an order transferred to the credit of the lunacy to an account in the names of herself and other persons interested, and the income was paid to her, the order preserved the right of the parties interested, but arrears of income could only be recovered for six years (*Re Walker*, 7 Ch. 120). An order for repayment to executors of advances made by their testator for maintenance of a lady found lunatic after his death was limited to six years

before the death (*Re Weaver*, 21 Ch. Div. 615). Guardians could only recover six years' arrears in respect of the maintenance of a pauper lunatic (*Re Newbegin*, *Eggleton v. Newbegin*, 36 Ch. D. 477; *Re Watson*, *Stamford v. Bartlett*, 1899, 1 Ch. 72; *Re Taylor*, *Edmonton v. Deely*, 1901, 1 Ch. 480). *Secus* where payments on account had been made by a receiver in lunacy (*Wandsworth v. Worthington*, 1906, 1 K. B. 420); or the claim was by the Crown (*Re J.*, 1909, 1 Ch. 574).

56 & 57 Vict.
c. 61, s. 1.

IX.—LIMITATIONS UNDER THE PUBLIC AUTHORITIES PROTECTION ACT, 1893.

A number of limitations under particular provisions in various acts are set out in Darb. & Bos., 2nd ed., p. 577, and Supplement, p. 24. Many of these provisions, however, have been repealed by the Public Authorities Protection Act, 1893. Having regard to the importance of the last-mentioned Act, the material sections thereof are set out at length, with a note of cases decided under them.

PUBLIC AUTHORITIES PROTECTION ACT, 1893.

56 & 57 VICT. c. 61.

An Act to generalize and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties. [5th December 1893.]

BE it enacted as follows :

1. Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect :

Protection of
persons acting
in execution
of statutory
or other
public duty.

(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof :

(b) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client.

[Sub-sects. (c) and (d) of sect. 1 relate to tender of amends; and sect. 2 provides for the repeal of previous acts.]

3. This Act shall not apply to any action, prosecution, or other proceeding for any act done in pursuance or execution, or intended execution, of any Act of Parliament, or in respect of any alleged neglect or default in the execution of any Act of

Saving as to
Scotland.

56 & 57 Vict. c. 61, s. 3. Parliament, or on account of any act done in any case instituted under an Act of Parliament when that Act of Parliament applies to Scotland only, and contains a limitation of the time and other conditions for the action, prosecution, or proceeding.

Commence-
ment. 4. This Act shall come into operation on the first day of January one thousand eight hundred and ninety-four.

Short title. 5. This Act may be cited as the Public Authorities Protection Act, 1893.

Reason for
the protection
given to
public bodies. The present Act has been largely applied to proceedings against public bodies administering or supported by the rates. A possible reason for the protection which the Legislature has given to such public bodies may be found in the general principle in reference to matters which have to be paid for out of the rates, viz. that each body of ratepayers for the time being should bear its own burden (*Parker v. London County Council*, 1904, 2 K. B. 505).

Kind of
persons
protected.
Corporations
included. As regards the persons protected, the word "persons" in sect. 1 includes any body of persons corporate or unincorporate (*Interpretation Act*, 1889, s. 19). It will be observed that the short title of the present Act is "The Public Authorities Protection Act, 1893." And it has been said that the long title (printed above), which "is an important part of the Act," gives the key to the wide language of sect. 1 (*Fielding v. Morley*, 1899, 1 Ch. 4). Having regard to the titles, the word "person" should, it seems, be construed as excluding traders (*Lyles v. Southend-on-Sea*, 1905, 2 K. B. 13): e.g. a company of Pier proprietors, who were held to be a commercial company earning dividends for their shareholders (*A.-G. v. Margate*, 1902, 1 Ch. 749); or a Railway Co. See *Parker v. L. C. C.*, 1904, 2 K. B. 505; *Lanarkshire v. Airdrie*, 8 Fraser, 781, where it was said by the Scotch Court of Session that there is a broad distinction between (1) county councils and other bodies who are directed to perform public duties the cost of which is defrayed by rates; and (2) incorporated companies who are empowered with a view to profit to undertake certain works. In the one case the public body is under a legal obligation to proceed with the undertaking, but its members act gratuitously and are neither entitled to make a profit nor are responsible for loss. In the other case the Co. is absolutely free to consider whether the speculation for which Parliamentary powers have been obtained is worth prosecuting with a view to profit.

Commercial
companies
not protected.

Corporations
protected. The "persons" protected by the Act have been held to include Highway authorities (*Southwark v. Wandsworth*, 1898, 2 Ch. 603; *Harvey v. Truro*, 1903, 2 Ch. 646; *Offin v. Rochford*, 1906, 1 Ch. 342), Poor Law Guardians (*Sharpington v. Fulham*, 1904, 2 Ch. 449), County Councils (*North Metropolitan Co. v. London County Council*, 1898, 2 Ch. 145), Harbour authorities (*Williams v. Mersey*, 1905, 1 K. B. 804; *The Ydun*, 1899, P. 236), the Tyne Improvement Commissioners (*The Johannesburg*, 1907, P. 65).

Municipal
corporations. Municipal Corporations, even when carrying on work not strictly municipal (*The Ydun*, 1899, P. 241), e.g. when using land as a hospital (*Harrop v. Ossett*, 1898, 1 Ch. 525), or supplying water (*Fielding v. Morley*, 1899, 1 Ch. 1), or electric light (*Jeremiah Ambler v. Bradford*, 1902, 2 Ch. 585; *Chamberlain v. Bradford*, 83 Law Times Rep. 518), or working a tramway (*Lyles v. Southend-on-Sea*, 1905, 2 K. B. 1; *Spittal v. Glasgow*, 6 Fraser, 828). Qu. whether the protection applies where the corporation is under no statutory obligation to do the particular work (see 1905, 2 K. B. 13, 18, 21).

Individuals
protected. The protection extends not only to the public body as principals, but also to individual subordinates carrying out their mandates (*Greenwell v. Howell*, 1900, 1 Q. B. 540). But not to an independent person undertaking for his own profit work under a contract with a public body (*Tilling v. Dick Kerr*, 1905, 1 K. B. 570; see *Kent Council v. Folkestone Corporation*, *ib.*, 620). As to the trustees of a Loan Society, see *O'Brien v. Mitchelstown*, 1903, 1 Ir. 282.

The protection also extends to individuals discharging public duties, *e.g.* a commander of volunteers (*Wilson v. Mackay*, 7 Fraser, 168), or a doctor giving a statutory notice of illness (*Salisbury v. Gould*, 68 J. P. 158). 56 & 57 Vict.
c. 61.

As to the acts or defaults in respect whereof the proceedings must be commenced to bring the case within the protection. It has been held in several cases under this Act that the wide words of sect. 1 extended the protection to proceedings in respect of an act done in the voluntary execution of the powers of an Act of Parliament, even where it was not done in the execution of a public duty (*Jeremiah Ambler v. Bradford*, 1902, 2 Ch. 590, 592, 595; *Chamberlain v. Bradford*, 83 Law Times Rep. 519). Thus the protection was held to apply where proceedings were brought against a public body to restrain them from using land as a Fire Engine Station in breach of an alleged contract (*Holford v. Acton*, 1898, 2 Ch. 240, 249), or as a cemetery (*Toms v. Clacton*, 14 T. L. R. 474); also where a school board was sued for libel alleged to be contained in a resolution of the Board (*Reid v. Blisland*, 17 T. L. R. 626); and where a lord of a manor claimed from an urban council an account of certain tolls as payable to him under a lease (*Newcastle v. Worksop*, 1902, 2 Ch. 145, 162). Kind of acts
or defaults in
respect
whereof the
proceedings
must be
commenced.
Earlier cases.

It is, however, difficult to suppose that the statute was intended to apply to every act done in pursuance of statutory powers (see *National Telephone Co. v. Kingston-upon-Hull*, 89 L. T. 294; *A.-G. v. Margate*, 1900, 1 Ch. 754). It is possible to read the wide words of sect. 1 as limited by the long title of the statute, which refers to persons "acting in the execution of statutory or other public duties." And in a later case *Vaughan Williams*, L. J., seems to have laid down that the protection is only given where the act or default occurs in the execution of a public duty (*Lyles v. Southend-on-Sea*, 1905, 2 K. B. 13, 18; see *National Telephone Co. v. Kingston-upon-Hull*, 89 L. T. 294; *Walsh v. Southwark*, 72 J. P. 71; *Lanarkshire v. Airdrie*, 8 Fraser, 781). Later cases.

Protection has been given under the section in respect of the following acts or defaults as being acts or defaults where a public duty was involved; *e.g.* the acts or defaults of a Highway Authority in relation to the protection of Highways (*Harvey v. Truro*, 1902, 2 Ch. 638; *Leckhampton v. Ballinger*, 21 T. L. R. 632; *Offin v. Rochford*, 1906, 1 Ch. 342), of a public body in working Tramways (*Lyles v. Southend-on-Sea*, 1905, 2 K. B. 1; *Spittal v. Glasgow*, 6 Fraser 838; *Hewlett v. London C. C.*, 72 J. P. 136), or in managing Harbours or Piers (*Williams v. Mersey*, 1905, 1 K. B. 804; *The Johannesburg*, 1907, P. 81), or in managing a Hospital (*Markey v. Tolworth*, 1900, 2 Q. B. 454); the acts or defaults of an individual in relation to public medical duties (*Salisbury v. Gould*, 68 J. P. 158), or to public military duties (*Wilson v. Mackay*, 7 Fraser, 168). Acts or de-
faults where
protection has
been given,
public duty
being
involved.

But the protection has been refused in the case of actions against a public body for breach of a contract entered into by them with a private individual, although entered into in the execution of a statutory or public duty or authority (*Sharpington v. Fulham*, 1904, 2 Ch. 449; *Clarke v. Lewisham*, 19 T. L. R. 62; *Macfie v. Greenock*, 7 Fraser, 246; *Milford v. Milford*, 65 J. P. 483; *National Telephone Co. v. Kingston-upon-Hull*, 89 L. T. 294). Nor did the protection extend to an action for false representation whereby the plt. was induced to enter into a contract with a public body (*Pearson v. Dublin*, 1907, A. C. 368). Nor was protection given to the Trustees of a Loan Society formed under a statute who made defaults occasioning loss to the members, and who were held not to be acting in execution of a public duty (*O'Brien v. Mitchelstown*, 1903, 1 I. R. 282). Acts or de-
faults
where protec-
tion not
given.

The protection applied where the action was brought in respect of a negligent act committed by a person who was a servant of a public body in the execution of a public duty of such body (*Markey v. Tolworth*, 1900, 2 Q. B. 454). But not where the person who committed the act was not the servant or agent of the public body, but only a contractor (*Kent Council v. Folkestone Corporation*, 1905, 1 K. B. 620). Acts or de-
faults by
servant of
public body.

The protection only applies where the proceedings are brought in respect of some act or default of the Deft. alleged to be unlawful. An action be some act or

56 & 57 Vict. c. 61.	brought to set aside an agreement on the ground that it was <i>ultra vires</i> the Plt. was not within the statute (<i>Holsworth v. H.</i> , 1907, 2 Ch. 62). But the section may be construed so as to protect debts in proceedings commenced in respect of acts done in intended execution of a public duty (<i>The Johannesburg</i> , 1907, P. 85, 86; <i>Cree v. St. Pancras</i> , 1899, 1 Q. B. 693).
default by defendant.	
Intended execution of public duty.	As to the proceedings in which protection is given; these proceedings include actions in the Chancery division, whether for an injunction or for damages (<i>Fielding v. Morley</i> , 1899, 1 Ch. 1), or for a declaration (<i>Grand Junction Waterworks Co. v. Hampton</i> , 15 T. L. R. 412); but not an action <i>in rem</i> which is not a proceeding against a "person" (<i>The Burns</i> , 1907, P. 137). As to actions on contract, see cases quoted on p. 259 in relation to matters not protected.
Kind of proceedings in which protection given.	As regards the point from which time runs under sect. 1, sub-sect. (a). Where there is no "continuance of injury or damage," time runs from the "act, neglect or default complained of." Where proceedings were commenced for damages for an accident which caused subsequent death, time ran from the accident (<i>Williams v. Mersey</i> , 1905, 1 K. B. 804). And where proceedings were commenced against a Highway Authority who had pulled down a fence and subsequently claimed title to the land within it, time ran from the pulling down of the fence, the claim of title not giving rise to any cause of action (<i>Offin v. Rochford</i> , 1906, 1 Ch. 342). Where in proceedings against a magistrate damages were claimed for an illegal distress put in for a fine under a conviction, which conviction was subsequently quashed, time ran from the distress and not the conviction (<i>Polley v. Fordham</i> , 1904, 2 K. B. 345). But where in proceedings against the High Bailiff of a County Court, damages were claimed for negligence in failing to serve a Judgment Summons on the Plt., who was subsequently arrested, time ran from the omission to serve the Judgment, not from the arrest (<i>Turley v. Daw</i> , 22 T. L. R. 231).
Point from which time runs.	
Where no continuance of injury.	In cases where there is a "continuance of injury or damage" time runs from the ceasing thereof. The words do not mean damage inflicted once and for all which continues unrepaired (<i>Harrington v. Derby</i> , 1905, 1 Ch. 227), or from the effects of which the plaintiff is still suffering (<i>Carey v. Bermondsey</i> , 20 T. L. R. 2; <i>Spittal v. Glasgow</i> , 6 Fraser, 828); but new damage recurring day by day, whether by reason of one act or repeated acts (<i>Harrington v. Derby</i> , <i>sup.</i> ; see <i>Pearson v. Dublin</i> , 1907, A. C. 368; <i>Markey v. Tolworth</i> , 1900, 2 Q. B. 458; and compare <i>Crumbie v. Wallsend</i> , 1891, 1 Q. B. 503). The action may be brought within six months after the ceasing of a continuing injury for damage done within the previous six years (<i>Harrington v. Derby</i> , <i>sup.</i>).
Where there is continu- ance of injury.	The limitation in the statute applies though another general statute allows a longer limit of time in respect of the particular act done (<i>Kent Council v. Folkestone Council</i> , 1905, 1 K. B. 620; <i>Markey v. Tolworth</i> , <i>sup.</i>).
Effect of other statutes of limitation.	

X.—PLEADING AND PRACTICE AS TO THE STATUTES OF LIMITATION.

Raising the statute;	By R. S. C. Ord. 19, r. 15, a party must raise by his pleading all such grounds of defence or reply as, if not raised, would take the opposite party by surprise or would raise issues of fact not arising out of the preceding pleadings, as, for instance, Statute of Limitations. In the County Court the particular statute need not be specified (<i>Eaton v. Tapley</i> , 1899, 1 Q. B. 953).
by pleading.	In <i>Dawkins v. Penrhyn</i> (4 App. Cas. 59; an action commenced in 1877, when demurrer was permitted), Earl Cairns held that in personal actions the statute must be pleaded; but that, in the case of real property, where it was a question of title, the statute might be raised by demurrer (see further, <i>Re Burge</i> , <i>Gillard v. Lawrenson</i> , 57 L. T. 364; <i>Noyes v. Crawley</i> ,

10 Ch. D. 31; and see as to the previous rule at common law, *De Beauvoir v. Owen*, 5 Exch. 166; *Owen v. De Beauvoir*, 16 M. & W. 547). Since *Dawkins v. Penrhyn* demurrer has been abolished, but in lieu thereof a party can raise by his pleading a point of law (R. S. C. Ord. 25).

Pleading and Practice as to the Statutes of Limitation.

Where an action is brought to recover land of which the defendant is in possession, the statute is often pleaded expressly (*Lyell v. Kennedy*, 18 Q. B. Div. 796; *Pedder v. Hunt*, *ib.* 565). In *Heath v. Pugh* (6 Q. B. Div. 353), it was said that in such a case the defence of the statute might be raised under the plea of possession in a general form (Ord. 21, r. 21; see *Coppinger v. Norton*, 1902, 2 I. R. 241). As to the effect of such a plea, see *Danford v. McNulty*, 8 App. Cas. 456. Under the old practice in equity a plea of adverse possession was overruled because it did not state the particular facts constituting the adverse possession on which the defendant relied (*Hardman v. Ellames*, 5 Sim. 640; 2 M. & K. 732). Compare the mode in which a plaintiff can plead a possessory title under the modern practice, *Pledge v. Pomfret*, 1905, W. N. 56.

Ord. 8, r. 1, provides that no original writ of summons shall be in force for more than twelve months from the date thereof. Ord. 6, r. 1, provides for the issue of concurrent writs, such writs only to be in force for the period during which the original writ is in force. Under Ord. 8, r. 1, however, upon application before the expiration of the twelve months, the writ or concurrent writ may for good reason be renewed for six months, and so from time to time. Under Ord. 64, r. 7, times may be enlarged. Where the plaintiff's claim would, in the absence of renewal, be barred by statute, the time for renewing a writ will not usually be enlarged (*Doyle v. Kaufmann*, 3 Q. B. Div. 7, 340; *Hewett v. Barr*, 1891, 1 Q. B. 98; see *Magee v. Hastings*, 28 L. R. Ir. 288). But the court has a discretion (*ib.*). And where the original writ was issued and renewed in proper time, the time for issuing a concurrent writ was enlarged, although the operation of the statute was thereby affected (*Smalpage v. Tonge*, 17 Q. B. Div. 644).

Where a writ was issued in due time in the Common Pleas to recover a debt, which writ was never served; and six months later (when, unless saved by the writ, the debt was barred) the plaintiff took out an administration summons in chancery; such summons was held barred, the writ not keeping the debt alive for the purpose of proceedings in another court (*Manby v. Manby*, 3 Ch. D. 101. Compare *Hurst v. Hurst*, 21 Ch. Div. 291, 295).

In the case of pleadings, a party cannot by amendment set up fresh claims which since the writ have become barred by statute (*Weldon v. Neal*, 19 Q. B. Div. 394; *Lancaster v. Moss*, 15 T. L. R. 476; see *Steward v. North Metropolitan Co.*, 16 Q. B. Div. 556; *Hudson v. Fernyhough*, 61 L. T. 722). As to raising by amendment a case of concealed fraud to meet the statute, see *Laurance v. Norreys* (39 Ch. Div. 235).

Amendments.

THE FINES AND RECOVERIES ACT, 1833.

3 & 4 WILL. IV. c. 74, SS. 1—76, 92.

*An Act for the Abolition of Fines and Recoveries, and for the
Substitution of more simple Modes of Assurance.**

[28th August, 1833.]

1. *Interpretation clause*, s. 1...262.
2. *Fines and recoveries abolished*, ss. 2, 3...267.
3. *The tenure of ancient demesne*, ss. 4—6...269.
4. *The amendment and validating of fines and recoveries*, ss. 7—12...271.
5. *The custody of the records of fines and recoveries*, s. 13...274.
6. *Estates tail not barrable by warranty*, s. 14...274.
7. *Disposition of lands entailed*, ss. 15—21...275.
8. *Definition of the protector*, ss. 22—33...285.
9. *Powers of the protector*, ss. 34—37...291.
10. *Confirmation of voidable estates created by tenant in tail*, s. 38...293.
11. *Enlargement of base fees*, s. 39...295.
12. *Modes in which dispositions of land under this act by tenants in tail are to be effected*, ss. 40—49...297.
13. *Estates tail in copyholds*, ss. 50—54...302.
14. *Bankrupt's estate tail*, ss. 55—69...305.
15. *Money to be laid out in lands to be entailed*, ss. 70—72...312.
16. *The inolment of deeds, &c.*, ss. 73—76...315.
17. *Ireland*, s. 92...316.

1. *Interpretation Clause.*

3 & 4 Will. 4,
c. 74, s. 1.

Meaning of
certain words
and expres-
sions.

1. Be it enacted, that in the construction of this act the word "lands" shall extend to manors, advowsons, rectories, messuages, lands, tenements, tithes, rents and hereditaments of any tenure (except copy of court roll), and whether corporeal or incorporeal, and any undivided share thereof, but when accompanied by some expression including or denoting the

* This act does not extend to Ireland, but on the 15th August, 1834, the statute 4 & 5 Will. 4, c. 92, was passed, which corresponds in most particulars with the English statute, and came into operation on the 31st October, 1834, instead of 31st December, 1833.

tenure by copy of court roll, shall extend to manors, messuages, lands, tenements and hereditaments of that tenure, and any undivided share thereof; and the word "estate" shall extend to an estate in equity as well as at law, and shall also extend to any interest, charge, lien or incumbrance in, upon, or affecting lands, either at law or in equity, and shall also extend to any interest, charge, lien or incumbrance in, upon or affecting money subject to be invested in the purchase of lands (*a*); and the expression "base fee" shall mean exclusively that estate in fee simple into which an estate tail is converted where the issue in tail are barred, but persons claiming estates by way of remainder or otherwise are not barred (*b*); and the expression "estate tail," in addition to its usual meaning (*c*), shall mean a base fee into which an estate tail shall have been converted; and the expression "actual tenant in tail" shall mean exclusively the tenant of an estate tail which shall not have been barred, and such tenant shall be deemed an actual tenant in tail, although the estate tail may have been divested or turned to a right (*d*); and the expression "tenant in tail" shall mean not only an actual tenant in tail, but also a person who, where an estate tail shall have been barred and converted into a base fee, would have been tenant of such estate tail if the same had not been barred; and the expression "tenant in tail entitled to a base fee" shall mean a person entitled to a base fee, or to the ultimate beneficial interest in a base fee, and who, if the base fee had not been created, would have been actual tenant in tail; and the expression "money subject to be invested in the purchase of lands" shall include money, whether raised or to be raised, and whether the amount thereof be or be not ascertained, and shall extend to stocks and funds, and real and other securities, the produce of which is directed to be invested in the purchase of lands, and the lands to be purchased with such money or produce shall extend to lands held by copy of court roll, and also to lands of any tenure, in Ireland or elsewhere out of England, where such lands or any of them are within the scope or meaning of the trust or power directing or authorizing the purchase; and the word "person" shall extend to a body politic, corporate or collegiate, as well as an individual; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the plural number shall extend and be applied to one person or thing as well as several persons or things; and every word importing the masculine gender only shall extend and be applied to a female as well as a male; and every assurance already made or hereafter to be made, whether by deed, will, private act of parliament or otherwise, by which lands are or shall be entailed, or agreed or directed to be entailed, shall be deemed a settlement; and every appointment made in exercise of any power contained in any settlement, or of any other power arising out

3 & 4 Will. 4,
c. 74, s. 1.

"Estate."

"Base fee."

"Estate
tail."

"Actual
tenant in
tail."

"Tenant in
tail."

"Tenant in
tail entitled to
a base fee."

"Money."

"Person."

Number and
gender.

Settlement.

3 & 4 Will. 4, c. 74, s. 1. of the power contained in any settlement, shall be considered as part of such settlement, and the estate created by such appointment shall be considered as having been created by such settlement (e); and where any such settlement is or shall be made by will, the time of the death of the testator shall be considered the time when such settlement was made: provided always, that those words and expressions occurring in this clause, to which more than one meaning is to be attached, shall not have the different meanings given to them by this clause in those cases in which there is anything in the subject or context repugnant to such construction.

The principal objects of this statute. The principal objects of this statute (which was prepared by Mr. Brodie; *Bell v. Holtby*, 15 Eq. 189) were to abolish fines and recoveries; to enable a tenant in tail to make an effectual alienation by enrolled deed; and to enable married women to dispose of land by deed acknowledged.

Estate. (a) In the Irish act the word "estate" is made to extend to "any interest, charge, right, title, lien or incumbrance, in, upon, or affecting lands, either at law or in equity, whether present or vested, or future or contingent." The word "estate" includes the reversionary life interest of a married woman in money invested on mortgage of land (*Miller v. Collins*, 1896, 1 Ch. 573; overruling *Re Newton*, 23 Ch. D. 187), but not a mere *spes successionis* on a possible intestacy (*Allcard v. Walker*, 1896, 2 Ch. 369). See further, as to the definition of "estate" in the present act, *Briggs v. Chamberlain* (11 Hare, 74); *Williams v. Cooke* (4 Giff. 343).

Base fees. Statutory base fee. (b) The species of base fee here defined (which may be referred to as a statutory base fee) is thus described by Lord Coke:—Where tenant in tail bargains and sells the estate to another and his heirs, and afterwards levies a fine to him and his heirs with proclamations, he has an estate in fee simple as long as the tenant in tail has heirs of his body, derived out of the estate tail; this being an inferior and subordinate estate, a remainder or reversion may be expectant upon it (*Seymour's Case*, 10 Rep. 97 b, 98 a; see 2 Ld. Raym. 1148; Plowd. 557; Co. Litt. 18; Shep. T. 46, 103, 402; 3 Leon. 117; 1 Prest. on Estates, 431, 433).

A statutory base fee results from a disposition by an actual tenant in tail made without the consent of the protector (sect. 34, *post*). It may be enlarged into a fee simple absolute either by a subsequent disposition by the person who, if the former disposition had not been executed, would have been actual tenant in tail (sect. 19); or by the owner of the base fee becoming entitled to the immediate reversion (sect. 39). As to the operation of the Stat. Lim. in barring the title of reversioners where persons claiming in respect of a statutory base fee remain in possession, see sect. 6 of the R. P. Lim. Act, 1874, *ante*, p. 159.

Common law base fee. Apart from a statutory base fee, there is at common law another estate which is also known as a base fee. Thus according to the old authorities a release or bargain and sale by a tenant in tail passes a fee (known as a base fee) which is voidable by the entry of the issue in tail (*Doe v. Woodroffe*, 15 M. & W. 793; 2 H. L. C. 829, referring to *Machell v. Clarke*, 2 Ld. Raym. 782; s.c. 2 Salk. 619; Com. 720; 7 Mod. 18; 11 Mod. 19; see *Goodright v. Mead*, 3 Burr. 1703; *Doe v. Rivers*, 7 T. R. 276; *Seymour's Case*, 10 Rep. 95). So in a modern case it has been laid down that a conveyance by a tenant in tail without a disentailing assurance will in general pass a fee determinable by the entry of the issue in tail (*Sturgis v. Morse*, 2 D. F. & J. 231; see *Re Gaskell and Walter*, 1906, 1 Ch. 444; and the judgment of *Kay, J.*, in *Hankey v. Martin*, 49 J. T. 560). Such a common law base fee created before the present Act by lease and release might have been confirmed and made indefeasible by a fine levied by the releasor after the death of the releasee (*Doe v. Wichelo*, 8 T. R. 211). As to the powers of confirming and

enlarging common law base fees given by the present Act, see sect. 38, *post* 3 & 4 Will. 4, A list of the methods by which a base fee arises is given in Challis Real Prop., 2nd ed., p. 298. c. 74, s. 1.

(c) By the common law, before the stat. Westm. 2, commonly called the *Estate tail*: statute *De Donis* (13 Edw. 1, c. 1), there were two kinds of estates of the origin of inheritance: the one a fee simple absolute, where lands were limited to a man and to his heirs generally; and the other a fee simple *conditional*, where lands were given to a man and to the heirs of his body (see *Willion v. Berkeley*, Plowd. 222—252; 2 Prest. on Est. 323—354). In the case of the latter, until issue born, the grantee had not the absolute property in the estate; but the moment issue was born, the condition being performed, the estate became absolutely his property, and he could dispose of it in the same manner as if he had held it in fee simple. The statute *De Donis* declared that the will of the donor or grantor should be observed, and that an estate so granted to a man and the heirs of his body should descend to the issue, and that he should not have power to alienate the estate (*A.-G. v. Marlborough*, 3 Madd. 531, 532). Hence the modern estate tail.

Two things are essential to an entail within the statute, viz., that the subject be of a real nature, and that the estate in it be an inheritance (Harg. Co. Litt. 20 a, note (5)). Where a dignity is limited to the heirs of the body, even though no place be named in the creation of the title, the dignity is within the statute *De Donis*, and descendible as an estate tail (*Re Rivett-Carnac*, 30 Ch. D. 136). Lands in ancient demesne are not within the statute *De Donis* (*Cresswell v. Hawkins*, 3 Jur. N. S. 407). As to copyholds, see note to sect. 50, *post*, p. 302. What may be entailed.

If a purely personal annuity be granted to a man and the heirs of his body, a fee conditional is created, and A. can alienate the annuity as soon as an heir of his body is born; as he could have done in the case of real estate before the Statute *De Donis* (*Stafford v. Buckley*, 2 Ves. senr. 180; Co. Litt. 20 a). But such a grant does not create an estate tail, for the Statute *De Donis* uses only the word "tenement," and an annuity although it may be an "hereditament," is not a "tenement" (*Bignold v. Giles*, 4 Drew. 347; see *Turner v. Turner*, 1 Bro. C. C. 323; *Re Rivett Carnac*, 30 Ch. D. 141). Annuities granted with words of inheritance have been held to be personal estate where they were granted by the Crown, either out of Barbadoes Duties (*Aubin v. Daly*, 4 B. & Ald. 59; *Stafford v. Buckley*, 2 Ves. senr. 170), or out of the revenue of the Post Office (*Holderness v. Carmarthen*, 1 Bro. C. C. 376), or out of Coal Duties (*Radburn v. Jarvis*, 3 Beav. 450). See on the other hand, *A.-G. v. Richmond*, 1907, 2 K. B. 973, where the same Coal Duties were held to be realty, and entailable within the Statute *De Donis*. Annuities.

In the case of bequests of personalty to A. and the heirs of his body, the ordinary rule is that A. takes an absolute interest (*Re Walker, Macintosh Walker v. Walker*, 1908, 2 Ch. 714; see further, *Leventhorpe v. Ashbie*, Tud. L. C. Conv. 242, 4th ed.).

Neither estates *pur autre vie* in lands, nor terms of years, are entailable any more than personal chattels. They may, however, be so settled as to answer the purposes of an entailed estate and be rendered inalienable almost for as long a time as if they were entailable (Harg. Co. Litt. 20 a, note (5); see *Fearne*, 495—501, 8th ed.). As to chattels settled by reference to limitations of real estate in strict settlement, see *Glenorchy v. Bosville* (1 White & Tud. L. C. Eq. 1).

A *quasi* tenant in tail in possession of an estate *pur autre vie* may by act *inter vivos* deal with the estate as if there had never been any settlement of estates *pur autre vie*. (*Allen v. Allen*, 2 Dru. & War. 307; *Re Barber*, 18 Ch. D. 628; see *Pickers-gill v. Grey*, 31 L. J. Ch. 394). The *quasi* entail in such an estate may be barred by deed, surrender, or even by articles (*Guy v. Mannock*, 2 Eden, 339; see 16 Ves. 313; *Coop. C. C.* 178; 1 Mer. 665; see *Lynch v. Nelson*, 1 R. 5 Eq. 192), but not by will (*Hopkins v. Ramadge*, Batty, 365; *Campbell v. Sandys*, 1 Sch. & L. 281; *Cresswell v. Hawkins*, 3 Jur. N. S. 408; *Re Barber*, 18 Ch. D. 628; see *Doe v. Luxton*, 6 T. R. 292). Where a

3 & 4 Will. 4,
c. 74, s. 1.

tenant in tail in remainder after an estate *pur autre vie* by deed barred such entail, the deed was held also to bar a *quasi* estate tail taken by the same person in the estate *pur autre vie* (*Re Michell, Moore v. Moore*, 1892, 2 Ch. 87). A *quasi* entail in a lease for lives may be barred by the first *quasi* tenant in tail surrendering and renewing (*Blake v. Blake*, 1 Cox, 266; 3 P. Wms. 10, note 1, by Cox; see *Coop. C. C.* 184, 185); mortgaging for a term (*Walsh v. Studdert*, 1 R. 5 C. L. 478), or taking a fee farm grant (*Morris v. Morris*, 1 R. 6 C. L. 73; see further, *Tud. L. C. Conv.* 102, 4th ed.). But a *quasi* tenant in tail in remainder of an estate *pur autre vie*, after an estate for life to some other person, could not by fine or otherwise, in the lifetime of the tenant for life and without his concurrence, bar the remainders over (*Slade v. Pattison*, 5 L. J. Ch. 51; *Allen v. Allen*, *sup.*; see *Wastneys v. Chappell*, 3 Br. P. C. 50; *Edwards v. Champion*, 3 D. M. & G. 202). So where an estate *pur autre vie* is limited to one for life with remainder over in tail, there the first taker cannot bar the remainder, unless the remainderman in tail joins (*Low v. Barron*, 3 P. Wms. 262; *Osbreys v. Bury*, 1 Ball & B. 53).

Before this act estates tail were barred by means of fines or recoveries (see the note to sect. 2, *post*).

Actual tenant
in tail.

(d) The words "actual tenant in tail" describe the person upon whom sect. 15 confers the power of barring. They do not include a person who has barred an estate tail, either completely so as to convert it into a fee simple, or incompletely so as to convert it into a statutory base fee (see sect. 19, *post*).

"Divested or
turned to a
right."

As to the words "divested or turned to a right," Lord Coke distinguished between those alienations which take away an entry by working a discontinuance, and those which divest an estate" (*Co. Litt.* 327 b). The word "divested" is thus explained in *Termes de la Ley*: "As invest signifieth to deliver possession of a thing, so divest signifieth the taking away of the possession." The words "turned to a right" have a more extensive signification; for when an estate is turned to a right, the owner has only the "Jus proprietatis" or mere right of property, which could not be regained by a possessory but only by a real action (*Taylor v. Horde*, 1 Burr. 107; see Mr. Preston's argument in *Goodright v. Forester*, 1 Taunt. 588; *Smith v. Clyfford*, 1 T. R. 744; *Co. Litt.* 239 a, note (1)). Having regard to these words (which were discussed in argument, *Re Gaskell and Walter*, 1906, 2 Ch. 6), the expression "actual tenant in tail" seems to include a tenant in tail who (1) has been ousted by an intruder, or who (2) has by his own conveyance passed to a stranger a common law base fee (see *Re Gaskell and Walter*, 1906, 2 Ch. 5, 6), or who (3) has been convicted of felony, his property thereupon vesting in an administrator (*Ib.* 1906, 2 Ch. 1).

Tenant in
tail.

"Tenant in tail" is so defined as to include the person upon whom sect. 19 confers the power of enlarging base fees (see *Banckes v. Small*, 36 Ch. Div. 721).

Relation of
appointment
to deed creat-
ing a power.

(e) It has been established ever since the time of Lord Coke (*Sir Edward Clere's Case*, 6 Rep. 18), that where a power of appointment over real estate is executed, the appointee takes under him who created the power, and not under him who executes it (*Marlborough v. Godolphin*, 2 Ves. sen. 78); the appointee, however, does not take from the time of the creation of the power, but from the time of its complete execution, *e.g.* where the execution is by will from the testator's death (*Ib.*). The estates limited in default of and until the execution of the power are vested until an appointment is made (*Doe v. Martin*, 4 T. R. 39; compare *Re Ware, Cumberlege v. Cumberlege-Ware*, 45 Ch. D. 269), but are defeated by an appointment (compare *Lovett v. Lovett*, 1898, 1 Ch. 89). Thus, in the case of a power of leasing, the lessee stands in the same relation to all the persons named in the settlement as if that settlement had contained a limitation to his use antecedent to the life estate and the subsequent limitations (*Maundrell v. Maundrell*, 10 Ves. 255, 256; see *Co. Litt.* 216 a, 241 a, notes by Butl.). So a right of dower, which had attached before the execution of a power, was defeated by an appointment (*Ray v. Pung*, 5 B. & Ald. 561; 5 Madd. 310).

But the donee of a power cannot by an appointment defeat a lease or other

interest granted by him by virtue of his estate (*Snape v. Turton*, Sir W. Jones, 392; *Yelland v. Fielis*, Moore, 788; *Goodright v. Cator*, Dougl. 477; see Gilb. on Uses, 142; *Edwards v. Slater*, Hardr. 415; *Reg. v. Ellis*, 4 Exch. 652; see also the note, *post*, p. 323).

With reference to the rules against perpetuities and remoteness, where an appointment is made in exercise of a special power, the appointment must be read into the instrument creating the power, and its validity tested in that way (*Whitby v. Mitchell*, 42 Ch. D. 500; 44 Ch. Div. 85; *Re Brown and Sibley*, 3 Ch. D. 159). But where the appointment is made under a general power, time runs from the execution of the power, not from its creation (*Rous v. Jackson*, 29 Ch. D. 521, 526; *Re Devon Settled Estates*, 1896, 2 Ch. 567).

2. Fines and Recoveries abolished.

2. After the thirty-first day of December, one thousand eight hundred and thirty-three, no fine shall be levied or common recovery suffered of lands of any tenure, except where parties intending to levy a fine or suffer a common recovery shall, on or before the thirty-first day of December, one thousand eight hundred and thirty-three, have sued out a writ of dedimus, or any other writ, in the regular proceedings of such fine or recovery; and any fine or common recovery, which shall be levied or suffered contrary to this provision, shall be absolutely void.

No fine or recovery to be levied or suffered after the 31st of December, 1833.

The S. L. Rev. Act, 1888, has repealed the words, "and be it further enacted," wherever they occurred in this act, and has also repealed immaterial words in the following sections, viz. 36, 47, 79, 80, 83, 84, and 89. The repealed words have accordingly been omitted.

The following account of the nature and operation of fines and recoveries is abridged from the First Report of the Real Property Commissioners, 1829, pp. 20—25.

Report of Real Property Commissioners.

A fine in its origin was an amicable composition, by leave of the king or his justices, of any actual suit, whereby the lands were acknowledged to be the right of one of the parties, and at common law all persons were barred by it who did not claim within a year and a day. The safe title acquired by this process led, it is supposed, to the practice of transferring lands by means of a fictitious suit of the same nature as the real suit above alluded to. This is the origin of fines, which, before this statute, subject to certain modifications made from time to time by statutes, had been in use for centuries (see 34 Edw. 3, c. 16; 1 Rich. 3, c. 7; 4 Hen. 7, c. 24; 32 Hen. 8, c. 36).

Definition of a fine and its origin.

There were four sorts of fines, viz., 1st, a fine "*Sur conuizance de droit come ceo*, &c."; 2ndly, a fine "*Sur conuizance de droit tantum*"; 3rdly, a fine "*Sur concessit*"; and 4thly, a fine "*Sur done grant et render*." The first and third were those in general use; the second was sometimes used, where the same purposes could not be attained either by the first or third; the fourth had become obsolete.

Different sorts of fines.

The three principal uses to which fines were applied were, to bar estates tail, and enable a tenant in tail to acquire or pass a base fee (see 32 Hen. 8, c. 36); to gain a title by non-claim (see *ante*, p. 130; *Davies v. Lowndes*, 7 Scott, N. R. 141); and to pass the estates and bar the rights of married women (see *Life Association v. Siddal*, 3 D. F. & J. 74; Co. Litt. 121 a, n.; *Dickens v. Unthank*, 1 Jur. N. S. 916; 24 L. J. Ch. 501). For other effects of a fine, see notes to the following sections of this act, viz., sects. 20, 34, 38, 39, and the note to sect. 39 of R. P. Lim. Act, 1833 (*ante*, p. 181); *Doe v. Dilnot* (2 Bos. & P. N. R. 401); *Brassington v. Llewellyn* (1 F. & F. 27).

Operation of fines.

**3 & 4 Will. 4,
c. 74, s. 2.**

Definition of
a common
recovery and
its origin.

Operation of
a recovery.

Necessary
parties to a
recovery for
barring
estates tail
and remain-
ders.

Persons liable
after 31st
December,
1833, to levy
fines or suffer
recoveries
under cove-
nants to effect
the purposes
intended by
means of this
act; but in
any case
where the
purpose of a
fine or reco-
very cannot
be so effected,
the persons
liable to levy
fines or suffer
recoveries
shall execute
a deed which
shall have the
same opera-
tion as the
fine or reco-
very.

A common recovery was a judgment in a fictitious suit brought by the demandant against the tenant of the freehold, who vouched some person to warrant the lands, and judgment was given for the demandant to recover them against the tenant, in consequence of the person vouched making default in defending the title to the lands, which title he was supposed to have warranted. In a recovery, the regular process of a real action was pursued throughout (see *Broome v. Swan*, 1 Bl. Rep. 496, 526), and no compromise took place as in a fine. Common recoveries were invented by ecclesiastics in order to elude the statutes of mortmain (Willes Rep. 448, 551; 5 J. B. Moore, 607; 5 T. R. 109, n.; Shelford's Mortmain, 12, 13), and were in constant use for that purpose until checked by the statute of Westminster 2, 13 Edw. 1, c. 32. In consequence of the principles laid down in the 12 Edw. 4, in *Taltarum's Case* (Hardr. 209; Willes Rep. 452; see Tudor, L. C. Conv. 695, 3rd ed.), a common recovery was afterwards applied to the purpose of evading the statute of Westminster 2, 13 Edw. 1, c. 1, commonly called the statute *De Donis Conditionalibus* (*ante*, p. 265).

The principal use of a recovery was to enable a tenant in tail to bar not only his estate tail, but also all remainders, reversions, conditions, collateral limitations and charges, not prior to the estate tail, and to acquire or pass a fee simple or an estate commensurate with the estate of the settlor; it was not unfrequently made use of at the same time to convey, release, bar, or extinguish the estates, rights, powers, and interests of married women and others. As to other effects of a recovery, see notes to sects. 18 and 38 of this act, and *Doe v. Llandaff* (2 Bos. & P. N. R. 491).

The writ, in the case of a recovery, must have been brought by the demandant against the person who had the immediate freehold, who was called the tenant to the *præcipe*; consequently there were frequently great difficulties in barring entails, for if the tenant to the *præcipe* did not join in the conveyance, the recovery was void, and it often happened that he could not be traced or would refuse to concur (see further First Report of the Commissioners of Real Property, ordered to be printed 20th May, 1829; 5 Cru. Dig.; Prest. on Conv.; Coventry on Recoveries; Shep. Touch.; *Doe v. Scarborough*, 3 Ad. & Ell. 1).

3. In case any person shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable to levy a fine or suffer a common recovery of lands of any tenure, or to procure some other person to levy a fine or suffer a common recovery of lands of any tenure, under a covenant or agreement already entered into or hereafter to be entered into, before the first day of January, one thousand eight hundred and thirty-four, then and in such case, if all the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, the person liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be subject and liable, under such covenant or agreement, to make, or to procure to be made, such a disposition under this act as will effect all the purposes intended to be effected by such fine or recovery; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December,

one thousand eight hundred and thirty-three, be subject and liable under such covenant or agreement to make or procure to be made such a disposition under this act as will effect such of the purposes intended to be effected by such fine or recovery as can be effected by a disposition under this act; and in those cases where the purposes intended to be effected by such fine or recovery, or any of them, cannot be effected by any disposition under this act, then the person so liable to levy such fine or suffer such recovery, or to procure some other person to levy such fine or suffer such recovery as aforesaid, shall, after the thirty-first day of December, one thousand eight hundred and thirty-three, be liable under such covenant or agreement to execute, or to procure to be executed, some deed whereby the person intended to levy such fine or suffer such recovery shall declare his desire that such deed shall have the same operation and effect as such fine or recovery would have had if the same had been actually levied or suffered; and the deed by which such declaration shall be made shall, if none of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered; but if some only of the purposes intended to be effected by such fine or recovery can be effected by a disposition under this act, then the deed by which such declaration shall be made shall, so far as the purposes intended to be effected by such fine or recovery cannot be effected by a disposition under this act, have the same operation and effect in every respect as such fine or recovery would have had if the same had been actually levied or suffered.

3 & 4 Will. 4,
c. 74, s. 3.

3. *The Tenure of Ancient Demesne.*

4. No fine already levied in a superior court of lands of the tenure of ancient demesne which hath not been reversed, and no fine hereafter to be levied of lands of that tenure, shall, upon a writ of deceit already brought by the lord of the manor of which the lands were parcel, the proceedings in which are now pending, or upon a writ of deceit which at any time after the passing of this act may be brought by the lord of the said manor, be reversed as to any person except the lord of the said manor; and the court shall order such fine to be vacated only as to the lord of the said manor; and every such fine which may be reversed as to the lord of the said manor upon such writ of deceit as aforesaid shall still remain as good and valid against, and as binding upon, the conusors thereof and all the persons claiming under them, as such fine would have been if the same had not been reversed by such writ of deceit as aforesaid; and no common recovery already suffered in a superior court of lands of the tenure of ancient demesne which hath not been

Fines and recoveries of lands in ancient demesne, when levied or suffered in a superior court, may be reversed as to the lord by writs of deceit, the proceedings in which are now pending, or by writs of deceit hereafter to be brought, but shall be as valid

3 & 4 Will. 4,
c. 74, s. 4.

against the
parties
thereto, and
persons
claiming
under
them, as if
not reversed
as to the lord.

reversed, and no common recovery hereafter to be suffered of lands of that tenure, shall, upon a writ of deceit already brought by the lord of the manor of which the lands were parcel, the proceedings in which are now pending, or upon a writ of deceit which at any time after the passing of this act may be brought by the lord of the said manor, be reversed as to any person except the lord of the said manor; and the court shall order such recovery to be vacated only as to the lord of the said manor; and every such recovery which may be reversed as to the lord of the said manor, upon such writ of deceit as aforesaid, shall still remain as good and valid against, and as binding upon, the vouchees therein, and all persons claiming under them, as such recovery would have been if the same had not been reversed by such writ of deceit as aforesaid.

Tenure by
ancient
demesne.

All those estates which are called in Domesday Book *terræ regis* were manors belonging to the crown, being part of its ancient demesne; a great portion of the lands comprised within those manors was in the hands of tenants who held the same of the crown by a peculiar species of socage tenure which has long been known by the appellation of *ancient demesne* (4 Inst. 269, 270), which can only subsist in manors of that sort. Whether ancient demesne or not can only be determined by a reference to Domesday Book (Dyer, 250; *Doe v. Roe*, 2 Burr. 1046; see Scriven on Cop. 36—41, 475—477, 7th ed.; Com. Dig. Ancient Demesne; and Third Real Property Report, 12, 13). The tenants in ancient demesne were subject to certain restraints, and entitled to certain immunities. They could not bring or defend any real action touching their tenements, except in the lord's court. Hence the title to lands of that tenure are frequently involved in considerable difficulties, in consequence of fines or recoveries having by mistake been levied or suffered in the Court of Common Pleas (see the First Report of the Real Property Commissioners, pp. 28, 29). See as to manors of ancient demesne, *Merttens v. Hill*, 1901, 1 Ch. 842.

Fines and
recoveries of
lands in
ancient
demesne
levied or
suffered in
the manor
court, after
other fines
and reco-
veries in a
superior
court, shall
be as valid as
if the tenure
had not been
changed.

Fines and
recoveries
shall not be
invalid in
other cases,
though levied
or suffered in
courts whose

5. If at any time before or after the passing of this act a fine or common recovery shall have been levied or suffered, or shall be levied or suffered in a superior court, of lands of the tenure of ancient demesne, and subsequently to the levying or suffering thereof a fine or common recovery shall have been or shall be levied or suffered of the same lands in the court of the lord of the manor of which the lands had been previously parcel, and the fine or common recovery levied or suffered in such superior court shall not have been reversed previously to the levying of the fine or the suffering of the common recovery in the lord's court, then and in every such case the fine or common recovery levied or suffered in the lord's court shall, notwithstanding the alteration or change of the tenure by the fine or common recovery previously levied or suffered in the superior court, be as good, valid and binding as the same would have been if the tenure had not been altered or changed; and that in every other case where any fine or common recovery shall at any time before the passing of this act have been levied or suffered in a court whose jurisdiction does not extend to the lands of which such fine or recovery shall have been levied

or suffered, such fine or recovery shall not be invalid in consequence of its having been levied or suffered in such court, and such court shall be deemed a court of sufficient jurisdiction for all the purposes of such fine or recovery; and in every other case where persons shall have assumed to hold courts in which fines or common recoveries have been levied or suffered, and such courts shall be unlawful or held without due authority, the fines or common recoveries which at any time before the passing of this act may have been levied or suffered in such unlawful or unauthorized courts shall not be invalid in consequence of their having been levied or suffered therein, and such courts shall be deemed courts of sufficient jurisdiction for all the purposes of such fines or recoveries.

3 & 4 Will. 4,
c. 74, s. 5.

jurisdictions
may not
extend to the
lands therein
comprised.

6. In every case in which at any time, either before or after the passing of this act, the tenure or * ancient demesne has been or shall be suspended or destroyed by the levying of a fine, or the suffering of a common recovery of lands of that tenure in a superior court, and the lord of the manor of which the lands at the time of levying such fine or suffering such recovery were parcel, shall not reverse the same before the first day of January, one thousand eight hundred and thirty-four, and shall not by any law in force on the first day of this session of parliament be barred of his right to reverse the same, such lands, provided within the last twenty years immediately preceding the first day of January, one thousand eight hundred and thirty-four, the rights of the lord of the manor of which they shall have been parcel shall in any manner have been acknowledged or recognized as to the same lands, shall, from the said first day of January, one thousand eight hundred and thirty-four, again become parcel of the said manor, and be subject to the same heriots, rents and services, as they would have been subject to if such fine or recovery had not been levied or suffered; and no writ of deceit for the reversal of any fine or common recovery shall be brought after the thirty-first day of December, one thousand eight hundred and thirty-three.

Tenure of
ancient
demesne
where sus-
pended or
destroyed by
fine or re-
covery in a
superior
court,
restored
in cases in
which the
rights of the
lord of the
manor shall
have been
recognized
within
twenty years.

[* *Lege* of.]

4. *The Amendment and Validating of Fines and Recoveries.*

7. If it shall be apparent, from the deed declaring the uses of any fine already levied or hereafter to be levied, that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusor or conusee of such fine, or any misdescription or omission of lands intended to have been passed by such fine, then and in every such case the fine, without any amendment of the indentures, record or proceedings in which such error, misdescription or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to

Fines made
valid without
amendment.

3 & 4 Will. 4, have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription or omission.

Amendment of fines.

Amendment was refused where the error in the fine was cured by this section (*Life Association v. Siddal*, 3 D. F. & J. 58; *Lockington v. Shipley*, 1 Bing. N. C. 355). Fines were amended in the following cases: *Totton v. Vincent* (5 Bing. N. C. 626); *Lloyd v. Nicholas* (4 Bing. N. C. 633); *Price v. Watkins* (6 Jur. 170); *Evans v. Davis* (5 Bing. N. C. 229).

Recoveries made valid without amendment.

8. If it shall be apparent, from the deed making the tenant to the writ of entry or other writ for suffering a common recovery already suffered or hereafter to be suffered, that there is in the exemplification, record, or any of the proceedings of such recovery any error in the name of the tenant, demandant, or vouchee in such recovery, or any misdescription or omission of lands intended to have been passed by such recovery, then and in every such case the recovery, without any amendment of the exemplification, record or proceedings in which such error, misdescription or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, in the same manner as it would have done if there had been no such error, misdescription or omission.

Amendment of recoveries.

A recovery was amended under this section by inserting a latent fact (*Re Twisden*, 4 Bing. N. C. 253); but amendment was refused when the defect was remedied by this section (*Wickens v. Windus*, 9 C. B. 711; *Re Watkins*, 9 Dowl. P. C. 58; *Re Evans*, 2 Scott, N. R. 83).

A warrant of attorney cannot be amended (*Re Lamont*, 3 Scott, 666).

See further, as to the amendment of fines and recoveries, Cruise, Dig. tit. 35, c. 5; tit. 36, c. 6; 2 Wms. Saund. 94.

Saving jurisdiction in cases not provided for.

9. Provided always, that nothing in this act contained shall lessen or take away the jurisdiction of any court to amend any fine or common recovery, or any proceeding therein, in cases not provided for by this act.

Recoveries made valid in certain cases where bargain and sale is not duly enrolled.

10. No common recovery already suffered or hereafter to be suffered shall be invalid in consequence of the neglect to inrol in due time a bargain and sale purporting to make the tenant to the writ of entry or other writ for suffering such recovery, provided such recovery would have been valid if the bargain and sale purporting to make the tenant to the writ had been duly enrolled.

Recoveries invalid in consequence of there not being proper tenants to the writs of entry made valid in certain cases.

11. No common recovery already suffered or hereafter to be suffered shall be invalid in consequence of any person in whom an estate at law was outstanding having omitted to make the tenant to the writ of entry or other writ for suffering such recovery, provided the person who was the owner of or had power to dispose of an estate in possession, not being less than an estate for life or lives in the whole of the rents and profits

of the lands in which such estate at law was outstanding, or the ultimate surplus of such rents and profits, after payment of any charges thereout, and whether any surplus after payment of such charges shall actually remain or not, shall, within the time limited for making the tenant to the writ for suffering such recovery, have conveyed or disposed of such estate in possession to the tenant to such writ; and an estate shall be deemed to be an estate in possession notwithstanding there shall be subsisting prior thereto any lease for lives or years, absolute or determinable, upon which a rent is reserved, or any term of years upon which no rent is reserved.

Fines and recoveries were levied or suffered of equitable estates, and Equitable had, with a few exceptions, the same operation as they would have had if fines and the estates had been legal; but neither a fine nor a recovery of an equitable estate produced a forfeiture of a particular estate, or destroyed contingent interests, except in the instance of a recovery suffered by an equitable tenant in tail, which would bar the entail, and all interests to take effect on the determination or in derogation thereof. Fines and recoveries of equitable estates must have been levied and suffered in the same courts, and with the same formalities, as those of legal estates; but there was some difference between legal and equitable recoveries, so far as regarded the tenant to the *præcipe* (see First Real Property Report, 1829, p. 29).

In order to make a good tenant to the *præcipe* there should have been a legal estate for life, with a legal remainder in tail, or an equitable estate for life, with an equitable remainder in tail (*Shapland v. Smith*, 1 Br. C. C. 75; *Salvin v. Thornton*, *Id.* 73, n.; see *Iveson v. Pearman*, 3 B. & C. 811; 4 B. & Ad. 55; 1 Collect. Jurid. 214; *Doe v. Ewart*, 7 Ad. & Ell. 670). A recovery suffered by an equitable tenant for life with a legal remainder in tail was void (3 B. & Cr. 799). But an equitable remainder in tail might have been barred although the person making the tenant to the *præcipe* had the legal estate (3 Ves. 125). Where a legal tenant in tail conveyed his estate to a trustee or mortgagee, the concurrence of his alienee in making a tenant to the *præcipe* was necessary. But this rule was held not applicable by analogy to trust estates (*Nouaille v. Greenwood*, Turn. & Russ. 26; see *Casborne v. Scarfe*, 1 Atk. 603). In equitable recoveries the person who made the tenant to the *præcipe* was the person who had the real equitable ownership (*Re Dudson*, 8 Ch. Div. 632; see also *Penny v. Allen*, 7 D. M. & G. 409; *Adams v. Adams*, 6 Q. B. 860).

As to the necessity of possession by the tenant to the *præcipe*, see *Grenville v. Blyth* (16 Ves. 224); *Pigott v. Waller* (7 Ves. 122); *Taylor v. Horde* (1 Burr. 60; Cowp. 689; 6 Br. P. C. 633, Toml. ed.; see Butl. Co. Litt. 330 b, n.); *Doe v. Lyons* (3 B. & C. 388).

A dowress who had not entered was not a necessary party to a recovery (4 Br. C. C. 525; see Gilb. Ten. 26; 5 Cru. Dig. p. 246, pl. 18); nor a person holding a freehold lease (14 Geo. 2, c. 20). A recovery might be void in part for want of a good tenant to the *præcipe* as to that part (*Row v. Power*, 2 Bos. & Pull. 1; *Moody v. Moody*, Ambler 649; see Co. Litt. 187; 2 Br. C. C. 180; *Winchester's case*, 3 Rep. 1; *Collyer v. Mason*, 2 Brod. & Bing. 685).

12. Provided always, that where any fine or common recovery shall before the passing of this act have been wholly reversed, such fine or recovery shall not be rendered valid by this act; and where any fine or common recovery shall before the passing of this act have been reversed as to some only of the parties

Certain cases in which fines and recoveries shall not be made valid by this act.

3 & 4 Will. 4,
c. 74, s. 12.

thereto, or as to some only of the lands therein comprised, such fine or recovery shall not be rendered valid by this act so far as the same shall have been reversed; and where any person who would have been barred by any fine or common recovery, if valid, shall before the passing of this act have had any dealings with the lands comprised in such fine or recovery, on the faith of the same being invalid, such fine or recovery shall not be rendered valid by this act; and this act shall not render valid any fine or common recovery as to lands of which any person shall at the time of the passing of this act be in possession in respect of any estate which the fine or common recovery, if valid, would have barred, nor any fine or common recovery which, before the passing of this act, any court of competent jurisdiction shall have refused to amend; nor shall this act prejudice or affect any proceedings at law or in equity, pending at the time of the passing of this act, in which the validity of such fine or recovery shall be in question between the party claiming under such fine or recovery, and the party claiming adversely thereto; and such fine or recovery, if the result of such proceedings shall be to invalidate the same, shall not be rendered valid by this act; and if such proceedings shall abate or become defective in consequence of the death of the party claiming under or adversely to such fine or recovery, any person who but for this act would have a right of action or suit by reason of the invalidity of such fine or recovery shall retain such right, so that he commence proceedings within six calendar months after the death of such party.

See as to this section, *Davies v. D'Arcy* (3 Ir. C. L. Rep. N. S. 617; 4 Ir. Ch. Rep. N. S. 87; Sugd. R. P. Stat. 2nd ed. 187).

5. *Custody of the Records of Fines and Recoveries.*

[Sect. 13 provided for the custody of the records of fines and recoveries which are now kept at the Central Office of the Supreme Court (see 5 & 6 Will. 4, c. 82; 42 & 43 Vict. c. 78, s. 5). As to fines and recoveries in the Courts of Great Session in Wales, see 5 Vict. c. 32; *Doe v. Price*, 16 M. & W. 603.]

6. *Estates Tail not Barrable by Warranty.*

Estates tail,
and estates
expectant
thereon,
no longer
barrable by
warranty.

14. All warranties of lands which after the thirty-first day of December, one thousand eight hundred and thirty-three, shall be made or entered into by any tenant in tail thereof, shall be absolutely void against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail.

See R. P. Lim. Act, 1833, s. 39, *ante*, p. 182.

3 & 4 Will. 4,
c. 74, s. 15.

7. Disposition of Lands Entailed.

15. After the thirty-first day of December, one thousand eight hundred and thirty-three, every actual tenant in tail, whether in possession, remainder, contingency, or otherwise, shall have full power to dispose of for an estate in fee simple absolute, or for any less estate, the lands entailed, as against all persons claiming the lands entailed by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act would have been vested in or might have been claimed by, the person making the disposition, at the time of his making the same, and also as against all persons,* including the King's most excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of any such estate tail: saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made.

* The remainder of the corresponding clause in the Irish Act (4 & 5 Will. 4, c. 92), s. 12, runs thus: "whose estates are to take effect after the determination or in defeasance of any such estate tail, including the King's most excellent Majesty, his heirs and successors, as regards the title to his Majesty to any reversion or remainder created or reserved by any settlement or will, and which reversion or remainder shall have come or shall hereafter come to the Crown in consequence of the attainder of any person to whom the forfeited reversion or remainder was previously to such forfeiture limited by any settlement or will, but not in any other case, or where the title to the crown shall have accrued by any other means; saving always the rights of all persons in respect of estates prior to the estate tail in respect of which such disposition shall be made, and the rights of all other persons except those against whom such disposition is by this act authorized to be made."

The words "actual tenant in tail" are defined by sect. 1, *ante*, p. 263. The words include a person who has conveyed away his estate tail by a deed not inrolled. After the conveyance he can still under this section execute a disentailing deed (*Re Gaskell and Walter*, 1906, 2 Ch. 5). As to the effect before the present act of a tenant in tail's assurance (apart from fine or recovery) in creating a common law base fee, see *ante*, p. 264. And as to the power of tenants in tail to confirm base fees and voidable estates previously created, see sects. 19 and 38, *post*.

The rule applicable where the reversion expectant on the estate tail is in the Crown is stated in the note to sect. 18, *post*. In cases not falling within that section, it has been said that the mere fact that an estate tail was created or governed by an act of parliament does not prevent the tenant from being a tenant in tail within the present statute (*A.-G. v. Richmond*, 1907, 2 K. B. 978). The Duke of Richmond was held actual tenant in tail of land governed by private acts (*Ib.*).

A disentailing deed executed by a tenant in tail does not destroy the interest he possesses in the estate, but enables him, by the exercise of the power which that interest gives him, to render it perpetual (*Lilford v. A. G.*, L. R. 2 H. L. 63). A disentailing deed whereby A. tenant in tail grants the entailed land to B. and his heirs to the use of A. his heirs and assigns is not an "alienation" (*Re Gaskell and Walter*, 1906, 2 Ch. 10). As to the destruction of powers by a disposition under the statute, see Sugden, Powers,

Power after the 31st of December, 1833, to dispose of lands entailed in fee simple, or for a less estate, saving the rights of certain persons.

Corresponding clause of Irish Act.

Actual tenant in tail.

Estate tail created by statute.

Operation of disentailing deeds under this section.

3 & 4 Will. 4, 91, 8th ed.; *Hill v. Pritchard* (Kay, 394); *Re Wright and Marshall* (28 c. 74, s. 15. Ch. D. 93).

Equitable tenants in tail.

The word "estate" in the statute extends to estates in equity as well as at law (sect. 1). As to equitable tenants in tail, and the form of assurance made necessary in that case by this act, see 1 Hayes, Conv. 155, 5th ed. As to fines and recoveries of equitable estates, see note to sect. 11, *ante*, p. 273.

Where land was devised to trustees on trust for sale and subject thereto to persons in tail, it was not necessary to bar the entail on a sale by the trustees (*Re Skeerett*, 2 Dru. & War. 585).

Tenant in tail in contingency.

The owner of a contingent estate tail was deemed incompetent to suffer a common recovery with effect (1 Prest. Conv. 142); but tenants in tail in contingency are expressly within the words of this section (see Sugd. R. P. Stat. 192; 1 Hayes, Conv. 194, 5th ed.). Until the contingency happens the only effect of the disposition ought to be to substitute a contingent fee for the contingent estate tail (Sugd. R. P. Stat. 192). Where successive entails were limited subject to a proviso that in a certain event the second entail was to be postponed to the third entail, the operation of the proviso was held to be "in defeasance" of the second entail, and to be barred by a disentailment thereof (*Milbank v. Vane*, 1893, 3 Ch. 79). And where, after the death of A., who was tenant for life, trustees were directed to convey real estate to the use of B. in tail, but if B. should be then dead to the use of the person who should then be the first heir male of the body of B. in tail, with remainder over, it was held that, during the life of A., B. had a vested equitable estate tail in remainder expectant on the decease of A., and that the subsequent estates were barred by B.'s disentailing deed, being estates to take effect in a certain event after, if not in defeasance of, B.'s estate tail (*Cardigan v. Curzon Howe*, 1901, 2 Ch. 479; where it was pointed out that "any such estate tail" means any estate tail in possession or remainder, &c.). In both the last cases it was unsuccessfully argued that the effect of the limitations was to create alternative gifts. See, further, *Doe v. Scarborough*, 3 Ad. & Ell. 43, under the old law.

Dispositions under this section — by an alien, lunatic, infant,

An alien might suffer a common recovery (Leon. 404; Shep. Touch. 404), and may execute a disentailing deed (1 Jarm. Wills 44, 5th ed.). Where the tenant in tail is a lunatic, the Court of Lunacy can bar the entail, but the power will not be exercised so as to affect the remaindermen (*Re Pares*, *Lillingston v. Pares*, 12 Ch. Div. 333; see Lunacy Act, 1890, s. 123). A base fee has been enlarged where it was for the benefit of the lunatic (*Re Sefton*, 1898, 2 Ch. 378). An infant has been ordered under Debts Recovery Act, 1830, s. 11, to execute a disentailing deed (*Radcliffe v. Eccles*, 1 Keen, 130; see *Re Montagu*, *Faber v. Montagu*, 1896, 1 Ch. 549; *Re Hambrough*, *H. v. H.*, 1909, 2 Ch. 620). A married woman is not prevented by a restraint on anticipation from barring an entail (*Cooper v. Macdonald*, 7 Ch. Div. 288). Where a settlor gives an estate tail, he cannot restrict the power of the tenant in tail to bar it (*Dawkins v. Penrhyn*, 4 App. Cas. 64).

married woman.

Bankruptcy of tenant in tail.

Where a tenant in tail becomes bankrupt, his trustee can bar the entail (see Bankruptcy Act, 1883, sect. 56, sub-s. 5; sect. 56 of present act, *post*). And where a tenant in tail is convicted of felony, notwithstanding that his property has become vested in an administrator, he still remains able to bar the entail by executing a disentailing deed. The fee simple so acquired will vest in the administrator (*Re Gaskell & Walter*, 1906, 2 Ch. 20).

Felony.

Disposition by tenant for life.

A disentailing deed executed by a tenant for life has no operation under this section (*Slater v. Dangerfield*, 15 M. & W. 263; as to the effect of a recovery suffered by a tenant for life, see *Smith v. Clyfford*, 1 T. R. 738; *Meredith v. Leslie*, 6 Br. P. C. 388; *Doe v. Scarborough*, 3 Ad. & Ell. 43). But a proper disentailing deed will bar the entail, though the tenant in tail who executes it is recited in it to be tenant for life (*Evans v. Jones*, Kay, 29).

As to the nature and effect of the instrument to be executed by the tenant in tail for the purpose of barring the entail, see cases quoted in the note to sect. 40, *post*, p. 297.

Leases by tenant in tail.

The power of leasing conferred by this section on tenants in tail (see sect. 41, *post*) has become less material since the Settled Land Act, 1882, which

last act (sect. 58, sub-sect. 1, *post*) has enabled a tenant in tail to exercise **3 & 4 Will. 4.**, the powers under that act of a tenant for life. Where a tenant in tail is a lunatic, the judge in lunacy may authorize the committee to grant leases **c. 74, s. 15.** binding on all reversioners (Lunacy Act, 1890, ss. 120, 122; see *S. L. Act*, 1882, s. 62).

"Lands" in this act includes rents (sect. 1, *ante*). As to the effect of a recovery on entailed rents, see *Smyth v. Farnaby*, Carter, 52; Sid. 285; 2 Keb. 29, 55, 84; *Weeks v. Peach*, Lutw. 1218, 1224; *S. C.*, Salk. 577; *Chaplin v. Chaplin*, 3 P. Wms. 229; Butl. Co. Litt. 298 a, n. 2; 1 Prest. on Conv. 3. Entail of rent.

16. Provided always, that where under any settlement made before the passing of this act, any woman shall be tenant in tail of lands within the provisions of an act passed in the eleventh year of the reign of his Majesty King Henry the Seventh, intituled "Certain Alienations made by the Wife of the Lands of her deceased Husband shall be void," the power of disposition hereinbefore contained as to such lands shall not be exercised by her except with such assent as, if this act had not been passed, would, under the provisions of the said act of King Henry the Seventh, have rendered valid a fine or common recovery levied or suffered by her of such lands. Power of disposition not to be exercised by women tenants in tail ex provisione viri, under 11 Hen. 7, c. 20, except with assent.

By stat. 11 Hen. 7, c. 20, a woman who had any estate in *dower* or for *life*, or *in tail jointly* with her husband, or *only to herself*, or *to her use*, in any lands or hereditaments of the *inheritance or purchase of her husband* (Co. Litt. 326 b), or given to the husband and wife in tail or for life, by any of the *ancestors of the husband*, or by any other person seised to the use of the husband, or of his ancestors, could not, being *sole*, or with any *after-taken husband*, except with the consent of the persons next entitled to the inheritance, or for the term of her *life only*, alien such estate (see *Foster v. Pitfal*, Cro. Eliz. 2, 524; *Symson v. Turner*, 1 Eq. Cas. Abr. 220; *Gretton v. Howard*, 6 Taunt. 94; *Villars v. Beaumont*, Dyer, 145 a; *Watkins v. Lewis*, 1 Russ. & M. 390; Cro. Eliz. 2; 1 Leon. 261; *Curtis v. Price*, 12 Ves. 97; *Rochfort v. Fitzmaurice*, 2 Dru. & War. 19; 1 Roper on Hus. & W. by Bright, pp. 497, 515; Cruise's Dig. tit. 36, c. 10; Prest. Conv. 19—21, 146—149). The stat. 11 Hen. 7, c. 20, and construction of it.

[Sect. 17, repealing 11 Hen. 7, c. 20, was repealed by *S. L. Rev. Act*, 1874, without reviving the former act.]

18. Provided always, that the power of disposition hereinbefore contained shall not extend to tenants of estates tail, who, by an act passed in the thirty-fourth and thirty-fifth years of the reign of his Majesty King Henry the Eighth, intituled, "An Act to embarfeigned Recovery of Lands wherein the King is in Reversion," or by any other act, are restrained from barring their estates tail, or to tenants in tail after possibility of issue extinct. The power of disposition not to extend to certain tenants in tail.

Before this statute it was doubtful how far a tenant in tail could by recovery bar the Crown's reversion (Cruise, Dig. vol. 5, p. 422; see Com. Dig. Estates, B. 21; Bac. Abr., Fines and Recoveries, 2nd Division, C.). Sect. 15 gives express power to bar the Crown. But by the present section this power does not extend to tenants in tail who by any statute are restrained from barring. Where private statutes contained no such express restraint, a Reversion in the Crown.

3 & 4 Will. 4. restraint was not implied from words apparently inconsistent with a power of alienation (*A.-G. v. Richmond*, 1907, 2 K. B. 981).

Tenants in tail of the gift of the Crown. By statute 34 & 35 Hen. 8, c. 20, no feigned recovery by assent of parties against any tenant in tail of any lands *given by the Crown*, whereof the reversion shall be in the King, shall bind the heirs in tail (see Co. Litt. 372 b, 373 a; Cruise's Dig. tit. 36, c. 10, ss. 42—51; 1 Prest. Conv. 18, 19, 144—146, 221; *Chesterfield's case*, Hardr. 409; 1 Anne, sess. 1, c. 7; 34 Geo. 3, c. 75; 39 & 40 Geo. 3, cc. 86, 88; 47 Geo. 3, c. 24; S. E. Act, 1877, sect. 55, *post*). As to the law before 34 & 35 Hen. 8, c. 20, see 2 Roll. Abr. 293, 294; Hob. R. 339; Bro. Tail. 41; Cro. Car. 430; Plowd. 555; Dyer, 32 a; *Neal v. Wilding*, 1 Wils. 275; *Blosse v. Clanmorris*, 3 Bligh, 62.

The statute 34 & 35 Hen. 8, c. 20, only applies where the Crown grant was in consideration of money or services (*Perkins v. Sewell*, 1 W. Bl. 659). A consideration may be presumed after a lapse of time (*Robinson v. Giffard*, 1903, 1 Ch. 865). But where the grant was *ex facie* voluntary, the case was not within this statute (*Grafton v. London Co.*, 5 Bing. N. C. 27).

Tenant in tail of the gift of the Crown disseised; fine by disseisor. Where tenant in tail of the gift of the Crown was disseised, and the disseisor levied a fine with proclamations, and five years elapsed; it was held that the issue in tail were not barred (*Stratfield v. Dover*, Cro. Eliz. 595; but see 1 Sid. 166; 1 Roll. R. 171; and *Abergavenny v. Brace*, L. R. 7 Exch. 176).

Inalienable estates tail. In several acts of parliament conferring estates on eminent individuals, tenants in tail are restrained from alienating such estates, except for their own lives, as in the case of the Duke of Marlborough, by 5 Anne, cc. 3, 4 (see *Davis v. Marlborough*, 1 Swanst. 74; *Osborn v. Marlborough*, 14 W. R. 886; *Re Blenheim*, 8 Times L. R. 582); the Duke of Wellington (see statutes 41 Geo. 3, c. 59, s. 6; 42 Geo. 3, c. 113, s. 6; 54 Geo. 3, c. 161, s. 28); the Earl of Abergavenny (2 & 3 Ph. & M. c. 23; see *Abergavenny v. Brace*, L. R. 7 Exch. 145); the Bolton estates (see 27 H. 8, c. 16; *Re Bolton Estates*, *Russell v. Meyrick*, 1903, 2 Ch. 461; where jointuring being excepted from the prohibition against alienation, a jointure given by a recent will was valid; and see *Re Bolton Estates Act*, 1863, 1904, 2 Ch. 289). An attempt to bring under the parliamentary settlement estates larger than those originally settled was held void (*Howard v. Shrewsbury*, 2 Ch. 760).

Tenants in tail after possibility of issue extinct. By statute 14 Eliz. c. 8 (repealed by 26 & 27 Vict. c. 125), recoveries against tenant by the curtesy, tenant in tail after possibility of issue extinct, or otherwise, for term of life, or estate determinable upon life, were void against the reversioner, unless by the assent of the reversioner. See however *Doe v. Gatacre* (5 Bing. N. C. 609). A tenant in tail after possibility of issue extinct had no power of barring the estate tail or the remainders expectant thereon, but for all purposes of alienation was considered merely as tenant for life (Co. Litt. 28 a; 11 Rep. 80), although not impeachable for waste.

Where lands were settled to the use of the wife for life for her *jointure* and in bar of dower, remainder to the sons and daughters successively of the marriage in tail, *remainder to the heirs of the body of the husband and wife*, and there was no issue of the marriage, the widow was held tenant in tail after possibility of issue extinct (*Williams v. Williams*, 15 Ves. 419; see *Platt v. Poules*, 2 M. & S. 65).

S. L. Act, 1882. Tenants in tail where the reversion is in the Crown, or who are restrained by act of parliament from barring the entail (with certain exceptions), and tenants in tail after possibility of issue extinct, can exercise the powers given to tenants for life by the S. L. Act, 1882 (see sect. 58, sub-sect. 1 (i), (iii), (vii), of that act, *post*). See also the powers of leasing in the case of a lunatic tenant in tail under Lunacy Act, 1890, ss. 120, 122.

Power after 31st December, 1833, to enlarge base

19. After the thirty-first day of December, one thousand eight hundred and thirty-three, in every case in which an estate tail in any lands shall have been barred and converted

into a base fee, either before or on or after that day, the person who, if such estate tail had not been barred, would have been actual tenant in tail of the same lands, shall have full power to dispose of such lands as against all persons, including the King's most excellent Majesty, his heirs and successors, whose estates are to take effect after the determination or in defeasance of the base fee into which the estate tail shall have been converted, so as to enlarge the base fee into a fee simple absolute (*f*); saving always the rights of all persons in respect of estates prior to the estate tail which shall have been converted into a base fee, and the rights of all other persons, except those against whom such disposition is by this act authorized to be made.

3 & 4 Will. 4,
c. 74, s. 19.

fees; saving
rights of cer-
tain persons.

(*f*) The remainder of the corresponding section of the Irish statute, 4 & 5 Will. 4, c. 92, s. 16, runs thus:—"including the King's most excellent Majesty, his heirs and successors, as regards the title to * his Majesty to any reversion or remainder created or reserved by any settlement or will, and which reversion or remainder shall have come or shall hereafter come to the Crown in consequence of the attainder of any person to whom the forfeited reversion or remainder was, previously to such forfeiture, limited by any settlement or will, but not in any other case, or where the title to the Crown shall have accrued by any other means; saving always the rights of all persons in respect of estates prior to the estate tail which shall have been converted into a base fee and the rights of all other persons, except those against whom such disposition is by this act authorized to be made: provided always, that nothing in this act contained shall authorize any tenant in tail or other person to defeat or bar any estate or interest which may at the time of passing this act have been granted to any person or persons by his Majesty, or any of his predecessors, in any reversion or remainder which may have come to the Crown by attainder or otherwise."

Correspond-
ing clause of
Irish act.
[* Sic.]

Compare with this section the definition in sect. 1 of "tenant in tail." A tenant in tail can under this section enlarge a statutory base fee, notwithstanding that he has parted with it to a purchaser (*Bankes v. Small*, 36 Ch. Div. 716). And where the tenant in tail is a woman married since 1882, she may enlarge a base fee without the concurrence or acknowledgment required by sect. 40 (*Re Drummond and Davie*, 1891, 1 Ch. 524).

Cases on
sect. 19.

20. Provided always that nothing in this act contained shall enable any person to dispose of any lands entailed in respect of any expectant interest (*g*) which he may have as issue inheritable to any estate tail therein (*h*).

Issue inher-
able not to
bar expect-
ancies.

(*g*) The words in the corresponding section of the Irish statute, 4 & 5 Will. 4, c. 92, s. 17, are "expectant interest or possibility."

Correspond-
ing clause of
the Irish act.

By sect. 22 of the same statute it is enacted, "that from and after the 31st day of October, 1834, it shall be lawful for any person, either before or after he shall become entitled in any manner, except as expectant heir of a living person, or as expectant heir of the body of a living person, to an estate in lands, not being a vested estate, and whether he be or be not ascertained as the person or one of the persons in whom the same may become vested, to dispose of such lands for the whole or any part of such estate therein by any assurance, whether deed, will, or any other instrument by which he could have made such disposition if such estate were a vested estate in possession: provided nevertheless, that no such disposition shall be valid or have any effect where the person making the same shall not at the time of the disposition have become entitled to such estate, unless the deed, will, or other instrument by virtue of which he may become entitled be

3 & 4 Will. 4,
c. 74, s. 20.

existing and in operation at the time of the disposition." As to the nature of this provision, see 1 Hayes, Conv. 219, 5th ed., and compare the Real Prop. Act, 1845, s. 6, *post*. This provision is not in terms confined to Ireland, but from the context it would probably be held to be so confined (Sugd. R. P. Stat. 243).

Alienation of
expectant
interests,

(h) Sect. 20 and the abolition of fines put an end to some powers of alienation which previously might have been exercised by persons having only expectant interests, such as the eldest son of a tenant in tail or fee simple had during the life of his father. A fine levied by a person who afterwards became heir was an estoppel (1 Roll. Abr. 482 (S.) pl. 2; *Helps v. Hereford*, 2 B. & Ald. 242; *Doe v. Martyn*, 2 Mann. & R. 485; *Doe v. Oliver*, 10 B. & C. 181; *Edwards v. Rogers*, W. Jones, 756; *Wright v. Wright*, 1 Ves. sen. 412); but a grant by such a person was void (*Wivel's case*, Hob. 45; Perk. sect. 65; 1 Anst. 11; 3 Term. Rep. 365); and the fine did not bind collateral heirs unless the right to the entail descended to the cognisor or his heirs (*Bradstock v. Scovel*, Cro. Car. 434; see 8 Rep. 88 b).

Alienation of
possibilities
at law and
in equity.

According to the older cases a mere possibility could only be bound or extinguished at law by estoppel, by a fine, or a recovery (*Weale v. Lower*, Pollex. 54); or in equity by contract (*Beckley v. Newland*, 2 P. Wms. 182; *Hobson v. Trevor*, *Id.*, 191; see *Lyde v. Mynn*, 1 M. & K. 693). But when a possibility was coupled with an interest, as where the person was fixed and ascertained, it might be released (*Jewson v. Moulson*, 2 Atk. 417), or be devised, though it could not be granted or transferred by the ordinary rules of the common law (*Lampet's case*, 10 Rep. 46).

Modern cases have settled the rule that possibilities and expectancies are assignable in equity for value, and an assignment will bind the subject-matter if sufficiently identified (*Tailby v. Official Receiver*, 13 A. C. 543). The rule was applied to assignments of expectant interests in legacies under the will of a living person (*Re Dallas*, 1904, 2 Ch. 385; *Re Clarke, Coombe v. Carter*, 36 Ch. Div. 346). An agreement, of which the subject is an expectancy contingent upon the will of a living person, is not illegal (*Cook v. Field*, 15 Q. B. 460), and will be enforced in equity (*Lyde v. Mynn*, 1 M. & K. 683; see *Pope v. Whitcombe*, 3 Russ. 124). Specific performance was decreed of an agreement between two sons to share equally whatever property they might derive from their father either in his lifetime or at his decease (*Wethered v. Wethered*, 2 Sim. 183; see *Harwood v. Tooke*, 2 Sim. 192; *Alexander v. Wellington*, 2 R. & M. 55; *Carleton v. Leighton*, 3 Mer. 667). But a volunteer cannot enforce a contract made by deed to dispose of an expectancy (*Re Ellenborough, Towry Law v. Burne*, 1903, 1 Ch. 697; following *Meek v. Kettlewell*, 1 Phil. 342).

A *spes successionis* is not a title to property by English law (*Re Parsons, Stockley v. Parsons*, 45 Ch. D. 51). So held as to a wife's *spes successionis* under Scotch law in her husband's personal property (*Re Simpson, S. v. S.*, 1904, 1 Ch. 1). A member of a class of possible next of kin has not a "contingent title" (*Re Parsons, sup.*); and cannot maintain an action in respect thereof (*Clowes v. Hilliard*, 4 Ch. D. 413; *Davis v. Angel*, 4 De G. F. & J. 529). See further *Allcard v. Walker*, 1896, 2 Ch. 369, quoted under sect. 77, *post*.

Fines by
contingent
remainder-
men.

A fine by a contingent remainderman did not operate by estoppel only, but when the contingency happened the estate which then became vested fed the estoppel, so that the fine operated upon that estate as if it had been vested in the cognisors at the time the fine was levied (*Doe v. Oliver*, 10 Barn. & Cress. 181; *Doe v. Howell*, *Id.* 191; *Rawlin's case*, 4 Rep. 52; *Weale v. Lower*, Pollex. 54; *Trevivian v. Lawrence*, 6 Mod. 258; Ld. Raym. 1051; *Vick v. Edwards*, 3 P. Wms. 372; *Doe v. Martyn*, 8 B. & C. 527; *Davies v. Bush*, 1 MClel. & Y. 58; see *Fearnie*, 365). The estoppel raised by the fine of a contingent remainderman was available only by parties and privies (*Doe v. Martyn*, 8 B. & C. 527).

Contingent
interest now

A contingent interest in terms of years might be assigned in equity for valuable consideration, or for love and affection between parent and child

(1 Ves. sen. 411; *Wind v. Jekyl*, 1 P. Wms. 572). As to the alienation of contingent interests by married women, see sect. 77, *post*; *Crofts v. Middleton*, 8 D. M. & G. 192; *Jones v. Frost*, 7 Ch. 773). Contingent interests in any tenements or hereditaments are now made alienable by deed (Real Prop. Act, 1845, s. 6, *post*). And all contingent, executory or other future interests in any real or personal estate are devisable (Wills Act, 1837, s. 3, *post*).

3 & 4 Will. 4, c. 74, s. 20.
alienable and devisable.

An estoppel is when one is concluded and forbidden in law to speak against his own act or deed, even though it be to say the truth (Terms of the Law, 157; Litt. s. 667; Co. Litt. 352 a). It is a rule of evidence which prevents a man saying what is true (*Onward Society v. Smithson*, 1893, 1 Ch. 14). There are three kinds of estoppels, (1) by matter of record, (2) by deed, whether an indenture or a deed poll (*Bonner v. Wilkinson*, 5 B. & Ald. 682; Co. Litt. 47 b; *Lewis v. Willis*, 1 Wils. 314; Litt. s. 693); and (3) by matter *in pais*. Estoppel by matter of record is discussed at length, 2 Smith, L. C. 728, 10th ed. See Co. Litt. 352.

ESTOPPEL.

- (1) *Estoppel by Deed*...281.
- (2) *Estoppel by Matter in pais*...283.

According to the doctrine of estoppel by deed (which will not be extended, *General Finance Co. v. Liberator Society*, 10 Ch. D. 21), a fictitious statement is treated as true (10 Ch. D. 20). The principle is that where a man has entered into a solemn engagement under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted (*Bowman v. Taylor*, 2 Ad. & El. 291; see *Goodtitle v. Bailey*, Cowp. 600; Co. Litt. 47 b; *Gwyn v. Neath Canal Co.*, L. R. 3 Ex. 209). The estoppel binds persons claiming under the person estopped (*Taylor v. Needham*, 2 Taunt. 278; *Doe v. Stone*, 3 C. B. 176). But where by a deed which erroneously recited A's title A granted land to B, persons claiming under B were not (as between themselves and a stranger) estopped from showing what interest passed under the deed (*Trinidad Co. v. Coryat*, 1896, A. C. 587; where it was said that recitals are not representations of fact on which a stranger is entitled to act without inquiry).

(1)
Estoppel by deed.

In accordance with the above doctrine, the recital of a particular fact in a deed will estop the party making the statement (*Bowman v. Taylor*, 2 Ad. & El. 278; *Hill v. Manchester Waterworks Co.*, 2 B. & Ad. 544; *Pargeter v. Harris*, 7 Q. B. 709; *Horton v. Westminster*, 7 Exch. 780), e.g., the recital of an ante-nuptial contract to settle property (*Re Holland, Gregg v. Holland*, 1902, 2 Ch. 360, 387; see *Re Maddy, M. v. M.*, 1901, 2 Ch. 822). Where a lease recited a will, the lessee who executed the counterpart was estopped from denying the execution of the will (*Bringloe v. Goodson*, 5 Bing. N. C. 738). The recital must be precise and unambiguous, e.g., that a grantor is seised of the legal estate (*Heath v. Crealock*, 10 Ch. 30; *Right v. Bucknell*, 2 B. & Ad. 278; *Onward Society v. Smithson*, 1893, 1 Ch. 1; *Re Holland*, 1901, 2 Ch. 159; *Re Horton, Horton v. Perks*, 51 L. T. 420); and since every deed must be construed according to the intention of the parties as appearing by the whole deed, when a recital is intended to be the statement of one party only, the estoppel is confined to that party (*Stroughill v. Buck*, 14 Q. B. 781; *S. E. R. Co. v. Wharton*, 6 H. & N. 526). There was no estoppel from a recital which, though accurate so far as it went, was incomplete (*Lovett v. Lovett*, 1898, 1 Ch. 82). As a general rule no estoppel arises by a deed upon the face of which the truth appears (*Doe v. Scarborough*, 3 Ad. & El. 2; *Doe v. Lawrence*, 4 Taunt. 23; *Jolly v. Arbuthnot*, 4 D. G. & J. 237). As to the application of this rule to the case where the creation by estoppel of a tenancy between mortgagor and mortgagee was in question, see *Morton v. Woods* (L. R. 4 Q. B. 293, 303); *Ex p. Punnett* (16 Ch. Div. 226, 234). Where an untrue recital has been introduced into a deed by mistake and without fraud there is no estoppel (*Brooke v. Haymes*, 6 Eq. 25; *Empson's case*, 9 Eq. 597; *Scholefield v. Lockwood*, 31 L. J. Ch. 106). Again, a recital will not estop a party in an action not founded on the deed, but

Estoppel arising from a recital.

3 & 4 Will. 4, wholly collateral to it (*Carpenter v. Bulleſt*, 8 M. & W. 209; *Carter v. C.*, c. 74, s. 20. 3 K. & J. 645; *Ex p. Morgan, Re Simpson*, 2 Ch. Div. 72; see *Doe v. Shelton*, 3 Ad. & El. 265; *Melbourne v. Brougham*, 7 A. C. 307). A married woman may be estopped by a recital in a deed duly executed and acknowledged by her (*Jones v. Frost*, 7 Ch. 773).

From operative words.

As to an estoppel arising from the operative words of a grant, apart from the effect of the recitals. In the case of leaseholds it is settled that where A. by deed leases to B. Blackacre wherein he has no interest at the time of the lease, and afterwards acquires the legal fee, the lease which was at first a good lease by estoppel becomes (from the feeding of the estoppel) a good lease in interest (*Webb v. Austin*, 7 M. & G. 724; see *Goodtitle v. Morse*, 3 T. R. 371). But the doctrine of feeding the estoppel does not apply where in the first instance some interest has passed (Co. Litt. 47B; *Doe v. Seaton*, 2 C. M. R. 730). In the case of freeholds where A. purported to convey Blackacre to B., and subsequently by fraud himself obtained the legal estate which B. claimed on the ground of estoppel, it was held that the doctrine of feeding the estoppel did not apply where the estate from which it was sought to feed the estoppel arose from a conveyance obtained fraudulently (*Heath v. Crealock*, 10 Ch. 30, 33; see *Onward Society v. Smithson*, 1893, 1 Ch. 13). Nor did the doctrine apply where A. subsequently acquired the legal estate as trustee (*Keate v. Phillips*, 18 Ch. D. 577). In *Heath v. Crealock* (*sup.*) it was said that the operative words of a grant would create no estoppel. (See *Right v. Bucknell*, 2 B. & Ad. 283.) Compare with the above, the rule that where A. sells land and his title is afterwards defeated but A. subsequently acquires the same land under another title, there is an equity arising out of the contract to fasten it upon the new title (*Jones v. Kearney*, 1 Dr. & War. 159; see *Smith v. Baker*, 1 Y. & C. Ch. 223; *Noel v. Bewley*, 3 Sim. 103). So where a person who had purported to assign one-sixth of a fund, being at the time only entitled to one-ninth, afterwards acquired one-eighteenth, the whole interest was bound (*Re Hoffe*, 82 L. T. 556).

From covenants for title.

No estoppel arose from covenants for title (*General Finance Co. v. Liberator Society*, 10 Ch. D. 15). As to estoppel by covenant, see *Doe v. Ford*, 3 Ad. & Ell. 649.

From parcels.

An estoppel may arise from the parcels of a deed of grant; *e.g.*, where land was described as "bounded by the seashore" (*Mellor v. Walmesley*, 1905, 2 Ch. 175; *Roberts v. Karr*, 1 Taunt. 494; see *ante*, p. 66).

Consideration.

A nominal consideration being expressed in a deed does not prevent the admission of evidence *alivunde* of the real consideration if not inconsistent with the deed (*Re Leifchild*, 1 Eq. 231). Before the Judicature Acts the parties were bound by a receipt for the consideration money in the body of the deed (*Rowntree v. Jacob*, 2 Taunt. 141; *Baker v. Dewey*, 1 B. & C. 704); but not by an indorsed receipt, which, being no part of the deed, was not an estoppel, but only evidence (*Lampon v. Corke*, 5 B. & Ald. 606; *Graves v. Key*, 3 B. & Ad. 313). In either case it might be shown in equity that the money was not paid (*Ryle v. Haggie*, 1 Jac. & W. 234; *Wilson v. Keating*, 27 Beav. 121). The rule of equity now prevails. In favour, however, of third parties acting on the faith thereof, a receipt may be binding (*Bickerton v. Walker*, 31 Ch. Div. 151; see *Gordon v. James*, 30 Ch. Div. 249; *Lloyd's Bank v. Bullock*, 1896, 2 Ch. 192; *King v. Smith*, 1900, 2 Ch. 425; *Rimmer v. Webster*, 1902, 2 Ch. 173).

Forged deed.

Where a man executes a deed by forging the name of another, representing himself to be that other, he is bound by an estoppel, as to the nature of which see *Re Cooper, Cooper v. Vesey* (20 Ch. Div. 633).

Cases where there is no estoppel.

The rule which requires a man to be bound by his deliberate representations of fact may be overbalanced by weightier considerations. Thus if a trustee, deriving his authority from a public act of parliament, grants by a deed unauthorized by the act, the grantor will not be estopped from insisting against the other party to the deed that he had no such power (*Fairtitle v. Gilbert*, 2 T. R. 169; see *Doe v. Hares*, 4 B. & Ad. 435; *Webb v. Herne Bay*, L. R. 5 Q. B. 642; *Re Eddystone Co.*, 1893, 3 Ch. 19; *Islington v. Hornsey*, 1900, 1 Ch. 706). So a party to the deed is not estopped from pleading its

illegality (*Collins v. Blantern*, 2 Wils. 347; *Paxton v. Popham*, 9 East, 408); nor from showing that the consideration was immoral, or contrary to an act of parliament or public policy (*Prole v. Wiggins*, 3 Bing. N. C. 230). So a party is not estopped from showing that a deed is void under a statute (*Doe v. Howells*, 2 Ad. & Ell. 744; see *Doe v. Ford*, 3 Ad. & Ell. 649). But a man cannot avoid his own deed by an allegation of his own fraud, as that the deed was executed for the purpose of giving a colourable qualification to kill game (*Doe v. Roberts*, 2 B. & Ald. 367). See also the cases, *Doe v. Skirrow*, 7 Ad. & Ell. 157; *Gaunt v. Wainman*, 3 Scott, 413; *Whitton v. Peacock*, 2 Bing. N. C. 411; *Bringloe v. Goodson*, 4 Bing. N. C. 726; see an article on Estoppel by Deed, 5 Jur. 858, 1170.

A surrender of copyholds does not operate by estoppel (*Taylor v. Phillips*, 1 Ves. sen. 230; *Goodtitle v. Morse*, 3 T. R. 365; *Morse v. Faulkner*, 3 Swanst. 429; *Doe v. Tomkins*, 11 East, 185; *Doe v. Wilson*, 4 B. & Ald. 303; see *Doe v. Rolfe*, 8 Ad. & Ell. 650).

Copyholds not bound by estoppel.

Parties can be estopped by matters *in pais*, such as livery, entry, acceptance of an estate, and the like (Co. Litt. 352 a). Estoppels *in pais* often arise between landlord and tenant. As against the tenant, a man who accepts a lease is estopped from disputing the title of his landlord (*Langford v. Selmes*, 3 K. & J. 220), or of his landlord's heir (*Weeks v. Birch*, 69 L. T. 759; see *Tadman v. Henman*, 1893, 2 Q. B. 168). In a wider form the rule is that a tenant cannot deny that the person by whom he is let into possession had title at that time (*Doe v. Barton*, 11 Ad. & Ell. 307). Again, where a tenant pays rent to a person by whom he was not let into possession, a tenancy by estoppel may arise (*Jump v. Payne*, 68 L. J. Q. B. 607); apparently on the ground that it is a representation by the tenant that the relation of landlord and tenant exists (see *Serjeant v. Nash*, 1903, 2 K. B. 312, 316). But in such a case the payment of rent may only amount to an admission which can be explained (*Ib.* 315). A voluntary payment made under a mistake of money by way of rent does not create any obligation on the ground of estoppel (*Batten Pool v. Kennedy*, 1907, 1 Ch. 268). As regards estoppels arising against the landlord; it has been laid down that the estoppel must be mutual (*Green v. James*, 6 M. & W. 660; see Co. Litt. 352 A). And a landlord has been held estopped from denying that he was reversioner, or from setting up an overriding title (*Keith v. Gancia*, 1904, 1 Ch. 790). See further as to estoppel between landlord and tenant, Woodfall, 16th ed. 223; Foa, 4th ed. 466.

(2)
Estoppel by matter *in pais*.

Between landlord and tenant.

As to estoppel where a person enters on land under an invalid title, see *ante*, p. 132.

In mercantile transactions an estoppel may arise by representations or conduct, as to which several propositions are given by Brett, J., in *Curr v. L. & N. W. R.*, 10 C. P. 316; as to these see *Dixon v. Kennaway*, 1900, 1 Ch. 837; *Whitechurch v. Cavanagh*, 1902, A. C. 130, 135.

Estoppel in mercantile transactions.

A representation of an intention does not create an estoppel (*Chadwick v. Manning*, 1896, A. C. 231; *Coleman v. North*, 47 W. R. 57). But if A. makes a representation of fact to B. intending it to be acted upon by B., and it is acted upon by B., A. is estopped from saying that it is not true (*Low v. Bouverie*, 1891, 3 Ch. 110; *Burkinshaw v. Nicolls*, 3 App. Cas. 1026; *Seaton v. Seaton*, 13 App. Cas. 74; *Bateman v. Faber*, 1898, 1 Ch. 147); compare Lord Selborne's statement of equitable estoppel by representation (*Citizens' Bank v. First National Bank*, L. R. 6 H. L. 360). The representation must be unambiguous (*Low v. Bouverie*, 1891, 3 Ch. 106, 113; *Whitechurch v. Cavanagh*, 1902, A. C. 145). And B. cannot rely by way of estoppel on A.'s statement where it was induced by B.'s own misrepresentation or concealment or where the circumstances would have deterred a reasonable man from acting on it (*Porter v. Moore*, 1894, 2 Ch. 367). The onus of proving that the representation was acted on lies on B. (*Re Lewis*, L. v. L., 1904, 2 Ch. 602).

Estoppel by representation.

The representation may be made not merely by language but by conduct, and conduct may include negligence (*Bell v. Marsh*, 1903, 1 Ch. 541). But

3 & 4 Will. 4. the negligence must be the proximate cause of B's mistaken action (*Longman v. Bath*, 1905, 1 Ch. 646). A client could not rely on an estoppel alleged to arise from his solicitor's negligence in investigating title and preparing conveyance so as to compel the solicitor to give him (the client) the benefit of a mistake in the original contract (*Bell v. Marsh*, 1903, 1 Ch. 528).

On the above principle, where a company issues to A. a certificate for shares, upon which he acts, the company will be estopped from denying, either that A. is the proprietor of these shares (*Balkis v. Tomkinson*, 1893, A. C. 396; see *Dixon v. Kennaway*, 1900, 1 Ch. 833; *Foster v. Tyne Co.*, 63 L. J. Q. B. 50); or (unless A. be affected with notice to the contrary) that the amount certified to have been paid on the shares has been paid (*Parbury's case*, 1896, 1 Ch. 100; *Bloomenthal v. Ford*, 1897, A. C. 156; see *Markham and Darter's case*, 1899, 1 Ch. 414). Even where A. is affected with such notice, the above rule applies in the case of a transferee from him for value without notice (*Burkinshaw v. Nicolls*, 3 A. C. 1004; see *McKay's case*, 1896, 2 Ch. 757). As to a company's duty in the custody of share certificates, see *Longman v. Bath*, 1905, 1 Ch. 646.

Estoppel in the case of agency.

Where a person holds out another as his agent, and the agent acts within his agency, the principal may be estopped from denying the agency. Thus where a person by an agreement authorized another to apply for shares, but imposed a condition in a covering letter, he was estopped as against one who had acted on the faith of the agreement without notice of the letter (*Ex p. Harrison*, 69 L. T. 204; see *Re Consort Mines*, 1897, 1 Ch. 575, where there was no estoppel; *Farquharson v. King*, 1902, A. C. 325; *Rimmer v. Webster*, 1902, 2 Ch. 171). And a person who leaves in the hands of his brokers securities and executed transfers, may be estopped from denying authority to deal with them (*Bentinck v. London Bank*, 1893, 2 Ch. 120; see *Robinson v. Montgomeryshire*, 1896, 2 Ch. 841; *Bechuanaland v. London Bank*, 1898, 2 Q. B. 658). So also a man who leaves in the hands of his solicitor a mortgage deed executed by himself and containing a receipt for the money (*King v. Smith*, 1900, 2 Ch. 425; compare *Gordon v. James*, 30 Ch. Div. 249). But where the secretary of a company acted outside the scope of his agency, the company was not estopped (*Whitechurch v. Cavanagh*, 1902, A. C. 117; *Ruben v. Great Fingall*, 1906, A. C. 439). A person having notice of an agent's want of authority was estopped by his own negligence in dealing with him (*Jacobs v. Morris*, 1902, 1 Ch. 830).

Miscellaneous cases of estoppel.

A warehouseman who attorned to a purchaser was held to be estopped from denying the latter's title (*Henderson & Co. v. Williams*, 1895, 1 Q. B. 521; see *Ross v. Edwards*, 73 L. T. 100). As to estoppel in case of delivery orders, see *Union Credit Bank v. Mersey Board* (1899, 2 Q. B. 205); in case of bills of exchange, see *Scholfield v. Londesborough* (1896, A. C. 514); and in case of a customer who withholds from his bankers information about forged cheques, see *McKenzie v. British Linen Co.* (6 App. Cas. 82); *Ogilvie v. West Australian Corporation* (1896, A. C. 257).

The court refused to apply equitable estoppel in favour of a volunteer (*Lovett v. Lovett*, 1898, 1 Ch. 82); or to permit a married woman's restrained property to be bound by estoppel (*Bateman v. Faber*, *Ib.* 149).

Extent of the estate created by a tenant in tail by way of mortgage, or for any other limited purpose.

21. Provided always, that if a tenant in tail of lands shall make a disposition of the same under this act by way of mortgage, or for any other limited purpose, then and in such case such disposition shall, to the extent of the estate thereby created, be an absolute bar in equity as well as at law to all persons as against whom such disposition is by this act authorized to be made, notwithstanding any intention to the contrary may be expressed or implied in the deed by which the disposition may be effected: provided always, that if the estate created by such disposition shall be only an estate *pour autre vie*, or for years absolute or determinable, or if, by a disposition under this act

by a tenant in tail of lands, an interest, charge, lien, or incum- 3 & 4 Will. 4,
c. 74, s. 21.
brance shall be created without a term of years absolute or
determinable, or any greater estate for securing or raising the
same, then such disposition shall in equity be a bar only so far
as may be necessary to give full effect to the mortgage, or to
such other limited purpose, or to such interest, lien, charge, or
incumbrance, notwithstanding any intention to the contrary may
be expressed or implied in the deed by which the disposition
may be effected.

This section was intended to put an end to such questions as arose in *Jackson v. Innes* (1 Bligh, 104), as to whether an equity of redemption was resettled by the mortgage deed (*Plomley v. Felton*, 14 App. Cas. 66). Effect of this
section.

By this section, if a tenant in tail makes a mortgage in fee with a proviso for redemption in the usual form, he will thenceforth be entitled to the equity of redemption discharged from the entail; but if he creates an estate *pour autre vie*, or for years only, or an "interest, charge, or incumbrance," without a term of years, by way of mortgage, the entail will be affected only to the extent of the charge, although there be an express declaration that the deed shall operate as a complete bar (see 1 Hayes, Conv. 183; 9 Bythewood & Jarm. Conv. 404, 405).

Where a tenant in tail subject to charges for portions was lunatic, the court directed the charges to be raised by a mortgage for a term of years without a power of sale (*Re Pares*, 2 Ch. Div. 61; and see *S. C.*, 12 Ch. Div. 333). But it cannot authorize a mortgage of the interest of an infant tenant in tail in remainder for raising maintenance (*Re Hambrough, H. v. H.*, 1909, 2 Ch. 620).

It seems that if a legal tenant in tail of copyholds mortgages by conditional surrender which is not followed by admittance, but the money is paid off and the surrender vacated by the entry of satisfaction, the estate tail remains unaffected; but that the estate tail would be barred if the surrender were followed by admittance (see sect. 50, *post*; Davidson, Mortgages, 4th ed. 39). Mortgage of
entailed copy-
holds.

Interest, charges, liens or incumbrances may be created by a tenant in tail under the act; but they must be created, and not left to rest in contract (Sugd. R. P. Stat. 197). Sect. 40 (*post*) expressly requires in every case a formal legal assurance; it would seem, therefore, that the words "interest, charge, lien or incumbrance," do not include an equitable mortgage by mere deposit of title deeds. Interest,
charge, lien or
incumbrance.

Equitable
mortgages.

8. Definition of the Protector.

22. If at the time when there shall be a tenant in tail of lands under a settlement there shall be subsisting in the same lands or any of them, under the same settlement, any estate for years determinable on the dropping of a life or lives, or any greater estate (not being an estate for years), prior to the estate tail, then, the person who shall be the owner of the prior estate, or the first of such prior estates, if more than one, then subsisting under the same settlement, or who would have been so if no absolute disposition thereof had been made (the first of such prior estates, if more than one, being for all the purposes of this act deemed the prior estate), shall be the protector of the settlement so far as regards the lands in which such prior estate shall be subsisting, and shall for all the purposes of this act be deemed the owner of such prior estate, although the same may have been charged or incumbered either by the owner thereof The owner
of the first
existing
estate under
a settlement,
prior to the
estate tail
under the
same settle-
ment, to be
the protector
of the settle-
ment.

3 & 4 Will. 4,
c. 74, s. 22.

or by the settlor, or otherwise howsoever, and although the whole of the rents and profits be exhausted or required for the payment of the charges and incumbrances on such prior estate, and although such prior estate may have been absolutely disposed of by the owner thereof, or by or in consequence of the bankruptcy or insolvency of such owner, or by any other act or default of such owner; and that an estate by the curtesy, in respect of the estate tail, or of any prior estate created by the same settlement, shall be deemed a prior estate under the same settlement within the meaning of this clause; and that an estate by way of resulting use or trust to or for the settlor shall be deemed an estate under the same settlement within the meaning of this clause.

In cases of Lunacy the Lord Chancellor is protector (see *post*, ss. 33, 48). Where there is a tenant in tail in possession and a tenant in tail in remainder under the same settlement, the tenant in tail in possession is the protector as to the tenant in tail in remainder (*Re Blewitt*, 6 D. M. & G. 187).

Where the owner of the only prior estate holds under a different settlement from the tenant in tail, he is not the protector (*Berrington v. Scott*, 32 L. T. 125). The owner of the prior estate referred to in this section is the owner of the beneficial interest (*Re Dudson*, 8 Ch. Div. 632; compare *Clarke v. Chamberlin*, 16 Ch. D. 176; *Re Hughes*, 1906, 2 Ch. 642). Thus, where an equity of redemption was limited to trustees in trust for A. for life, with remainder to the use of B. in tail, A. was the protector, not the trustees (*Re Dudson*, *sup.*; compare the old law of recoveries, *ante*, pp. 268, 273). So, where lands were devised to trustee for a term on trust to pay an annuity, and manage the estate, and pay the surplus to A., who was also the life tenant, subject to the term, A. was the protector (*Re Ainslie*, A. v. A., 54 L. J. Ch. 8). Where, however, a trustee is given an estate during the life of a person on trust to pay the rents to the settlor's creditors, it was said that the trustee would be the protector (*Re Dudson*, 8 Ch. Div. 633).

Where land was devised to trustees during certain lives on trusts for accumulation, which became avoided under the Thellusson Act, there was after the avoidance no protector. The trustees had no beneficial interest. And as to the heir (1) he was excluded by sect. 27; (2) he did not claim under a "resulting use or trust," nor could he be said to take "under the same settlement" (*Re Hughes*, 1906, 2 Ch. 642). Compare as to the last point *Vine v. Raleigh*, 1896, 1 Ch. 37, quoted under sect. 2 of S. L. Act, 1882, *post*.

An instance of a "resulting use" will be found in *Lynch v. Clarkin*, 1900, 1 I. R. 178.

Each of two
or more
owners of a
prior estate
to be the sole
protector as
to his share.

23. Provided always, that where two or more persons shall be owners, under a settlement, within the meaning of this act, of a prior estate, the sole owner of which estate, if there had been only one, would in respect thereof have been the protector of such settlement, each of such persons, in respect of such undivided share as he could dispose of, shall for all the purposes of this act be deemed the owner of a prior estate, and shall, in exclusion of the other or others of them, be the sole protector of such settlement to the extent of such undivided share.

Where A. had for life one-fifth of an estate with a remainder in tail in one-fifth, and had also one-fourth of another fifth for life, with a more remote remainder in tail in one-fourth of one-fifth, he was protector of the

identical undivided share of which he was tenant in tail, and not merely 3 & 4 Will. 4, protector of an equivalent aliquot share of the estate (*Tufnell v. Borrell*, c. 74, s. 23. 20 Eq. 196). See *Church v. Edwards*, 2 Br. C. C. 180; *Oakley v. Smith*, Amb. 90; 3 Prest. Conv. 90 *et seq.*

24. Provided always, that where a married woman would, if single, be the protector of a settlement in respect of a prior estate, which is not thereby settled, or agreed or directed to be settled, to her separate use, she and her husband together shall in respect of such estate be the protector of such settlement, and shall be deemed one owner; but if such prior estate shall by such settlement have been settled, or agreed or directed to be settled to her separate use, then and in such case she alone shall in respect of such estate be the protector of such settlement.

Where a married woman alone shall be the protector, and where she and her husband together shall be protector.

See *Keer v. Brown* (Johns. 138). Where several persons constitute the protector, the term protector is applicable equally to the entire body and to each individual (*Re Wainwright*, 1 Phill. 258; see *Re Bayley Worthington and Cohen*, 1908, 1 Ch. 30). In the case of disentailments after 1882, a married woman is alone protector in respect of a prior estate made separate by M. W. P. Act, 1882 (M. W. P. Act, 1907, sect. 3).

25. Provided always, that, except in the case of a lease hereinafter provided for, where an estate shall be limited by a settlement by way of confirmation, or where the settlement shall merely have the effect of restoring an estate, in either of those cases such estate shall for the purposes of this act, so far as regards the protector of the settlement, be deemed an estate subsisting under such settlement.

As to estates confirmed or restored by settlement.

26. Provided always, that where a lease at a rent shall be created or confirmed by a settlement, the person in whose favour such lease shall be created or confirmed, shall not in respect thereof be the protector of such settlement.

As to leases at rent created by settlement.

27. Provided always, that no woman in respect of her dower, and (except in the case hereinafter provided for of a bare trustee under a settlement made on or before the thirty-first day of December, one thousand eight hundred and thirty-three), no bare trustee, heir, executor, administrator or assign, in respect to any estate taken by him as such bare trustee, heir, executor, administrator or assign, shall be the protector of a settlement.

No tenant in dower, heir, executor, &c., to be protector, except in the case of a bare trustee.

There is a discrepancy between this date and the date given in sect. 31 (28th August, 1833). It seems doubtful which enactment must control the other (1 Hayes, Conv. 180, 5th ed.; Sugd. R. P. Stat. 203). See as to this section the argument in *Re Dudson*, 8 Ch. D. 628, and *Re Hughes*, 1906, 2 Ch. 642, *ante*, p. 286.

28. Provided always, that where under any settlement there shall be more than one estate prior to an estate tail, and the person who shall be the owner within the meaning of this act of any such prior estate, in respect of which but for the two

Who shall be the protector where the owner of the prior estate

3 & 4 Will. 4,
c. 74, s. 28.

shall, by the
two last
clauses, be
excluded.

last preceding clauses, or either of them, he would have been the protector of the settlement, shall by virtue of such clauses, or either of them, be excluded from being the protector, then and in such case the person (if any) who, if such estate did not exist, would be the protector of the settlement, shall be such protector.

See *Re Dudson*, (8 Ch. Div. 633).

Where, in the
disposition of
an estate
before the 31st
December,
1833, the
person to
make the
tenant to the
writ of entry
in a recovery
shall be the
protector.

29. Provided always, that where already, or on or before the thirty-first day of December, one thousand eight hundred and thirty-three, an estate under a settlement shall have been disposed of either absolutely or otherwise, and either for valuable consideration or not, the person who in respect of such estate would, if this act had not been passed, have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of the lands entailed by such settlement, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

This and the following section of the act will render it necessary, where it is intended to bar an entail created on or before the 31st December, 1833, to ascertain in whom the *immediate freehold* of the lands is vested, in the same way as was required for determining who was the proper person for making a tenant to the *præcipe* in a recovery (see *ante*, p. 273). This section must be attentively considered in connection with the 27th, 30th and 31st sections. In *Corrall v. Cattell* (4 Mees. & W. 734; and see *Cattell v. Corrall*, 3 Y. & Coll. 413), a tenant in tail, in 1817, conveyed to trustees for the life of the tenant in tail upon certain trusts. The impression of the court seemed to be that the trustees were not protectors. Mr. *Hayes* (1 Conv. 177), and Lord *St. Leonards* (Sugd. R. P. Stat. 203), were of opinion that the trustees were protectors (see s. 22, *ante*).

Where in the
case of the
disposition of
a reversion on
or before the
31st of De-
cember, 1833,
the person
to make the
tenant to the
writ of entry
in a recovery
shall be the
protector.

30. Provided always, that where any person having either already, or on or before the thirty-first day of December, one thousand eight hundred and thirty-three, either for valuable consideration or not, disposed of, either absolutely or otherwise, a remainder or reversion in fee in any lands, or created any estate out of such remainder or reversion, would, under this act, if this clause had not been inserted, have been the protector of the settlement by which the lands were entailed in which such remainder or reversion may be subsisting, and thereby be enabled to concur in the barring of such remainder or reversion, which he could not have done if he had not become such protector, then and in every such case the person who, if this act had not been passed, would have been the proper person to have made the tenant to the writ of entry or other writ for suffering a common recovery of such lands, shall, during the continuance of the estate which conferred the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

31. Provided always, that where, under any settlement of ^{3 & 4 Will. 4.} lands made before the passing of this act, the person who, if ^{c. 74, s. 31.} this act had not been passed, would have been the proper person to make the tenant to the writ of entry or other writ for suffering a common recovery of such lands for the purpose of barring any estate tail or other estate under such settlement, shall be a bare trustee, such trustee shall, during the continuance of the estate conferring on him the right to make the tenant to such writ of entry or other writ, be the protector of such settlement.

The husband of a married woman taking an estate for her separate use under a settlement is not a bare trustee under the settlement within this section (*Keer v. Brown*, Johns. 138).

Under this section a trustee, having the first *immediate* estate of *freehold*, will be protector of a settlement made *before the passing of this act* (28 Aug. 1833). Thus under a settlement to A. for ninety-nine years, if he should so long live, with remainder to trustees during the life of A. upon trust to preserve contingent remainders, with remainder in tail; the trustees would be protectors during the life of A. (See *Smith v. Packhurst*, 3 Atk. 135.) A bare trustee, who under this section is protector of a settlement, can insist on retaining the legal estate only so long as the purposes of the trust exist (*Buttanshaw v. Martin*, Johns. 89). This section will not apply where all the estates are equitable (*Re Dudson*, 8 Ch. Div. 633).

32. Provided always, that it shall be lawful for any settlor ^{Power to any} entailing lands to appoint, by the settlement by which the ^{settlor to} lands shall be entailed, any number of persons in esse, not ^{appoint the} exceeding three, and not being aliens, to be protector of the ^{protector.} settlement in lieu of the person who would have been the protector if this clause had not been inserted, and either for the whole or any part of the period for which such person might have continued protector, and by means of a power to be inserted in such settlement to perpetuate, during the whole or any part of such period, the protectorship of the settlement in any one person or number of persons in esse, and not being an alien or aliens, whom the donee of the power shall think proper by deed to appoint protector of the settlement in the place of any one person or number of persons who shall die or shall by deed relinquish his or their office of protector; and the person or persons so appointed shall, in case of there being no other person then protector of the settlement, be the protector, and shall, in case of there being any other person then protector of the settlement, be protector jointly with such other person: provided nevertheless, that by virtue or means of any such appointment, the number of the persons to compose the protector shall never exceed three: provided further nevertheless, that every deed by which a protector shall be appointed under a power in a settlement, and every deed by which a protector shall relinquish his office, shall be void unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof: provided further nevertheless, that the person who but for this clause would have been

3 & 4 Will. 4,
c. 74, s. 32.

sole protector of the settlement, may be one of the persons to be appointed protector under this clause, if the settlor shall think fit, and shall, unless otherwise directed by the settlor, act as sole protector, if the other persons constituting the protector shall have ceased to be so by death or relinquishment of the office by deed, and no other person shall have been appointed in their place.

Trustee of
executory
settlement a
settlor within
this section.

The trustee of an executory settlement is a settlor within this section of the act, and as such is entitled to appoint a protector at his discretion. A protector should not be appointed by the court, unless upon a special case (*Bankes v. Le Despencer*, 11 Sim. 527). If all the persons appointed under this section die, the owner of the first life estate is protector (*Clarke v. Chamberlin*, 16 Ch. D. 176). If one of them die the survivors can act as protector (*Bell v. Holtby*, 15 Eq. 178). And this rule was not altered by a power in the settlement to appoint protectors to fill up vacancies "to the intent that the full number of three persons might from time to time fill the office" (*Cohen v. Bayley Worthington*, 1908, A. C. 97). The final proviso in the section only applies when the "natural protector" is included in the persons appointed protectors (*Ib.* 99).

In cases of
lunacy, the
Lord Chan-
cellor or Lord
Keeper, or
Lords Com-
missioners, or
other persons
entrusted
with lunatics,
or in cases of
treason or
felony, &c.,
the Court of
Chancery
to be the
protector.

33. Provided always, that if any person, protector of a settlement, shall be lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, then the Lord High Chancellor of Great Britain, or the Lord Keeper or the Lords Commissioners for the custody of the great seal of Great Britain for the time being or other the person or persons for the time being entrusted by the King's sign manual with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, and of unsound mind, shall be the protector of such settlement in lieu of the person who shall be such lunatic or idiot, or of unsound mind as aforesaid (i); or if any person, protector of a settlement, shall be convicted of treason or felony, or if any person not being the owner of a prior estate under a settlement shall be protector of such settlement, and shall be an infant, or if it shall be uncertain whether such last-mentioned person be living or dead, then his Majesty's High Court of Chancery shall be the protector of such settlement in lieu of the person who shall be an infant, or whose existence cannot be ascertained as aforesaid (k); or if any settlor entailing lands shall in the settlement by which the lands shall be entailed, declare that the person who as owner of a prior estate under such settlement would be entitled to be protector of the settlement, shall not be such protector, and shall not appoint any person to be protector in his stead, then the said Court of Chancery shall, as to the lands in which such prior estate shall be subsisting, be the protector of the settlement during the continuance of such estate; or if in any other case where there shall be subsisting under a settlement an estate prior to an estate tail under the same settlement, and such prior estate shall be sufficient to qualify the owner thereof to be protector of the settlement, and there shall happen at

any time to be no protector of the settlement as to the lands in which the prior estate shall be subsisting, the said Court of Chancery shall, while there shall be no such protector, and the prior estate shall be subsisting, be the protector of the settlement as to such lands. 3 & 4 Will. 4,
c. 74, s. 33.

(i) As to the persons by whom the jurisdiction here conferred on the Lord Chancellor can be exercised, see Lunacy Act, 1890, s. 108.

The Lord Chancellor of Great Britain, and not the Lord Chancellor of Ireland, is the protector of a settlement in the place of a lunatic of estates situate in Wales, although the party is resident in Ireland, and has been found lunatic by inquisition issued by the Lord Chancellor of Ireland (*Re Graydon*, 1 Mac. & G. 655). The cases as to the exercise by the Lord Chancellor of his power of consenting are stated in the note to sect. 48, *post*, p. 301.

(k) On the husband of a married woman, tenant for life under a settlement, being convicted of felony, the Court of Chancery becomes protector of the settlement (*Re Wainwright*, 1 Phill. C. C. 258). There is an omission in this section of the case of a person convicted of treason or felony. But the omission must be supplied by implication, otherwise no effect can be given to the previous words, "if any person, protector of a settlement, shall be convicted of treason or felony" (*Ib.* pp. 261, 262).

As to the form of petition, evidence and order on an application to the court to consent as a protector of a settlement to the barring of an entail, see *Re Gravenor* (1 De G. & S. 700; Seton, 6th ed., 1784).

9. Powers of the Protector.

34. Provided always, that if at the time when any person, Where there is a protector, his consent is requisite to enable an actual tenant in tail to create a larger estate than a base fee. actual tenant in tail of lands under a settlement, but not entitled to the remainder or reversion in fee immediately expectant on the determination of his estate tail, shall be desirous of making under this act a disposition of the lands entailed, there shall be a protector of such settlement, then and in every such case the consent of such protector shall be requisite to enable such actual tenant in tail to dispose of the lands entailed to the full extent to which he is hereinbefore authorized to dispose of the same; but such actual tenant in tail may, without such consent, make a disposition under this act of the lands entailed, which shall be good against all persons who, by force of any estate tail which shall be vested in or might be claimed by, or which but for some previous act or default would have been vested in or might have been claimed by, the person making the disposition at the time of his making the same, shall claim the lands entailed.

Formerly, where an estate tail was being barred, a tenant for life was a conveying, not merely a consenting, party, which occasioned inconvenience; as to which, see Co. Litt. 203 b, n. by Butl.; 1 Prest. Conv. 107—118; 2 Sand. on Uses, 207, 4th ed.; *Pelham's case* (1 Rep. 14 b); *Smith v. Clifford* (1 T. R. 738); *Doe v. Mulgrave* (5 T. R. 320); *Jersey v. Deane* (5 B. & Ald. 575); *Roper v. Halifax* (8 Taunt. 845); *Doe v. Scarborough* (3 Ad. & Ell. 43); *Tyrrell v. Marsh* (3 Bing. 31); Sug. Pow. 71—78, 8th ed. Advantage of
consent to a
conveyance.

Where in a settlement there was a power of sale and exchange with the

3 & 4 Will. 4, c. 74, s. 34. assent of the tenant for life, her concurrence in a disentailing deed did not prevent her assenting to a subsequent exercise of the power (*Hill v. Pritchard*, Kay, 394).

Vesting order. Where there is an adult tenant for life, and an infant tenant in tail, a vesting order under the Trustee Act, 1893, will, if the protector consents to it, bar all estates in remainder, and not pass a base fee only under the act (*Powell v. Matthews*, 1 Jur. N.S. 973; *Re Montagu*, *Faber v. Montagu*, 1896, 1 Ch. 549, where see form of order; see also *Re Hambrough*, *H. v. H.*, 1909, 2 Ch. 620).

Where a base fee and a protector, his consent requisite to the exercising of a power of disposition.

35. Provided always, that where an estate tail shall have been converted into a base fee, in such case, so long as there shall be a protector of the settlement by which the estate tail was created, the consent of such protector shall be requisite to enable the person who would have been tenant of the estate tail, if the same had not been barred, to exercise, as to the lands, in respect of which there shall be such protector, the power of disposition hereinbefore contained.

The protector to be subject to no control in the exercise of his power of consenting.

36. Any device, shift, or contrivance, by which it shall be attempted to control the protector of a settlement in giving his consent, or to prevent him in any way from using his absolute discretion in regard to his consent, and also any agreement entered into by the protector of a settlement to withhold his consent, shall be void; and the protector of a settlement shall not be deemed to be a trustee in respect of his power of consent; and a court of equity shall not control or interfere to restrain the exercise of his power of consent, nor treat his giving consent as a breach of trust.

It seems that a contract under seal by a protector to give his consent might be such a consent as is required by the act (*Bankes v. Small*, 36 Ch. Div. 724). It has been said that this section enables a protector to act from mere caprice, ill-will, or any bad motive (*Bankes v. Le Despenser*, 11 Sim. 527).

Certain rules of equity not to apply between the protector and a tenant in tail under the same.

37. Provided always, that the rules of equity in relation to dealings and transactions between the donee of a power and any object of the power in whose favour the same may be exercised, shall not be held to apply to dealings and transactions between the protector of a settlement and a tenant in tail under the same settlement, upon the occasion of the protector giving his consent to a disposition by a tenant in tail under this act.

The rules of equity as to frauds on powers were not extended to the case of a tenant in tail in remainder joining with his father, a tenant for life, in suffering a recovery and resettling the estate, although an *immediate benefit* was conferred on the son as a consideration for his barring the entail (*Tweddell v. Tweddell*, T. & R. 1; *Davis v. Uphill*, 1 Sw. 129). As to the circumstances under which a tenant in tail in remainder can sue to set aside a disentailing deed alleged to have been made in fraud, see *Bellamy v. Sabine*, 2 Phill. 425; *Cornwall v. Prioleau*, 20 Times L. R. 606.

Frauds on powers.

The rules of equity above referred to are rules relating to special or limited powers. According to these rules an appointment under a power is invalid

where the appointee has agreed with the appointor that a benefit shall thereby accrue to the appointor (*Marlborough v. Godolphin*, 2 Ves. sen. 70; *Boyle v. Peterborough*, 1 Ves. 310; *Farmer v. Martin*, 2 Sim. 502; *Arnold v. Hurdwich*, 7 Sim. 343), or to a stranger to the power (*Pryor v. Pryor*, 2 D. J. & S. 205; *Salmon v. Gibbs*, 3 D. G. & S. 343; *Birley v. Birley*, 25 Beav. 299; *Re Kirwan*, 25 Ch. D. 373; *Crawshay v. Crawshay*, 43 Ch. D. 624). A mere suspicion, however, of a corrupt agreement will not be sufficient to invalidate an appointment (*Palmer v. Locke*, 15 Ch. Div. 300; *Hamilton v. Kirwan*, 2 Jo. & Lat. 393). Again, an appointment will not be invalidated (1) by the mere fact of a bargain between the appointor and appointee (*Langston v. Blackmore*, Amb. 288; *Roach v. Trood*, 3 Ch. Div. 429; see *Cooper v. Cooper*, 5 Ch. 203), as where the bargain did not induce the appointment (*Re Turner*, 28 Ch. Div. 205), or where the bargain related to a jointure which was not thereby diverted from the wife (*Saunders v. Shafto*, 1905, 1 Ch. 126). Nor will an appointment be invalidated (2) by a bargain between the appointor and all the objects of the power, being *sui juris* (*Davis v. Uphill*, 1 Sw. 136); or (3) by reason of the appointor having covenanted to appoint (*Bulteel v. Plummer*, 6 Ch. 160; *Palmer v. Locke*, 15 Ch. Div. 294; *Robinson v. Ommannney*, 21 Ch. D. 780). In some cases an appointment to a stranger may be valid if made with the assent of an object of the power; as where it can be considered as in effect an appointment to an object and a settlement by that object (*Daniel v. Arkwright*, 2 H. & M. 95; *Wright v. Goff*, 22 Beav. 207; *Goldsmid v. Goldsmid*, 2 Hare, 187). Where the invalidity arises by reason of a corrupt agreement, the appointment will be wholly bad, even as to the benefit appointed to an object (*Jackson v. Jackson*, Dru. 113); unless some consideration (e.g., marriage) has been given which cannot be restored, when the appointment may be good as to the appointee (*Daubeny v. Cockburn*, 1 Mer. 643); or unless the honest part of the appointment can be separated from the dishonest part, when the former may be good (*Topham v. Portland*, 1 D. J. & S. 572; *Viant v. Cooper*, 76 L. T. 768). Where a corrupt appointment has been carried into effect, the appointor may be liable for loss to the trust estate (*Re Deane, Bridger v. Deane*, 42 Ch. Div. 9).

3 & 4 Will. 4,
c. 74, s. 37.
Corrupt bargain.

An appointment is void where there is no bargain, but it is clear that Corrupt the appointor intends to benefit either himself (*Henty v. Wrey*, 21 Ch. Div. 342; *Wellesley v. Mornington*, 2 K. & J. 143; *Re Little, Harrison v. Harrison*, 40 Ch. Div. 424), or a stranger to the power (*Re Marsden*, 4 Drew. 594; see *Topham v. Portland*, 5 Ch. 40; *Whelan v. Palmer*, 39 Ch. D. 648; *Re Perkins, Perkins v. Bagot*, 1893, 1 Ch. 283; *Re Buckley*, 1893, W. N. 95). A release of a power by the donee with a view to his own benefit is valid (*Re Radcliffe, Radcliffe v. Bewes*, 1892, 1 Ch. 227; *Re Somes, Smith v. Somes*, 1896, 1 Ch. 250). A *bona fide* appointment is not necessarily void merely because a benefit in fact accrues to the appointor (*Henty v. Wrey*, *sup.*; *Re Huish*, 10 Eq. 5; *Beere v. Hoffmeister*, 23 Beav. 101), or to a stranger (*Fearon v. Debrisay*, 14 Beav. 635; *Roach v. Trood*, 3 Ch. Div. 440).

A purchaser with notice of the invalidity of an appointment will not get a Purchasers. good title (*Palmer v. Wheeler*, 2 Ba. & Be. 18), nor will a purchaser without notice, in the case of an equitable interest (*Daubeny v. Cockburn*, 1 Mer. 626). But a mere suspicion of a fraudulent appointment is not a good objection by a purchaser to title (*M^cQueen v. Farquhar*, 11 Ves. 467; *Green v. Pulsford*, 2 Beav. 70).

10. Confirmation of Voidable Estates created by Tenant in Tail.

38. Provided always, that when a tenant in tail of lands under a settlement, shall have already created or shall hereafter create in such lands, or any of them, a voidable estate, in favour of a purchaser for valuable consideration, and shall afterwards

A voidable estate by a tenant in tail, in favour

3 & 4 Will. 4,
c. 74, s. 38.

of a purchaser, confirmed by a subsequent disposition of such tenant in tail under this act, but not against a purchaser without notice.

under this act, by any assurance other than a lease not requiring enrolment, make a disposition of the lands in which such voidable estate shall be created, or any of them, such disposition, whatever its object may be, and whatever may be the extent of the estate intended to be thereby created, shall, if made by the tenant in tail with the consent of the protector (if any) of the settlement, or by the tenant in tail alone, if there shall be no such protector, have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; but if at the time of making the disposition there shall be a protector of the settlement, and such protector shall not consent to the disposition, and the tenant in tail shall not without such consent be capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such tenant in tail would then be capable under this act of confirming the same without such consent (l): provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him (m).

(l) The proviso in the corresponding clause in the Irish stat. 4 & 5 Will. 4, c. 92, s. 36, is as follows: "provided always, that if such disposition shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, and if the deed or instrument creating such voidable estate shall not have been registered previous to such disposition, then and in such case the voidable estate shall not be confirmed as against such purchaser and the persons claiming under him."

Old rule as to the effect of recoveries in confirming prior acts of tenant in tail.

Effect of fines.

(m) If a tenant in tail who had executed any settlement, lease or mortgage, or created any charge or incumbrance by statute, judgment, or otherwise, affecting the entailed land, afterwards suffered a recovery, its effect was to confirm such prior acts, and to make the lands chargeable with them, although before they were defeasible by the issue (*Capel's case*, 1 Rep. 60; *S. C.*, Poph. 5, 6; *Beck v. Welsh*, 1 Wills. 277; *Tourle v. Rand*, 2 Br. C. C. 652; *Goodright v. Mead*, 3 Burr. 1703; *Cheney v. Hall*, 3 Atk. 9; Ambl. 526; *Stapleton v. Stapleton*, 1 Atk. 2); but not if the settlement was voluntary (*Cormick v. Trapaud*, 6 Dow, 60). As to the similar effect of a fine in such a case, see *Shelburn v. Biddulph* (6 Br. P. C. 356, Toml. ed.); *Symonds v. Cudmore* (Show. 370; 1 Salk. 338; Skin. 284, 317, 328; 3 Salk. 335; Carth. 257; 12 Mod. 32; Holt, 666; 1 Freem. 503; 2 Atk. 204); see 7 Ves. 497; *Lloyd v. Lloyd* (4 Dru. & War. 374); *Browne v. Blake* (1 Molloy, 368).

Cases on s. 38.

Where after this statute A. tenant in tail in remainder created a common law base fee (see *ante*, p. 264) in favour of a purchaser for value, and then became bankrupt, but the commissioners did not bar the entail, a disentailing deed subsequently executed by A. was held to confirm the common law base fee under this section (*Hankey v. Martin*, 49 L. T. 560).

The proviso at the end of this section does not require that the disentailing instrument should pass the estate to the purchaser. It is sufficient if the instrument forms part of a transaction in respect of which the person claiming the benefit of the proviso is a purchaser (*Crocker v. Waine*, 5 B. & S. 697).

11. *Enlargement of Base Fees.*

3 & 4 Will. 4,
c. 74, s. 39.

39. If a base fee in any lands, and the remainder or reversion in fee in the same lands, shall at the time of the passing of this act, or at any time afterwards, be united in the same person, and at any time after the passing of this act there shall be no intermediate estate between the base fee and the remainder or reversion, then and in such case the base fee shall not merge, but shall be *ipso facto* enlarged into as large an estate as a tenant in tail, with the consent of the protector, if any, might have created by any disposition under this act if such remainder or reversion had been vested in any other person.

Base fee, when united with the immediate reversion, enlarged, instead of being merged.

"If a tenant in tail, claiming the immediate remainder or reversion in fee, bars his estate tail by means of a fine instead of a recovery, he frequently prejudices his title by merging in the remainder or reversion the base fee acquired by the fine, as he thereby not only lets in all the charges and estates made and created by the persons through whom he derived the remainder or reversion, but also renders it necessary, afterwards, to make out his title to the remainder or reversion, which, in many instances, is attended with great difficulty and expense" (1 Real Property Report, p. 28; but see *Sperling v. Trevor*, 7 Ves. 497). This difficulty is removed by this section.

Estates tail were an exception to the ordinary rule as to merger (see as to this below). Thus where an estate tail in freeholds and the reversion in fee vested in the same person, the estate tail was by the operation of the statute *De Donis* kept alive and did not merge (*Roe v. Baldmere*, 5 T. R. 109; 2 Rep. 61; *Foxwell v. Van Grutten*, 1897, A. C. 679); *secus*, in the case of copyholds, *Parker v. Turner*, 1 Vern. 458; *Dunn v. Green*, 2 P. W. 9. If, however, a tenant in tail with a reversion in fee to himself, levied a fine, the effect was to create a base fee, which merged in the other fee, and let in all the incumbrances of the ancestor (*Shelburne v. Biddulph*, 6 Br. P. C. 356; *Foxwell v. Van Grutten*, *supra*). An estate tail after possibility of issue extinct was merged by the acquisition of the fee (Co. Litt. 27 b; see 3 Preston Conv. 240).

Merger of base fees.

As to merger generally, the ordinary rule was settled that, whenever a greater estate and a smaller meet in the same person without any intermediate estate, the smaller estate merges in the greater (2 Black. Com. 177; Prest. Conv. vol. 3).

Merger of estates tail.

Before the Jud. Act, 1873, Courts of Law and Equity differed. The rule of the former was rigid that whenever a term of years and a freehold estate, whether for life or in fee immediately expectant on the term vested in the same person in his own right, the term was merged in the freehold (*Capital and Counties Bank v. Rhodes*, 1903, 1 Ch. 652). If the sole owner of a term became joint tenant of the immediately expectant freehold, the term merged as to one moiety (*Sir Ralph Bovy's Case*, 1 Vent. 193). So where a term was vested in two trustees, and one trustee subsequently became tenant for life of the freehold (*White v. Greenish*, 11 C. B. N. S. 233). A term merged in a reversionary term even where the latter was for a less number of years (*Stephens v. Bridges*, 6 Mad. 66; see *Hughes v. Robotham*, Cro. Eliz. 302). But where a lessee granted to his sub-lessee the residue of his own interest from the termination of the sub-lease, the grant operated as an "interesse termini," and the sub-lease did not merge (*Hyde v. Warden*, 3 Ex. D. 72). Again, where a lessee who had sub-leased for a shorter term assigned to his lessor his own interest during the sub-lease, there was no merger by reason of the intermediate estate which remained outstanding (*Burton v. Barclay*, 7 Bing. 745). As to the merger of a lease in the case where a lessee has granted a sub-lease, see further the note to sect. 9 of the Real Prop. Act, 1845, *post*. The effect of the merger of a lease in the freehold

Merger of smaller in greater estate.

Rule at common law before the Jud. Act, 1873, as to merger of legal estates.

Merger of terms:

3 & 4 Will. 4, c. 74, s. 39. reversion was to extinguish the lessee's covenants contained in the lease (*Dynevor v. Tennant*, 13 A. C. 279; see *Capital and Counties Bank v. Rhodes*, 1903, 1 Ch. 647).

merger of life :
life :

As regards estates for life, it was settled that where an estate for life and a greater estate immediately expectant on it met in the same person, the first estate *primâ facie* merged (*Re Dunsany*, *Nott v. Dunsany*, 1906, 1 Ch. 582). And for this purpose an estate for the party's own life was considered greater than an estate for another's life (see Co. Litt. 42 A). Where accordingly the first of two successive life tenants created a term out of his life interest and subject thereto granted such life interest to the second, it was said that before the Jud. Act, 1873, the first life interest would at law have merged in the second (*Re Barry Co.*, 76 L. T. 492). See further, *Re Radcliffe*; *R. v. Bewes*, 1892, 1 Ch. 231; *Re Munday & Roper*, 1899, 1 Ch. 296; *Re Barlow*, 1903, 1 Ch. 382).

of con-
ditional fee :

Again, a fee simple conditional was held to merge in the possibility of reverter on failure of such conditional fee (*Doe v. Simpson*, 4 Bing. N. C. 348; *Sodor & Man v. Derby*, 2 Ves. sen. 354; see *Pemberton v. Barnes*, 1899, 1 Ch. 548).

two estates
must have
been held by
same person
in his own
right.

It was a condition at Common Law of the merger of the smaller in the greater estate that the two estates should have been held by the same person in his own right and not in the right of another (*Re Radcliffe*, *R. v. Bewes*, *sup.*). Accordingly there was no merger at law where one of the two estates was held by a husband in right of his wife (*Jones v. Davies*, 7 H. & N. 507; *Doe v. Pett*, 11 Ad. & Ell. 842; *Platt v. Shap*, Cro. Jac. 275; see *Hurley v. Hurley*, 1908, 1 I. R. 393). Or by an administrator (*Chambers v. Kingham*, 10 Ch. D. 746). Nor where a lessee died, having appointed the reversioner his executor (2 Black. Comm. 177). The case of a person who holds the term as executor purchasing the fee is discussed Sug. V. & P., 14th ed. 618. Inasmuch, however, as the Common Law did not recognize trusts, there was a merger of the smaller in the greater estate, notwithstanding that of two estates held by the same person, one might be held in trust and the other beneficially (*Capital and Counties Bank v. Rhodes*, 1903, 1 Ch. 653).

Rule in
equity;
before 1873.

Courts of Equity before 1873 had regard to the intention of the parties; and in the absence of any direct evidence of intention, they presumed that merger was not intended, if it was to the interest of the party, or only consistent with the duty of the party, that merger should not take place (*Capital and Counties Bank v. Rhodes*, 1903, 1 Ch. 652). These courts interfered, and if necessary decreed the execution of such deeds as replaced the parties in their proper position (*Capital and Counties Bank v. Rhodes*, 1903, 1 Ch. 653, referring to *Saunders v. Bournford*, Finch, 424; *A.-G. v. Kerr*, 2 Beav. 420). As regards the merger of equitable estates, it was said before 1873 that *primâ facie* the rule of law prevailed also in equity; but that a court of equity would not allow merger if it saw equitable reasons against it (*Brandon v. Brandon*, 31 L. J. Ch. 49; see *Thellusson v. Liddard*, 1900, 2 Ch. 643).

Rule in equity
now prevails.
Jud. Act, 1873,
sect. 25 (4).

The Judicature Act, 1873, s. 25 (4), provided that there should not be any merger by operation of law only of any estate the beneficial interest in which would not be deemed to be merged or extinguished in equity. Since this act it has been laid down that the court is guided by intention; and in the absence of express intention, either in the instrument or by parol, looks to the benefit of the person in whom the two estates become vested (*Ingle v. Vaughan Jenkins*, 1900, 2 Ch. 368; compare *Re Gibbon*, *Moore v. Gibbon*, 1909, 1 Ch. 373). And this rule has been applied in the case of legal estates (*Snow v. Boycott*, 1892, 3 Ch. 110; *Re Barry Co.*, 76 L. T. 489; *Capital and Counties Bank v. Rhodes*, 1903, 1 Ch. 631; *Hurley v. H.*, 1908, 1 I. R. 393; see *Craig v. Creer*, 1899, 1 I. R. 258). Where a lessee acquires the freehold reversion and subsequently deals with the property, such subsequent dealings may be used as evidence of an intention against merger (*Lea v. Thursby*, 1904, 2 Ch. 57).

Merger of
equitable in
legal estates.

As regards the merger of equitable in legal estates, it is settled that wherever the legal and equitable estates uniting in the same person are co-extensive and commensurate, the latter is absorbed in the former (*Selby v.*

Alston, 3 Ves. 341; *Re Douglas*; *Wood v. Douglas*, 28 Ch. D. 331). The rule applies to a case where such estates unite in two or more persons (*Re Selous, Thomson v. Selous*, 1901, 1 Ch. 921). And an equitable tenancy in common and a legal joint tenancy were held to be equal and co-extensive and to merge accordingly (*Ib.*). The rule does not apply where a person has the whole legal estate and a partial equitable estate (*Phillips v. Brydges*, 3 Ves. 126; see *Capel v. Girdler*, 9 Ves. 509). So an equitable estate tail in a copyhold did not merge by the descent to the copyholder of the legal fee (*Merest v. James*, 6 Madd. 118). Nor did an equitable leasehold interest merge in a legal estate for life subsequently acquired by the lessee (*Ingle v. Vaughan Jenkins*, 1900, 2 Ch. 368).

3 & 4 Will. 4,
c. 74, s. 39.

12. *Modes in which Dispositions of Land under this Act by Tenants in Tail are to be effected.*

40. Every disposition of lands under this act by a tenant in tail thereof shall be effected by some one of the assurances (not being a will) by which such tenant in tail could have made the disposition if his estate were an estate at law in fee simple absolute: provided nevertheless, that no disposition by a tenant in tail shall be of any force either at law or in equity, under this act, unless made or evidenced by deed; and that no disposition by a tenant in tail resting only in contract either express or implied, or otherwise, and whether supported by a valuable or meritorious consideration or not, shall be of any force at law or in equity under this act, notwithstanding such disposition shall be made or evidenced by deed (*n*); and if the tenant in tail making the disposition shall be a married woman, the concurrence of her husband shall be necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition shall be acknowledged by her as hereinafter directed (*o*).

Tenant in tail to make a disposition by deed as if seised in fee, but not by will or contract; and if a married woman, with her husband's concurrence.

(*n*) This section adopts an established rule that the issue in tail was not bound, either at law or in equity, to complete contracts made by his ancestor, respecting the entailed land, because the issue claims by a paramount title *per formam doni*, from the creator of the estate tail, and not from his own ancestors (3 Rep. 41 b; 1 P. Wms. 271; 2 Ves. sen. 634; Hob. 203; 1 Ch. Cas. 171; 2 Ventr. 350; 1 Lev. 237; 2 Eq. Cas. Abr. 28, pl. 34; *A.-G. v. Day*, 1 Ves. sen. 218). Such rule applied, although the ancestor had received the whole purchase-money, and a decree had been made to levy a fine (Prec. Ch. 278; 2 Vern. 306; Gilb. Eq. R. 104; 1 Ves. sen. 224; see *Franks v. Mainwaring*, 2 Beav. 115); and even where tenant in tail, in pursuance of a covenant had acknowledged a fine, but died before it was perfected (2 Vern. 3). The rule was applicable to copyholds, and to equitable tenants in tail of lands whether freehold or copyhold (see Sugd. V. & P. 227, 11th ed.; 1 Prest. Conv. 153).

Old rule as to effect of contracts by tenant in tail.

There is nothing in this section to affect contracts as such. Therefore, although they will not bar the entail under the act, nor can equity give to them that operation, yet they may be recovered upon at law, or be the foundation of a specific performance against the tenant in tail. Thus the court will decree, as against the tenant in tail, specific performance of a contract for disentailment entered into by him with a purchaser (*Bankes v. Small*, 36 Ch. Div. 716; see *Davis v. Tollemache*, 2 Jur. N. S. 1181). Where a tenant in tail of copyholds deposited his title deeds with an agreement to "make a formal surrender" to secure a loan, a remainderman who joined in the

Effect of this section upon contracts by tenant in tail.

3 & 4 Will. 4, deposit was held bound to carry out the agreement *Bryce v. Bury*, 2 Drew. 11).
c. 74, s. 40. See further the note to sect 47, *post*; and Sugd. R. P. Stat. 197, 2nd ed.

No particular
form of disen-
tailing deed
necessary.

No particular form of disentailing deed is necessary; any deed which by its legal operation would have conveyed the fee simple, if the grantor had been seised in fee, will, if executed by a tenant in tail in possession and duly inrolled, bar the entail (*Nelson v. Agnew*, I. R. 6 Eq. 232). The word "disposition" is not a technical word; but in this section is limited to such an instrument *inter vivos* as would be effectual to pass a legal estate in fee simple (*Carter v. Carter*, 1896, 1 Ch. 67, 69). Accordingly in this section the word does not include a mere declaration of trust (*Green v. Paterson*, 32 Ch. Div. 108), *secus* in sect. 77, *post* (*Carter v. Carter, sup.*). As to the form of disentailing assurance necessary under this act, see further, 1 Hayes, Conv. 154 *et seq.* As to the effect of an order under the Trustee Act, 1893, vesting the estate of an infant tenant in tail, see *Re Montagu, Faber v. Montagu* (1896, 1 Ch. 549), and cases there cited; *Re Hambrough, H. v. H.*, 1909, 2 Ch. 620. Forms of disentailing assurances will be found in 3 Davidson, Conv. 1166 *et seq.*

Where a disentailing deed operates as a common law grant, and not by the Statute of Uses, it must be executed by the grantees; if not, it may be rendered inoperative by the subsequent disclaimer by the grantees (*Peacock v. Eastland*, 10 Eq. 21). But where the disentailing deed operates by the Statute of Uses, it is not necessary that it should be executed by the grantees to uses, and a subsequent disclaimer by them will not affect the operation of the deed (*Nelson v. Agnew, sup.*; *Re Dudson*, 8 Ch. Div. 631). As to the distinction between common law assurances, and assurances under the Statute of Uses, see further *Savill v. Bethell*, 1902, 2 Ch. 540; *Mallott v. Wilson*, 1903, 2 Ch. 494.

Acknowledg-
ment by
married
woman,
tenant in tail,
need not pre-
cede inrol-
ment.

(o) In the case of a married woman tenant in tail, it is not necessary that the acknowledgment should precede the inrolment (*Ex parte Tavener*, 7 De G. M. & G. 627). Independently of the Married Women's Property Act, 1882, the concurrence of the husband was held necessary in the case of separate property (*Cooper v. Macdonald*, 7 Ch. D. 295). The husband might concur, though a discharged bankrupt (*Ib.* 298). But in the case of women married since 1882, or of property acquired by a married woman since 1882, no concurrence or acknowledgment is necessary (*Re Drummond and Davie*, 1891, 1 Ch. 531).

Every assur-
ance by a
tenant in tail,
except a lease
not exceeding
twenty-one
years at a
rack rent, or
not less than
five-sixths of
a rack rent,
to be inopera-
tive unless
inrolled in
Chancery
within six
months.

41. Provided always, that no assurance by which any disposition of lands shall be effected under this act by a tenant in tail thereof (except a lease for any term not exceeding twenty-one years, to commence from the date of such lease, or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack rent, or not less than five sixth parts of a rack rent) shall have any operation under this act unless it be inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and if the assurance by which any disposition of lands shall be effected under this act shall be a bargain and sale, such assurance, although not inrolled within the time prescribed by the act passed in the twenty-seventh year of the reign of his Majesty King Henry the Eighth, intituled "For Inrolment of Bargains and Sales," shall, if inrolled in the said Court of Chancery within the time prescribed by this clause, be as good and valid as the same would have been if the same had been inrolled in the said court within the time prescribed by the said act of Henry the Eighth.

The inrolment under this statute may be effected either by the vendor or the purchaser; and as the inrolment relates back to the execution of the deed, it follows that a statutory disposition by the vendor subsequently enrolled by the purchaser will give a good title in fee simple (*Cattell v. Corral*, 4 Y. & Coll. 228). If the disentailing deed requires inrolment or registration by any other statute, the requisitions of such statute must be observed; if lands lie within a registry district, the deed must be registered. But inrolment, according to this act, will in the case of a bargain and sale satisfy the requisition of the statute 27 Hen. 8, c. 13; and (it seems) in the case of a conveyance to charitable uses, the requisition of the Mortmain and Charitable Uses Acts.

3 & 4 Will. 4,
c. 74, s. 41.

A deed is valid if inrolled within six months, although such inrolment is after the death of the tenant in tail who executed the deed (*Re Piers*, 14 Ir. Ch. R. 452; *Whitmore Searle v. Whitmore Searle*, 1907, 2 Ch. 332). See further, as to inrolment, the note to sect. 74, *post*. As to inrolment in the case of copyholds, see sect. 54, *post*.

Assurances under this act are now inrolled in the Enrolment Department of the Central Office (R. S. C. Ord. 61, r. 9).

42. The consent of the protector of a settlement to the disposition under this act of a tenant in tail shall be given either by the same assurance by which the disposition shall be effected, or by a deed distinct from the assurance, and to be executed either on or at any time before the day on which the assurance shall be made, otherwise the consent shall be void.

Consent of the protector to be given by the same assurance or by a distinct deed.

Where the tenant in tail and the protector were both made parties to a disentailing deed and, the tenant in tail having executed the deed and died, the protector subsequently executed it, the bar was effectual (*Whitmore Searle v. Whitmore Searle*, 1907, 2 Ch. 332).

43. If the protector of a settlement shall, by a distinct deed, give his consent to the disposition of a tenant in tail, it shall be considered that such protector has given an absolute and unqualified consent, unless in such deed he shall refer to the particular assurance by which the disposition shall be effected, and shall confine his consent to the disposition thereby made.

If by distinct deed, to be considered unqualified, unless he refer to the assurance.

A contract under seal by a protector to give his consent might amount to a consent within the act (*Bankes v. Small*, 36 Ch. Div. 724).

44. It shall not be lawful for the protector of a settlement who under this act shall have given his consent to the disposition of a tenant in tail, to revoke such consent.

Protector not to revoke his consent.

45. Any married woman, being either alone or jointly with her husband protector of a settlement, may under this act, in the same manner as if she were a feme sole, give her consent to the disposition of a tenant in tail.

A married woman protector to consent as a feme sole.

46. Provided always, that the consent of a protector to the disposition of a tenant in tail shall, if given by a deed distinct from the assurance by which the disposition shall be effected by the tenant in tail, be void, unless such deed be inrolled in his Majesty's High Court of Chancery either at or before the time when the assurance shall be inrolled.

Consent of a protector by distinct deed void, unless inrolled with or before the assurance.

3 & 4 Will. 4,
c. 74, s. 47.

Courts of equity excluded from giving any effect to dispositions by tenants in tail, or consents of protectors of settlements, which in courts of law would not be effectual.

47. In cases of dispositions of lands under this act by tenants in tail thereof, and also in cases of consents by protectors of settlements to dispositions of lands under this act by tenants in tail thereof, the jurisdiction of courts of equity shall be altogether excluded, either on the behalf of a person claiming for a valuable or meritorious consideration, or not, in regard to the specific performance of contracts, and the supplying of defects in the execution either of the powers of disposition given by this act to tenants in tail, or of the powers of consent given by this act to protectors of settlements, and the supplying under any circumstances of the want of execution of such powers of disposition and consent respectively, and in regard to giving effect in any other manner to any act or deed by a tenant in tail or protector of a settlement which in a court of law would not be an effectual disposition or consent under this act; and that no disposition of lands under this act by a tenant in tail thereof in equity, and no consent by a protector of a settlement to a disposition of lands under this act by a tenant in tail thereof in equity, shall be of any force unless such disposition or consent would, in case of an estate tail at law, be an effectual disposition or consent under this act in a court of law.

This section prevents the court from holding that a contract to disentail is, as against the issue in tail and remaindermen, as effectual as if a disentailing deed had been executed; or from remedying any defects in the execution of a deed intended to bar an estate tail (*Bankes v. Small*, 36 Ch. Div. 723; see *Mills v. Fox*, 37 Ch. D. 162). But the section does not prevent the court from ordering, as against a tenant in tail, specific performance of a contract for disentailment entered into by him with a purchaser (*Bankes v. Small*, *sup.*; see *Petre v. Duncombe*, 7 Hare, 24; *Re Montagu, Faber v. Montagu*, 1896, 1 Ch. 549). An infant has been ordered under Debts Recovery Act, 1830, s. 11, to execute a disentailing deed (*Radcliffe v. Eccles*, 1 Keen, 130; see *Hargreaves v. Wright*, 1 W. R. 408). To give effect to an election an infant tenant in tail was declared a trustee and a person was appointed to convey his estate so as to bar the entail (*Re Montagu, Faber v. Montagu*, 1896, 1 Ch. 549; see *Re Hambrough, H. v. H.*, 1909, 2 Ch. 620). As to lunatics, see *ante*, p. 276. Under the ordinary covenant, however, to settle after-acquired property a married woman cannot be compelled to execute a disentailing deed (*Re Dunsany, Nott v. Dunsany*, 1906, 1 Ch. 578, approving *Hilbers v. Parkinson*, 25 Ch. D. 200; see *Re Anstis, Chetwynd v. Morgan*, 31 Ch. Div. 605; *Mills v. Fox*, 37 Ch. D. 162; *Dering v. Kynaston*, 6 Eq. 210). The above section does not prevent the rectification, on the ground of mistake, of a deed enrolled under the act (*Hall-Dare v. Hall-Dare*, 31 Ch. Div. 251).

Lord Chancellor, &c. to have the power to consent to a disposition by a tenant in tail, and to make such orders as shall be thought necessary; and if any

48. Provided always, that in every case in which the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons entrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot and of unsound mind, or his Majesty's High Court of Chancery, shall be the protector of a settlement, such Lord High Chancellor, Lord Keeper, or Lords Commissioners, or person or persons so entrusted as aforesaid (p), or the said Court of Chancery (as the case may be), while protector of such settlement, shall, on the

motion or petition in a summary way by a tenant in tail under such settlement, have full power to consent to a disposition under this act by such tenant in tail, and the disposition to be made by such tenant in tail upon such motion or petition as aforesaid shall be such as shall be approved of by such Lord High Chancellor, Lord Keeper or Lords Commissioners, or person or persons so entrusted as aforesaid, or the said Court of Chancery (as the case may be); and it shall be lawful for such Lord High Chancellor, Lord Keeper or Lords Commissioners, or person or persons so entrusted as aforesaid, or the said Court of Chancery (as the case may be), to make such orders in the matter as shall be thought necessary (*q*); and if such Lord High Chancellor, Lord Keeper or Lords Commissioners, or person or persons so entrusted as aforesaid, or the said Court of Chancery (as the case may be), shall, in lieu of any such person as aforesaid, be the protector of a settlement, and there shall be any other person protector of the same settlement jointly with such person as aforesaid, then and in every such case the disposition by the tenant in tail, though approved of as aforesaid, shall not be valid, unless such other person being protector as aforesaid shall consent thereto in the manner in which the consent of the protector is by this act required to be given.

3 & 4 Will. 4,
c. 74, s. 48.

other person
shall be joint
protector, the
disposition
not to be valid
without his
consent.

(*p*) See *ante*, p. 290.

(*q*) The cases *Re Blewitt* (3 M. & K. 259); *Re Wood* (3 My. & Cr. 266); deciding that the Lord Chancellor has no jurisdiction where the tenant in tail in possession is a lunatic, have been overruled (*Re Blewitt*, 6 D. M. & G. 187; see *ante*, p. 286).

As protector of the settlement, the only duty of the court is to see what, in reference to the interests of the family, it would be proper for the tenant for life to do; and the object must be rather to protect the objects of the settlement, than to benefit one member of the family to the exclusion of the others (*Re Newman*, 2 My. & Cr. 112). So, consent was refused to a disposition which would benefit the husband of the tenant in tail to the detriment of the brother of the lunatic (*ib.*; *Re Graydon*, 1 Mac. & G. 655). Consent was also refused to the sale of the next presentation to a family living, the sale not being for the benefit of the lunatic tenant for life (*Re Tharp*, 3 Ch. Div. 59). Consent, however, was given, for carrying out a reasonable arrangement likely to have been made by the lunatic (*Re Blewitt*, 6 D. M. & G. 198); also, for enabling a tenant in tail in remainder to secure by mortgage the repayment to the estate of a lunatic tenant for life of an allowance made to the tenant in tail out of the surplus income of the tenant for life (*Re Sparrow*, 20 Ch. Div. 320; *Re Beridge*, 50 L. T. 653); also, for advancing a son of the lunatic (*Grant v. Yea*, 3 M. & K. 245).

49. Provided always, that in every case in which the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, or of unsound mind (*r*), or his Majesty's High Court of Chancery, shall be the protector of a settlement, no document or instrument, as evidence of the consent of such protector to the

Order of the
Lord Chan-
cellor, &c. to
be evidence
of consent.

3 & 4 Will. 4, c. 74, s. 49. disposition of a tenant in tail under such settlement, shall be requisite beyond the order in obedience to which the disposition shall have been made.

(r) See *ante*, p. 291, n. (i).

13. Estates Tail in Copyholds.

The previous clauses to apply to copyholds, with certain variations.

50. All the previous clauses in this act, so far as circumstances and the different tenures will admit, shall apply to lands held by copy of court roll, except that a disposition of any such lands under this act by a tenant in tail thereof, whose estate shall be an estate at law, shall be made by surrender, and except that a disposition of any such lands under this act by a tenant in tail thereof, whose estate shall be merely an estate in equity, may be made either by surrender or by a deed as hereinafter provided, and except so far as such clauses are otherwise altered or varied by the clauses hereinafter contained.

Entails in copyholds.

Copyholds are not within the stat. *De Donis* (13 Edw. 1, c. 1; Cro. Car. 44, 45), and therefore not entailable, except by special custom (*Doe v. Truby*, 2 W. Bl. 946; see *Goold v. White*, Kay, 683; 3 Rep. 8). Where no custom exists, the party, who would otherwise be tenant in tail, will take a fee simple conditional (*Doe v. Clark*, 5 B. & Ald. 458; *Simpson v. Simpson*, 4 Bing. N. C. 333; *Moore v. Moore*, 2 Ves. sen. 596; *Doe v. Simpson*, 3 Scott, N. R. 774; *Hardcastle v. Dennison*, 10 C. B. N. S. 606; see *ante*, p. 265).

Where copyholds are entailed by custom, the entail may be barred under the present act (see *R. v. Weedon-Beck*, 13 Q. B. 808). As to the enrolment of an assurance dealing with copyholds, see sect. 54, *post*, p. 304.

Old mode of barring entails in copyholds.

Before this act there were several modes of barring entails in copyholds besides that by recovery:—Thus, by the lord executing a deed of enfranchisement to the tenant in tail (*Challoner v. Murhall*, 2 Ves. jur. 524; *Re Hart*, 41 Ch. D. 547); by forfeiture and re-grant (*Pilkington v. Stanhop*, 1 Sid. 314; 2 Keb. 127; *Pilkington v. Bagshaw*, Sty. 450; *Carr v. Singer*, 2 Ves. sen. 606); by surrender (*Goold v. White*, Kay, 683; *Carr v. Singer*, *sup.*). Concurrent customs to bar entails by recovery and by surrender were good (*Doe v. Ossingbrooke*, 2 Bing. 70; *Everall v. Smalley*, 2 Str. 1197; 1 Wils. 26; *Doe v. Truby*, 2 W. Bl. R. 944; *Doe v. Dauncey*, 7 Taunt. 674; see *Roe v. Jeffrey*, 2 Maule & Selw. 92; *Doe v. Mason*, 3 Wils. 63; see 1 Watk. on Cop. 178; Scriv. on Cop. p. 42, 6th ed.). Before this act the same mode of barring an equitable entail in copyholds must have been pursued as was required by the special custom of the manor for barring an entail in the legal estate (3 Ves. 127; 3 Atk. 815; 1 Watk. on Cop. 180, 181). By this act, an equitable entail in copyholds may be barred either by surrender or by deed (see *post*, s. 53, p. 303). A bar might under the old law be presumed after long possession in fee (*Roe v. Lowe*, 1 H. B. 459).

As to the deed of consent and the entry of it on the court rolls where the protector of a settlement of copyholds consents by

51. Provided always, that if the consent of the protector of a settlement to the disposition of lands held by copy of court roll by a tenant in tail thereof shall be given by deed, such deed shall, either at or before the time when the surrender shall be made by which the disposition shall be effected, be executed by such protector, and produced to the lord of the manor of which the lands are parcel, or to his steward, or to the deputy of such steward; and the consent of such protector shall be void unless

such deed shall be so executed and produced; and on the production of the deed the lord, or steward or deputy steward, shall, by writing under his hand to be indorsed on the deed, acknowledge that the same was produced within the time limited, and shall cause such deed, with the indorsement thereon, to be entered on the court rolls of the manor; and the indorsement, purporting to be so signed, shall of itself be *primâ facie* evidence that the deed was produced within the time limited, and that the person who signed the indorsement was the lord of the manor, or his steward, or the deputy of such steward; and after such deed shall have been so entered the lord of the manor or his steward, or the deputy of such steward, shall indorse thereon a memorandum signed by him, testifying the entry of the same on the court rolls.

3 & 4 Will. 4,
c. 74, s. 51.

deed to the
disposition
of a tenant
in tail.

52. Provided always, that if the consent of the protector of a settlement to the disposition of lands held by copy of court roll by a tenant in tail thereof shall not be given by deed, then and in such case the consent shall be given by the protector to the person taking the surrender by which the disposition shall be effected; and if the surrender shall be made out of court, it shall be expressly stated in the memorandum of such surrender that such consent had been given, and such memorandum shall be signed by the protector; and the lord of the manor of which the lands are parcel, or his steward, or the deputy of such steward, shall cause the memorandum, with such statement therein as to the consent, to be entered on the court rolls of the manor; and such memorandum shall be good evidence of the consent and of the surrender therein stated to be made; and the entry of the memorandum on the court rolls, or a copy of such entry, shall be as available for the purposes of evidence as any other entry on the court rolls, or a copy thereof; but if the surrender shall be made in court, the lord of the manor, or his steward, or the deputy of such steward, shall cause an entry of such surrender, containing a statement that such consent had been given, to be made on the court rolls; and the entry of such surrender on the court rolls, or a copy of such entry, shall be as available for the purposes of evidence as any other entry on the court rolls, or a copy thereof,

As to the
consent of the
protector of a
settlement of
copyholds
when not
given by
deed, and the
preserving of
evidence of
the same on
the court
rolls.

A surrender and admittance may be proved by the original entries made by the steward (*Doe v. Hall*, 16 East, 208; *Doe v. Olley*, 12 Ad. & Ell. 481); or by an examined copy duly stamped (*Doe v. Mee*, 4 B. & Ad. 617; *Doe v. Freeman*, 12 M. & W. 844); see Stamp Act, 1891, s. 65 (31). In one case a surrender was proved by a draft, and the parol testimony of the foreman of the homage (*Doe v. Calloway*, 6 Barn. & Cress. 484). See further, Elton, 345 *et seq.*

Evidence of
entry in court
rolls.

53. Provided always, that a tenant in tail of lands held by copy of court roll, whose estate shall be merely an estate in equity, shall have full power by deed to dispose of such lands

Power to
equitable
tenants in tail
of copyholds

3 & 4 Will. 4,
c. 74, s. 53.

to dispose of
their lands by
deed.

under this act in the same manner in every respect as he could have done if they had been of freehold tenure; and all the previous clauses in this act shall, so far as circumstances will admit, apply to the lands in respect of which any such equitable tenant in tail shall avail himself of this present clause; and the deed by which the disposition shall be effected shall be entered on the court rolls of the manor of which the lands thereby disposed of may be parcel; and if there shall be a protector to consent to the disposition, and such protector shall give his consent by a distinct deed, the consent shall be void unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the equitable tenant in tail; and such deed of consent shall be entered on the court rolls (s); and it shall be imperative on the lord of the manor, or his steward, or the deputy of such steward, when required so to do, to enter such deed or deeds on the court rolls, and he shall indorse on each deed so entered a memorandum, signed by him, testifying the entry of the same on the court rolls: provided always, that every deed by which lands held by copy of court roll shall be disposed of under this clause, by an equitable tenant in tail thereof, shall be void against any person claiming such lands, or any of them, for valuable consideration under any subsequent assurance duly entered on the court rolls of the minor* of which the lands may be parcel, unless the deed of disposition by the equitable tenant in tail be entered on the court rolls of such manor before the subsequent assurance shall have been entered (t).

[* *Lege*
manor.]

(s) It seems that the deed of consent should be entered on the court rolls at or before the time when the principal assurance is entered (Dart, V. & P., 6th ed., 781, n. (q)). In applying for a mandamus to the steward to inrol a disposition pursuant to the above section, it is not necessary to annex a copy of the deed, if the contents are stated in the affidavit (*Crosby v. Fortescue*, 5 Dowl. P. C. 275). See further *Green v. Paterson*, 32 Ch. Div. 95, where the documents were held not to amount to a disposition of an equitable estate tail in copyholds.

(t) As to the final proviso, Lord *St. Leonards* considered it probable that notice would not be held to supply in equity, the want of an entry on the rolls (Sugd. R. P. Stat. 223, 2nd ed.; and V. & P. 471).

Customary
freeholds.

This section does not apply to customary freeholds (*R. v. Ingleton*, 8 Dowl. P. C. 693; see *Carlisle v. Towns*, 2 B. & Ad. 585).

Inrolment not
necessary as
to copyholds.

54. Provided always, that in no case where any disposition under this act of lands held by copy of court roll, by a tenant in tail thereof, shall be effected by surrender or by deed, shall the surrender or the memorandum, or a copy thereof, or the deed of disposition, or the deed, if any, by which the protector shall consent to the disposition, require inrolment, otherwise than by entry on the court rolls.

Entry on
court rolls to

A disentailing assurance of copyholds must be entered on the court rolls within six calendar months after the date of its execution (*Honeywood v.*

Foster, 30 Beav. 1; *Gibbons v. Snape*, 1 D. J. & S. 621; *Green v. Paterson*, 32 Ch. Div. 95; see sect. 41, *ante*, p. 298). An indorsement by the steward of a manor at his residence, that the same was produced before him at his residence, is not a sufficient inrolment within the statute (*Boyd v. Prawle*, 14 W. R. 1009).

3 & 4 Will. 4, c. 74, s. 54.
be within six months.

14. *Bankrupt's Estate Tail.*

[Sect. 55, which repealed the bankruptcy provisions of 6 Geo. 4, c. 16, was itself repealed by 37 & 38 Vict. c. 35.]

56. Any commissioner acting in the execution of any fiat which after the thirty-first day of December, one thousand eight hundred and thirty-three, shall be issued in pursuance of the said act (1 & 2 Will. 4, c. 56), under which any person shall be adjudged a bankrupt who at the time of issuing such fiat, or at any time afterwards, before he shall have obtained his certificate, shall be an actual tenant in tail of lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of such actual tenant in tail, and shall create by any such disposition as large an estate in the lands disposed of as the actual tenant in tail, if he had not become bankrupt, could have done under this act at the time of such disposition: provided always, that if at the time of the disposition of such lands, or any of them, by such commissioner as aforesaid, there shall be a protector of the settlement by which the estate of such actual tenant in tail in the lands disposed of by such commissioner was created, and the consent of such protector would have been requisite to have enabled the actual tenant in tail, if he had not become bankrupt, to have disposed of such lands to the full extent to which, if there had been no such protector, he could under this act have disposed of the same, and such protector shall not consent to the disposition, then and in such case the estate created in such lands, or any of them, by the disposition of such commissioner, shall be as large an estate as the actual tenant in tail, if he had not become bankrupt, could at the time of such disposition have created under this act in such lands without the consent of the protector.

The commissioner, in the case of an actual tenant in tail becoming bankrupt after the 31st of December, 1833, by deed to dispose of the lands of the bankrupt to a purchaser.

Sect. 56 of the Bankruptcy Act, 1883, empowers the trustee of the bankrupt's estate to deal with any property to which the bankrupt is beneficially entitled as tenant in tail, in the same manner as the bankrupt might have dealt with the same. And the same section provides that sects. 56—73 (both inclusive) of the Fines and Recoveries Act, 1833, shall extend and apply to proceedings in bankruptcy under the Bankruptcy Act, 1883, as if those sections were there re-enacted and made applicable in terms to such proceedings. In the absence of provisions of the above nature, the estate tail of a bankrupt could not have been reached (*Sturgis v. Morse*, 2 D. F. & J. 233: *Re Gaskell & Walter*, 1906, 1 Ch. 445). Compare the effect of the Forfeiture Act, 1870, where a tenant in tail is convicted of felony (*Re Gaskell & Walter*, 1906, 2 Ch. 1).

Clauses in 3 & 4 Will. 4, c. 74, with respect to the disposition of estates tail under bankruptcies, extended to proceedings under subsequent bankruptcy acts.

Where in the case of copyholds, the entail in which by custom could not be barred until it fell into possession, the tenant in tail in remainder (who had become bankrupt) obtained his certificate and purchased from his

3 & 4 Will. 4. assignees an estate in the copyhold to continue during his own life only, the
c. 74, s. 56. assignees could not on the death of the original tenant for life bar the entail
 and acquire the ultimate remainder in fee (*Johnson v. Smiley*, 17 Beav. 223).

Commis-
 sioner in case
 of a tenant in
 tail entitled
 to a base fee
 becoming
 bankrupt,
 and of there
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 tector, by
 deed to dis-
 pose of the
 lands of the
 bankrupt to a
 purchaser.

57. Any commissioner acting in the execution of any such fiat as aforesaid, under which any person shall be adjudged a bankrupt, who at the time of issuing such fiat, or at any time afterwards before he shall have obtained his certificate, shall be a tenant in tail entitled to a base fee in lands of any tenure, shall by deed dispose of such lands to a purchaser for valuable consideration, for the benefit of the creditors of the person so entitled as aforesaid, provided at the time of the disposition there be no protector of the settlement by which the estate tail converted into the base fee was created; and by such disposition the base fee shall be enlarged into as large an estate as the same could at the time of such disposition have been enlarged into under this act by the person so entitled if he had not become bankrupt.

As to the
 consent of the
 protector in
 case of bank-
 ruptcy.

58. The commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining the certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall be adjudged a bankrupt, shall, if there shall be a protector of the settlement by which the estate tail of such actual tenant in tail, or the estate tail converted into a base fee (as the case may be), was created, stand in the place of such actual tenant in tail, or tenant in tail so entitled as aforesaid, so far as regards the consent of such protector; and the disposition of such lands, or any of them, by such commissioner as aforesaid, if made with the consent of such protector, shall, whether such commissioner may have made under this act a prior disposition of the same lands without the consent of such protector or not, or whether a prior sale or conveyance of the same lands shall have been made or not, under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any acts hereafter to be passed concerning bankrupts, have the same effect as such disposition would have had if such actual tenant in tail, or tenant in tail so entitled as aforesaid, had not become bankrupt, and such disposition had been made by him under this act with the consent of such protector; and all the previous clauses in this act, in regard to the consent of the protector to the disposition of a tenant in tail of lands not held by copy of court roll, and in regard to the time and manner of giving such consent, and in regard to the inrolment of the deed of consent, where such deed shall be distinct from the assurance by which the disposition of the commissioner shall be effected, shall, except so far as the same may be varied by the clause next hereinafter contained, apply to every consent that may be given by virtue of this present clause.

59. Every deed by which any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of lands not held by copy of court roll, shall be void unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and every deed by which any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of lands held by copy of court roll, shall be entered on the court rolls of the manor of which the lands may be parcel; and if there shall be a protector who shall consent to the disposition of such lands held by copy of court roll, and he shall give his consent by a distinct deed, the consent shall be void, unless the deed of consent be executed by the protector either on or at any time before the day on which the deed of disposition shall be executed by the commissioner; and such deed of consent shall be entered on the court rolls; and it shall be imperative on the lord of every manor of which any lands disposed of under this act by any such commissioner as aforesaid may be parcel, or the steward of such lord, or the deputy of such steward, to enter on the court rolls of the manor every deed required by this present clause to be entered on the court rolls, and he shall indorse on every deed so entered a memorandum, signed by him, testifying the entry of the same on the court rolls.

3 & 4 Will. 4,
c. 74, s. 59.

As to the inrolment in Chancery of the deed of disposition of freehold lands, and the entry on the court rolls of the deed of disposition of copyhold lands, and of the deed of consent.

60. If any commissioner acting in the execution of any such fiat as aforesaid shall, under this act, dispose of any lands of any tenure, of which the bankrupt shall be actual tenant in tail, and in consequence of there being a protector of the settlement by which the estate of such actual tenant in tail was created, and of his not giving his consent, only a base fee shall by such disposition be created in such lands, and if at any time afterwards during the continuance of the base fee there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, such base fee shall be enlarged into the same estate into which the same could have been enlarged under this act, if at the time of the disposition by such commissioner as aforesaid there had been no such protector.

Subsequent enlargement of base fees created by the disposition of the commissioner.

61. If a tenant in tail entitled to a base fee in lands of any tenure shall be adjudged a bankrupt at the time when there shall be a protector of the settlement by which the estate tail converted into the base fee was created, and if such lands shall be sold or conveyed under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any other acts hereafter to be passed concerning bankrupts, and if at any time afterwards during the continuance of the base fee in such lands there shall cease to be a protector of such settlement, then and in such case, and immediately thereupon, the base fee in such lands shall be enlarged into the same estate into which the same

Enlargement of base fees subsequent to the sale or conveyance of the same under the Bankrupt Acts.

3 & 4 Will. 4.
c. 74, s. 61.

could have been enlarged under this act, if at the time of the adjudication of such bankruptcy there had been no such protector, and the commissioner acting in the execution of the fiat under which the tenant in tail so entitled shall have been adjudged a bankrupt had disposed of such lands under this act.

A voidable estate created in favour of a purchaser by an actual tenant in tail becoming bankrupt, or by a tenant in tail entitled to a base fee becoming bankrupt, confirmed by the disposition of the commissioner, if no protector, or being such with his consent, or on there ceasing to be a protector; but not against a purchaser without notice.

62. Provided always, that where an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall have already created or shall hereafter create in such lands, or any of them, a voidable estate in favour of a purchaser for valuable consideration, and such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall be adjudged a bankrupt under any such fiat as aforesaid, and the commissioner acting in the execution of such fiat shall make any disposition under this act of the lands in which such voidable estate shall be created, or any of them, then and in such case, if there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created, or being such protector he shall consent to the disposition by such commissioner as aforesaid, whether such commissioner may have made under this act a previous disposition of such lands or not, or whether a prior sale or conveyance of the same lands shall have been made or not under the said acts of the sixth year of King George the Fourth, and the first and second years of King William the Fourth, or either of them, or any other acts hereafter to be passed concerning bankrupts, the disposition by such commissioner shall have the effect of confirming such voidable estate in the lands thereby disposed of to its full extent as against all persons except those whose rights are saved by this act; and if at the time of the disposition by such commissioner in the case of an actual tenant in tail, there shall be a protector, and such protector shall not consent to the disposition by such commissioner, and such actual tenant in tail, if he had not been adjudged a bankrupt, would not without such consent have been capable under this act of confirming the voidable estate to its full extent, then and in such case such disposition shall have the effect of confirming such voidable estate so far as such actual tenant in tail, if he had not been adjudged a bankrupt, could at the time of such disposition have been capable under this act of confirming the same without such consent; and if at any time after the disposition of such lands by such commissioner, and while only a base fee shall be subsisting in such lands, there shall cease to be a protector of such settlement, and such protector shall not have consented to the disposition by such commissioner, then and in such case such voidable estate, so far as the same may not have been previously confirmed, shall be confirmed to its full extent as against all persons except those whose rights are saved by this

act: provided always, that if the disposition by any such commissioner as aforesaid shall be made to a purchaser for valuable consideration, who shall not have express notice of the voidable estate, then and in such case the voidable estate shall not be confirmed against such purchaser and the persons claiming under him.

3 & 4 Will. 4,
c. 74, s. 62.

See the following cases decided under old Bankruptcy Acts: *Beck v. Walsh* (1 Wils. 276); *Pye v. Daubuz* (3 Br. C. C. 595); *Edwards v. Appleby* (2 Br. C. C. 652, n.); *Ex p. Fripp* (1 D. G. 293); *Ex p. Wise* (1 Mont. & M. 65).

An insolvent tenant in tail executed in 1825 a conveyance under 1 Geo. 4, c. 119. In 1831 he became bankrupt, and under the bankruptcy a statutory conveyance was executed barring the entail. The disentailing assurance under the bankruptcy was held not to confirm or enlarge the determinable fee created by the conveyance of 1825 (*Sturgis v. Morse*, 2 D. F. & Jo. 223, where see judgment of *Turner*, L. J.). See also *Hankey v. Martin* (49 L. T. 560), quoted *ante*, p. 294.

63. All acts and deeds done and executed by a tenant in tail of lands of any tenure, who shall be adjudged a bankrupt under any such fiat as aforesaid, and which shall affect such lands, or any of them, and which, if he had been seised of or entitled to such lands in fee simple absolute, would have been void against the assignees of the bankrupt's estate, and all persons claiming under them, shall be void against any disposition which may be made of such lands under this act by such commissioner as aforesaid.

Acts of a bankrupt tenant in tail void against any disposition under this act by the commissioner.

64. Provided always, that, subject and without prejudice to the powers of disposition given by this act to the commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of lands of any tenure, or a tenant in tail entitled to a base fee in lands of any tenure, shall be adjudged a bankrupt, and also subject and without prejudice to the estate in such lands which may be vested in the assignees of the bankrupt's estate and also subject and without prejudice to the rights of all persons claiming under the said assignees in respect of such lands or any of them, such actual tenant in tail, or tenant in tail so entitled as aforesaid, shall have the same powers of disposition under this act in regard to such lands as he would have had if he had not become bankrupt.

Subject to the powers given to the commissioner, and to the estate in the assignees, a bankrupt tenant in tail shall retain his powers of disposition.

See *Davis v. Tollemache* (2 Jur. N. S. 1181).

65. Any disposition under this act of lands of any tenure by any commissioner acting in the execution of any such fiat as aforesaid under which a person being, or before obtaining his certificate becoming, an actual tenant in tail of such lands, or a tenant in tail entitled to a base fee in such lands, shall be adjudged a bankrupt, shall, although the bankrupt be dead at

The disposition by the commissioner of the lands of a bankrupt tenant in tail shall, if the bankrupt be

3 & 4 Will. 4,
c. 74, s. 65.

dead, have
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were alive.

the time of the disposition, be in the following cases as valid and effectual as the same would have been, and have the same operation under this act as the same would have had, if the bankrupt were alive; (that is to say,) in case at the time of the bankrupt's decease there shall be no protector of the settlement by which the estate tail of the actual tenant in tail, or the estate tail converted into a base fee, as the case may be, was created; or in case the bankrupt had been an actual tenant in tail of such lands, and there shall at the time of the disposition be any issue inheritable to the estate tail of the bankrupt in such lands, and either no protector of the settlement by which the estate tail was created, or a protector of such settlement who, in the manner required by this act, shall consent to the disposition, or a protector of such settlement who shall not consent to the disposition; or in case the bankrupt had been a tenant in tail entitled to a base fee in such lands, and there shall at the time of the disposition be any issue who if the base fee had not been created would have been actual tenant in tail of such lands, and either no protector of the settlement by which the estate tail converted into a base fee was created, or a protector of such settlement who, in the manner required by this act, shall consent to the disposition.

Every dispo-
sition by the
commissioner
of copyhold
lands where
the estate
shall not be
equitable, to
have the same
operation as a
surrender;
and the
person to
whom such
land shall
have been
disposed of
may claim to
be admitted
on paying the
fines, &c.

66. Every disposition which under this act may be made by any commissioner acting in the execution of any such fiat as aforesaid of lands held by copy of court roll shall, in every case in which the estate of the bankrupt in such lands shall not be merely an estate in equity, operate in the same manner as if such lands had, for the same estate which shall have been acquired by the disposition by such commissioner as aforesaid, been duly surrendered into the hands of the lord of the manor of which they may be parcel, to the use of the person to whom the same shall have been disposed of by such commissioner; and the person to whom the lands shall have been so disposed of by such commissioner may claim to be admitted tenant of such lands, to hold the same by the ancient rents, customs and services, in the same manner as if such lands had been duly surrendered to his use into the hands of the lord of the manor of which such lands may be parcel, and shall, upon being admitted tenant of such lands, to hold the same as aforesaid, pay the fines, fees, and other dues which could have been lawfully demanded upon such admittance if such lands had, for the same estate which shall have been acquired by the disposition by such commissioner as aforesaid, passed by surrender into the hands of the lord, to the use of the person so admitted.

As to copy-
holds and
customary
lands of
bankrupt.

Sect. 50, sub-sect. 4, of the Bankruptcy Act, 1883, enacts, that where any portion of the bankrupt's estate consists of copyhold or customary property or any like property passing by surrender and admittance or in any similar manner, the trustee shall not be compellable to be admitted to such property, but may deal with the same in the same manner as if it had been capable of

being and had been duly surrendered or otherwise conveyed to such uses as the trustee may appoint; and any appointee of the trustee shall be admitted to or otherwise invested with the property accordingly (See *Poole v. Bursell*, 10 W. R. 861). 3 & 4 Will. 4, c. 74, s. 66.

67. The rents and profits of any lands of which any commissioner acting in the execution of any such fiat as aforesaid hath power to make disposition under this act shall in the meantime and until such disposition shall be made, or until it shall be ascertained that such disposition shall not be required for the benefit of the creditors of the person adjudged bankrupt under the fiat, be received by the assignees of the estate of the bankrupt, for the benefit of his creditors; and the assignees may proceed by action of debt for the recovery of such rents and profits, or may distrain for the same upon the lands subject to the payment thereof, and in case any action of trespass shall be brought for taking any such distress may plead thereto the general issue, and give this act or other special matter in evidence, and also, in case any such distress shall be replevied, shall have power to avow or make cognizance generally in such manner and form as any landlord may now do by virtue of the statute 11 Geo. 2, c. 19, or by any other law or statute now in force or hereafter to be made for the more effectually recovering of rent in arrear; and such assignees and their bailiffs, agents and servants, shall also have all such and the same remedies, powers, privileges and advantages of pleading, avowing and making cognizance, and be entitled to the same costs and damages, and the same remedies for the recovery thereof as landlords, their bailiffs, agents and servants, are now or hereafter may be by law entitled to have when rent is in arrear; and such assignees shall also have the same power and authority of enforcing the observance of all covenants, conditions and agreements in respect of the lands of which such commissioner as aforesaid hath the power of disposition under this act, and in respect of the rents and profits thereof, and of entry into and upon the same lands for the non-observance of any such covenant, condition and agreement, and of expelling and amoving therefrom the tenants or other occupiers thereof, and thereby determining and putting an end to the estate of the persons who shall not have observed such covenants, conditions and agreements, as the bankrupt would have had in case he had not been adjudged a bankrupt; provided always that this clause shall apply to all lands held by copy of court roll, but shall only apply to those lands of any other tenure which any commissioner acting in the execution of any such fiat as aforesaid may have power to dispose of under this act after the bankrupt's decease.

Assignees to recover rents of the lands of a bankrupt of which the commissioner has power to make disposition, and to enforce covenants as if entitled to the reversion. This clause to apply to all copyhold lands, but as to other lands only to such as the commissioner may dispose of after the bankrupt's death.

This section does not apply to a case where there has been, before the bankruptcy, a voidable estate created in favour of a purchaser (*Hankey v. Martin*, 49 L. T. 560).

**3 & 4 Will. 4,
c. 74, s. 68.**

All the provisions of the act in regard to bankrupts shall apply to their lands in Ireland.

68. All the provisions in this act contained for the benefit of the creditors of persons who under such fiats as aforesaid shall be adjudged bankrupts after the thirty-first day of December, one thousand eight hundred and thirty-three, and for the confirmation in consequence of bankruptcy of voidable estates created by them shall extend and apply to the lands of any tenure in Ireland of such persons as fully and effectually as if this act had throughout extended to lands of any tenure in Ireland; saving always the rights of the King's most excellent Majesty, his heirs and successors, to any reversion or remainder in the crown in lands in Ireland.

Provisions of the Irish Act as to bankrupts apply to their lands in England.

Sections 48, 49, 50, 51, 52, 53, 54, 55, 56, 57, 58 and 59 of the 4 & 5 Will. 4, c. 92, as to bankrupts' lands in Ireland, with the omission of copyholds, agree in substance and effect with sects. 55, 56, 57, 58, 59, 60, 61, 62, 63, 64, 65 and 67 of the 3 & 4 Will. 4, c. 74. By the 4 & 5 Will. 4, c. 92, s. 60, it is enacted, that all the provisions in that act contained for the benefit of the creditors of persons who, under such commissions as aforesaid, (i.e. *issued under Irish stat. 11 & 12 Geo. 3, c. 8,*) shall be adjudged bankrupts after the 31st October, 1834, and for the confirmation in consequence of bankruptcy of voidable estates created by them, shall extend and apply to the lands of any tenure in England of such persons, as fully and effectually as if the act had throughout extended to land of any tenure in England.

Deeds relating to the lands of bankrupts in Ireland to be inrolled in the Court of Chancery there.

69. Provided always, that in all cases of bankruptcy, every deed of disposition under this act of lands in Ireland by any commissioner acting in the execution of any such fiat as aforesaid, and also every deed by which the protector of a settlement of lands in Ireland shall consent, shall be inrolled in his Majesty's High Court of Chancery in Ireland within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in England.

Deeds relating to Irish bankrupts' lands in England to be inrolled in Court of Chancery there.

The 61st section of the Irish stat. 4 & 5 Will. 4, c. 92, provides, that in all cases of bankruptcy every deed of disposition under that act of lands in England, by any commissioner acting in the execution of any such commission as aforesaid, and also every deed by which the protector of a settlement of lands in England shall consent, shall be inrolled in his Majesty's High Court of Chancery in England within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in Ireland.

15. *Money to be laid out in Lands to be Entailed.*

[*Sect. 70, which repealed 7 Geo. 4, c. 45, was itself repealed by 37 & 38 Vict. c. 35, without reviving the former statute.*]

The previous clauses, with certain variations, to apply to lands of any tenure to be sold, where the

71. Lands to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subject to be invested in the purchase of lands to be settled, so that any person, if the lands were purchased, would have an estate tail therein, and also money subject to be invested in the purchase of lands to be settled, so that any person,

if the lands were purchased, would have an estate tail therein, shall for all the purposes of this act be treated as the lands to be purchased, and be considered subject to the same estates as the lands to be purchased would, if purchased, have been actually subject to; and all the previous clauses in this act, so far as circumstances will admit, shall, in the case of the lands to be sold as aforesaid being either freehold or leasehold, or of any other tenure, except copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be freehold, and were actually purchased and settled; and shall, in the case of the lands to be sold as aforesaid being held by copy of court roll, apply to such lands in the same manner as if the lands to be purchased with the money to arise from the sale thereof were directed to be copyhold, and were actually purchased and settled; and shall in the case of money subject to be invested in the purchase of lands to be so settled as aforesaid, apply to such money in the same manner as if such money were directed to be laid out in the purchase of freehold lands, and such lands were actually purchased and settled; save and except that in every case where under this clause a disposition shall be to be made of leasehold lands for years absolute or determinable, so circumstanced as aforesaid, or of money so circumstanced as aforesaid, such leasehold lands or money shall, as to the person in whose favour or for whose benefit the disposition is to be made, be treated as personal estate, and, except in case of bankruptcy, the assurance by which the disposition of such leasehold lands or money shall be effected shall be an assignment by deed, which shall have no operation under this act unless inrolled in his Majesty's High Court of Chancery within six calendar months after the execution thereof; and in every case of bankruptcy the disposition of such leasehold lands or money shall be made by the commissioner, and completed by inrolment in the same manner as hereinbefore required in regard to lands not held by copy of court roll.

3 & 4 Will. 4,
c. 74, s. 71.

purchase-money is subject to be invested in the purchase of lands to be entailed, and where money is subject to be invested in like manner.

Money subject to an imperative direction for investment in the purchase of freehold land is considered by a court of equity as converted into real estate (Re Walker, Macintosh Walker v. Walker, 1908, 2 Ch. 712; see further, Fletcher v. Ashburner, 1 L. C. Eq.; and as to entailed money see also Mosley v. Ward, 29 Beav. 407). Old mode of barring estates tail in entailed money.

Formerly a person who would have been entitled to the land, if purchased, as tenant in tail, was enabled by a court of equity to receive the money if he could have acquired the fee by fine, but not if a recovery would have been requisite, in which case it was necessary to purchase land in order to suffer a recovery (5 Ves. 12; 6 Ves. 116; In re Lord Somerville, 2 Sim. & Stu. 470; 3 Russ. 369, 416; 5 Russ. 5). The Irish stat. 4 & 5 Will. 4, c. 92, s. 62, repealed the Irish stats. 58 Geo. 3, c. 46, and 7 Geo. 4, c. 45.

Where entailed land had been sold and the money paid into court, a subsequent disentailing assurance whereby the tenant in tail purported to "grant and dispose of" the hereditaments did not disentail the money; the court pointing out that this section requires the assurance to be an Cases under this section.

3 & 4 Will. 4. "assignment by deed," and not a grant (*Mills v. Fox*, 37 Ch. D. 162). Compare **c. 74, s. 71.** the case where in a will money subject to a trust for investment in land to be entailed was held to be referred to under the word "hereditaments" (*Re Gosselin, G. v. G.*, 1906, 1 Ch. 120; see *Re Cleveland*, 1893, 2 Ch. 250).

Where a disposition is to be made of money subject to be invested in the purchase of land to be settled on a tenant in tail, there under this section the money is, as to the donee, to be treated as personal estate. Compare the case of capital money which under sects. 21 and 24 of the Settled Land Act, 1882, is subject to be invested in the purchase of land to be settled on a tenant in tail. There by sect. 22, sub-s. (5) of the last-mentioned Act the money is to be considered as "land." And see *Re Walker, Macintosh Walker v. Walker*, 1908, 2 Ch. 705.

Under this section an entail may be barred of lands to be purchased with rents hereafter to become due to trustees (*Fordham v. Fordham*, 34 Beav. 59; see the order in this case, Seton, 6th ed., 1786) or to be purchased under a trust for investing money in land at a future date (*Re Harvey, H. v. H.*, 1901, 2 Ch. 290).

Payment out of court of entailed money.

A fund in court representing entailed land will not be paid out to a tenant in tail without a disentailing deed having been executed (*Re Butler*, 16 Eq. 479; *Re Broadwood*, 1 Ch. D. 438; *Re Reynolds*, 3 Ch. Div. 61; *Re Norcop*, 31 L. T. 85; *Re Tylden*, 11 W. R. 869; *Re Smythe*, 3 M. & K. 249; see *contra, Sowry v. Sowry*, 8 W. R. 339; *Re Row*, 17 Eq. 300; *Re Wood*, 20 Eq. 372; *Stead v. Harper*, 1896, W. N. 46). An affidavit proving the execution has been required (*Bishop v. De Burgh*, 15 L. J. Ch. 35; *Re Field*, 11 W. R. 927; see, however, *Re Butler, sup.*; *Re Reynolds, sup.*). As to an affidavit of no incumbrances, see *Thornhill v. Milbank* (12 W. R. 523).

Where the money had been paid into court by a company and a disentailing deed had been executed, the company was ordered to pay the costs of the deed (*Re Brooking*, 2 Giff. 31; *Re North Staffordshire R. Co.*, 3 Giff. 224; *Re Navan & Kingscourt Co.*, 1906, 1 I. R. 557).

Lands of any tenure in Ireland to be sold, where the purchase-money is subject to be invested in the purchase of lands to be entailed, and money under the control of a court of equity in Ireland, subject to be invested in like manner, to be subject to this act in cases of bankruptcy.

72. So far as regards any person adjudged a bankrupt under any such fiat as aforesaid, the provisions of the clause lastly hereinbefore contained shall, for the benefit of the creditors of the bankrupt, apply to lands in Ireland to be sold, whether freehold or leasehold, or of any other tenure, where the money arising from the sale thereof shall be subjected to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, and also to money under the control of any court of equity in Ireland, or of or to which any individuals as trustees may be possessed or entitled in Ireland, and which shall be subject to be invested in the purchase of lands to be settled, so that the bankrupt, if the lands were purchased, would have an estate tail therein, as fully and effectually as if this act had throughout extended to Ireland: provided always, that every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to lands in Ireland to be so sold, as aforesaid, shall be inrolled in his Majesty's High Court of Chancery in Ireland within six calendar months after the execution thereof; but every deed to be executed by any commissioner or protector, in pursuance of this clause, in regard to money subject to be invested in the purchase of lands to be so settled as aforesaid, shall be inrolled in his Majesty's High Court of Chancery in

England within six calendar months after the execution thereof, and not in his Majesty's High Court of Chancery in Ireland; saving always the rights of the King's most excellent Majesty, his heirs and successors, to any reversion or remainder in the crown in lands in Ireland to be sold.

3 & 4 Will. 4,
c. 74, s. 72.

This saving is not in the corresponding section in the Irish stat. 4 & 5 Will. 4, c. 92, s. 64.

16. The Inrolment of Deeds, &c.

73. Any rule or practice requiring deeds to be acknowledged before the inrolment shall not apply to any deed by this act required to be inrolled in his Majesty's High Court of Chancery in England or Ireland.

As to deeds being acknowledged before inrolment.

By the Irish Act, 4 & 5 Will. 4, c. 92, s. 73, it is provided that any rule or practice requiring deeds to be acknowledged before inrolment shall not apply to any deed by that act required to be inrolled in the Court of Chancery in Ireland.

74. Every deed required to be inrolled in his Majesty's High Court of Chancery in England or Ireland, by which lands or money subject to be invested in the purchase of lands shall be disposed of under this act, shall, when inrolled as required by this act, operate and take effect in the same manner as it would have done if the inrolment thereof had not been required, except that every such deed shall be void against any person claiming the lands or money thereby disposed of, or any part thereof, for valuable consideration, under any subsequent deed duly inrolled under this act, if such subsequent deed shall be first inrolled.

Every deed to be inrolled by which lands or money shall be disposed of under this act, to take effect as if inrolment not required.

See sect. 41 (*ante*, p. 298). Sect. 74 renders it necessary for purchasers and mortgagees to have the deed under which they take inrolled without any delay, and it will be proper for them to ascertain, by search at the inrolment department of the Central Office, that no conveyance prior to that under which they claim, made by the tenant in tail, has been inrolled. Compare the case of a bargain and sale, *Marlborough v. Godolphin*, 2 Ves. sen. 79. See Com. Dig. Bargain and Sale (B. 9).

It has been held, under the corresponding section of the Irish Act (4 & 5 Will. 4, c. 92, s. 66), that this section applies only to disentailing deeds executed by the same tenant in tail, and not to deeds executed by successive tenants in tail (*Re Piers*, 14 Ir. Ch. R. 452).

[Sect. 75 dealing with fees on inrolment was repealed by 42 & 43 Vict. c. 78, s. 29. For the present fees, see the order stated Shelf. R. P. Stat., 9th ed., 310.]

76. It shall be lawful for his Majesty's Court of Common Pleas at Westminster from time to time to make such orders as the court shall think fit touching the amount of the fees and charges to be paid for the entries of deeds by this act required

The Court of Common Pleas to regulate the fees for entries on

3 & 4 Will. 4,
c. 74, s. 76.

court rolls
and indorse-
ments on
deeds, and
for taking
consents, &c.

to be entered on the court rolls of manors, and for the indorsements thereon, and for taking the consents of the protectors of settlements of lands held by copy of court roll, where such consents shall not be given by deed, and for taking surrenders by which dispositions shall be made under this act by tenants in tail of lands held by copy of court roll, and for entries of such surrenders or the memorandums thereof on the court rolls.

[For sects. 77—91, see *post*, pp. 317 *et seq.*]

17. *Ireland.*

Ireland.

92. This act shall not extend to Ireland, except where the same is expressly mentioned.

By 4 & 5 Will. 4, c. 92, the provisions of this act have been extended to Ireland, with the omission of sects. 4, 5 and 6 (*ante*, pp. 269, 270), relating to lands, held by ancient demesne, and sects. 50—54, 66, 76, 90, relating to copyholds (see *ante*, pp. 302, 310, 315, and 330, *post*). The other variations between the two statutes are noticed *ante*, pp. 262, 275, 279, 294, 312, 315, and *post*, p. 318.

The clauses in 4 & 5 Will. 4, c. 92, with respect to the disposition of estates tail under bankruptcies, are extended to proceedings under the Bankruptcy (Ireland) Amendment Act, 1872 (35 & 36 Vict. c. 58, s. 50).

This act applies to lands locally situate in the town of Berwick-upon-Tweed (the Berwick-on-Tweed Act, 1836).

MARRIED WOMEN'S PROPERTY.

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I.—THE FINES AND RECOVERIES ACT, 1833, SS. 77—84, 90, 91.

- § 77. *Married women enabled to dispose by acknowledged deed of lands and money subject to be invested in land...* 317.
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77. After the thirty-first day of December, one thousand eight hundred and thirty-three, it shall be lawful for every married woman, in every case except that of being tenant in tail, for which provision is already made by this act (*a*), by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release (*b*), surrender or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid, and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid, or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole, save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: provided always, that this act shall not extend to lands held

A married woman, with her husband's concurrence, may dispose of lands and money subject to be invested in the purchase of lands and any estate therein; and may release and extinguish powers as a feme sole.

This Act shall not extend

3 & 4 Will. 4, c. 74, s. 77. by a copy of court roll of or to which a married woman, or she and her husband in her right, may be seised and entitled for an estate at law, in any case in which any of the objects to be effected by this clause could before the passing of this act have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel.

to copyholds of married women in certain cases.

- (a) See sections 15 and 40, *ante*, pp. 275, 297.
 (b) The Irish stat. 4 & 5 Will. 4, c. 92, s. 68, contains the word "disclaim."

- (1) *Disposal of Married Woman's Land before this Act...* 318.
- (2) *Cases since this Act where Statutory Method applies. Contracts...* 318.
- (3) *Disposition under the Section...* 319.
- (4) *Cases when Acknowledgment unnecessary...* 319.
- (5) *Disclaimer by Married Women, and generally...* 320.

(1)
 Disposal of married woman's land before this Act.

As to the disposal of a married woman's land before this act. According to the common law, having surrendered her will to her husband, a married woman in attempting to deal with her own land was presumed not to be exercising that free will which was necessary to voluntary alienation or contract. In early times several methods for conveying such land were adopted, such as fines and customary forms of alienation; all of which involved a separate examination directed to ascertain (for the purpose of rebutting the above presumption) that she was acting of her own free will (*Johnson v. Clark*, 1908, 1 Ch. 313 *et seq.*). This separate examination was so essential that a local custom purporting to enable a married woman to dispose of her land without it was held unreasonable and bad (*Id.* 1908, 1 Ch. 303). As to the effect of fines, see *May v. Roper*, 10 Sim. 360; *Forbes v. Adams*, 9 Sim. 462.

(2)
 Cases since Act where the statutory method of disposition applies.

Under the present section, read in connection with the interpretation clause, a married woman may by deed acknowledged dispose of any interest in land either at law or in equity, or any charge, lien or incumbrance in or upon or affecting land either at law or in equity (*Briggs v. Chamberlain*, 11 Hare, 74); including a right to dower (*Dent v. Clayton*, 12 W. R. 903); but not a mere *spes successionis* (*Allcard v. Walker*, 1896, 2 Ch. 369). This power of disposition includes (1) the married woman's equitable interest in a mortgage debt (*Williams v. Cooke*, 4 Giff. 343; *Miller v. Collins*, 1896, 1 Ch. 573; overruling *Re Newton*, 23 Ch. D. 181; *secus*, where the charge had been paid off: *Re Algeo*, 1 R. 2 Eq. 485); (2) the married women's interest whether in possession or reversion in proceeds of real estate devised on trust for sale, whether the sale be or be not made (*Briggs v. Chamberlain*, 11 Ha. 69; *Tuer v. Turner*, 20 Beav. 560; *Re Jakeman*, 23 Ch. D. 344). So where personalty in which the married woman had a reversionary interest under a settlement prior to M. W. Rev. Int. Act, 1857 (*post*, p. 337), had in breach of trust been invested in land, she could dispose of her interest under this section (*Re Durrant and Stonor*, 18 Ch. Div. 106). And a conveyance by *cestui que trusts* of land held on immediate trust for sale to the trustee for sale who had purchased it, was held void as against a married woman *c. q. t.* who had not acknowledged the deed (*Franks v. Bollans*, 3 Ch. 717; subsequently compromised, see *Re Clinton*, 13 Eq. 301).

By Real Prop. Act, 1845, s. 6 (*post*), contingent and other like interests, and also rights of entry, may be disposed of by a married woman conformably to this act (*Crofts v. Middleton*, 8 D. M. & G. 192).

The present section also enables a married woman, with the concurrence of her husband, to contract by an acknowledged deed so as to bind her non-separate land, but not herself personally (*Crofts v. Middleton*, 8 D. M. & G. 192; *Pride v. Bubbs*, 7 Ch. 64). A contract unacknowledged did not bind her so far as regards non-separate land (*Castle v. Wilkinson*, 5 Ch. 534; *Cahill v. Cahill*, 8 App. Cas. 420; *Williams v. Walker*, 9 Q. B. D. 576); even where she was a trustee for sale (*Avery v. Griffin*, 6 Eq. 606; *Re Harkness and Allsopp*, 1896, 2 Ch. 358; see now M. W. P. Act, 1907, s. 1, *post*). Nor did her husband's contract bind her (*Barnes v. Wood*, 8 Eq. 424; *Nicholl v. Jones*, 3 Eq. 696). Non-separate land is now less common having regard to M. W. P. Act, 1882. In cases falling within that act, see as to contracts, sect. 1, sub-sect. 2 (*post*, p. 346), and M. W. P. Act, 1893, s. 1, *post*, p. 365.

Contracts.

A declaration of trust whereby the married woman effectually parts with the entire equitable interest in property is a "disposition" within this section under the (*Carter v. Carter*, 1896, 1 Ch. 67). And where the property is copyhold the declaration binds her heir, the case not falling within the final proviso (*Ib.*). The fact that the husband is a discharged bankrupt does not prevent him from concurring (*Re Jakeman*, 23 Ch. D. 344). As to the effect of a lease by a husband and wife of the wife's land not acknowledged by her, see *Toler v. Slater*, L. R. 3 Q. B. 42.

(3)

Disposition section.

The formalities of this section are unnecessary in the following cases: (1) Generally in the case of separate estate whether independently of, or under, the M. W. P. Act, 1882 (see *post*, pp. 324, 347); including the cases where a married woman is dealing as a mortgagee with land on the security whereof her separate money has been advanced (*Re Brooke and Fremlin*, 1898, 1 Ch. 647), and where, as one of two mortgagees on joint account, she executes a transfer (*Re West and Hardy*, 1904, 1 Ch. 145). (2) Where she is disposing of real property held by her as trustee or personal representative (M. W. P. Act, 1907, sect. 1, *post*). (3) Where she is conveying land as bare trustee under sect. 16 of the Trustee Act, 1893 (*Re Howgate and Osborn*, 1902, 1 Ch. 451; *Re Docwra, Docwra v. Faith*, 29 Ch. D. 693). (4) In cases within the proviso at the end of this section; see *Green v. Paterson*, 32 Ch. Div. 95; *Carter v. Carter*, *sup.* (5) Where an act of parliament substitutes other proceedings (*Ex p. Ellison*, 2 Y. & Coll. 528). (6) Under sect. 52 of the Conv. Act, 1881 (*post*), a married woman may now by deed unacknowledged release her power over any property, whether real or personal, and whether in possession or reversion and (where the power is coupled with an interest) whether in respect of such interest she is restrained from anticipation or not (*Re Chisholm, Hemphill v. Hemphill*, 1901, 2 Ch. 82). As to leases or sales of a married woman's property under S. E. Act, 1877 (*post*), see sects. 12, 22, 50 and 51 of that act. In the case of conveyances by a married woman under the S. L. Act, 1882, sect. 61 of that act (*post*) seems to render an acknowledgment unnecessary. Where her property is sold in a partition action, she can, without deed acknowledged, request a sale under sect. 6 of the Partition Act, 1876 (*post*), and elect by examination in court to take the proceeds as personalty (*Standerling v. Hall*, 11 Ch. D. 652; *Wallace v. Greenwood*, 16 Ch. D. 362).

(4)

Cases where necessary.

Where a married woman executed but did not acknowledge a separation deed purporting to deal with her real estate, she could not by acting upon it make the deed binding (*Harle v. Jarman*, 1895, 2 Ch. 419). Similarly in the case of a postnuptial settlement purporting to deal with a married woman's reversionary interest in personalty (*Seaton v. Seaton*, 13 A. C. 61, see p. 73). With the above should be compared the cases where the difficulty arose not from coverture but from infancy. Thus where previous to the marriage of a female infant a settlement was executed of her land, the settlement was not void but voidable (*Cooke v. Cooke*, 38 Ch. D. 209; see *Edwards v. Carter*, 1893, A. C. 364), and on attaining her majority, she

Affirmation of settlements.

3 & 4 Will. 4. could by acts during coverture and without acknowledged deed affirm the settlement so as to bind the property (*Barrow v. Barrow*, 4 K. & J. 409; see *Re Hodson, Williams v. Knight*, 1894, 2 Ch. 421; *Wilder v. Pigott*, 22 Ch. D. 263, the case of a reversionary interest in personalty). The last-mentioned decisions have been said to proceed on the ground of election; but this is election in a general, not in a technical sense of the term; see *Harle v. Jarman*, 1895, 2 Ch. 427. Where previous to the marriage of an adult female there was an agreement for settlement which did not comply with the Statute of Frauds, a reversionary interest of the married woman in personalty was held bound by her subsequent acts (*Greenhill v. North British Co.*, 1893, 3 Ch. 474). This decision purported to follow *Barrow v. Barrow*, and *Wilder v. Pigott*, *sup.*; but qu. whether it is consistent with *Seaton v. Seaton* and *Harle v. Jarman*, *sup.*

Purchase-money in court belonging to married women. Purchase money of real estate belonging to a married woman, which has been paid into court, may be paid out to her upon her examination without a deed acknowledged (*Re Hayes*, 9 W. R. 769; see *Re Trevelyhan*, 31 L. J. Ch. 560; *Gibbons v. Kibbey*, 10 W. R. 55; *Clark v. Clark*, 14 W. R. 449; *White v. Herrick*, 4 Ch. 345). Where the fund is small the examination will be dispensed with (*Re Clark*, 13 W. R. 401; *Knapping v. Tomlinson*, 18 W. R. 684; *Frith v. Lewis*, 1881, W. N. 145).

Lunacy. Where the married woman is a lunatic, her heir and her own beneficial, but not her legal, interest can be bound by an order of the court (*Re Stables*, 4 D. J. & S. 257).

(5)
Disclaimer by married women. The Irish statute 4 & 5 Will. 4, c. 92, s. 68, contains the additional word *disclaim*, after the words "dispose of." By Real Prop. Act, 1845, s. 7, *post*, a married woman may disclaim by deed made conformable to this act. As to the release and extinguishment of powers, see *post*, p. 322.

Disclaimer generally. An interest devised vests in the devisee by presumption of law before entry (Co. Litt. 111 a). The old doctrine was, that an estate of freehold could be disclaimed only by matter of record (*Butler and Baker's case*, 3 Rep. 26). But it is now established that a deed is sufficient for that purpose (*Townson v. Tickell*, 3 B. & Ald. 31; *Begbie v. Crook*, 2 Bing. N. C. 70). The disclaimer must be clear and unequivocal (*Doe v. Smyth*, 6 B. & C. 112). A disclaimer after the exercise of various acts of ownership is void (*Bence v. Gilpin*, L. R. 3 Ex. 76). A devise of copyholds may be disclaimed by word of mouth only before the devisee has been admitted (*R. v. Wilson*, 10 B. & C. 5; see Shepp. Touchs. 452). A gift of personal chattels or a term of years, may be waived and avoided by parol (1 Ventr. 128). A husband's disclaimer gave effect to a wife's disposition of her personalty (*Rycroft v. Christy*, 3 Beav. 238). On a disclaimer by a devisee the estate will descend to the heir, or pass to a remainderman (*Ib.* 116). And on the disclaimer of one of two assignees of a term, the whole interest will vest in the other (*Smith v. Wheeler*, 1 Vent. 128).

Disclaimer by trustees. The disclaimer of one of several trustees has the effect of vesting the estate in the other trustees exclusively (*Small v. Marwood*, 9 B. & C. 300; *Browell v. Reed*, 1 Hare, 435; see *Re Birchall*, *Birchall v. Ashton*, 40 Ch. Div. 436; *Doe v. Harris*, 16 M. & W. 517); and a discretionary power of sale may be exercised by them (*Affleck v. James*, 13 Jur. 739). A trustee cannot disclaim part of a trust, *e.g.*, as to all property in England (*Re Lord and Fullerton*, 1896, 1 Ch. 228). It is most prudent that a deed of disclaimer should be executed by a person named trustee, who refuses to accept the trust, but there may be conduct which amounts to a clear disclaimer (*Re Birchall*, *Birchall v. Ashton*, 40 Ch. Div. 436). As where a trustee purchased the real estate, and took the conveyance from the widow, who was tenant for life, and the heir, to whom the estate must have descended upon the disclaimer of the trust (*Stacey v. Elph*, 1 M. & K. 195). A disclaimer executed after a lapse of time by one of the three executors of a will was held to be a refusal *ab initio* (*Peppercorn v. Wayman*, 5 De G. & S. 230; see *Harris v. Watkins*, 2 K. & J. 473, as to presuming a disclaimer by a devisee). The execution of a conveyance of trust premises has been held sufficient evidence of acceptance

of the trust (*Urch v. Walker*, 3 M. & C. 702; see *Sharp v. S.*, 2 B. & Ald. 405). In *Crewe v. Dickin* (4 Ves. 97), one of two trustees released and conveyed to his co-trustee; the trustee was considered as having accepted the trust (see *Nicholson v. Wordsworth*, 2 Swanst. 371). A trustee of real estate, who disclaimed all estate, powers, &c., in the estate devised, was held not to be a necessary party in a conveyance to a purchaser (*Adams v. Tuunton*, 5 Madd. 433). See, in addition to the cases cited, Litt. ss. 684, 685; stat. 21 Hen. 8, c. 4; Co. Litt. 113 a; *Bonifant v. Greenfield*, Cro. Eliz. 80; Godb. 77; *Anon.*, 4 Leon. 207; *Hawkins v. Kemp*, 3 East, 410.

In the case of a common law grant the land passes to the grantee in the first instance, though by a subsequent disclaimer it may be divested (*Thompson v. Leach*, 2 Vent. 198; Carth. 211, 230; 2 Salk. 616; Show. P. C. 151; 3 Lev. 284; 1 Show. 296; Rep. temp. Holl. 665). On this ground a voluntary settlement of real estate was supported notwithstanding disclaimer by the trustee (*Mallott v. Wilson*, 1903, 2 Ch. 494, 501).

The final proviso excepts from the Act in certain cases a married woman's copyholds. The proviso was held to apply, *Green v. Paterson*, 32 Ch. Div. 104. As to these copyholds, see further the note to sect. 90, *post*.

78. Provided always, that the powers of disposition given to a married woman by this act shall not interfere with any power which, independently of this act, may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this act she may be prevented from so doing in consequence of such power having been suspended or extinguished by such disposition.

The powers of disposition given to a married woman by this act not to interfere with any other powers.

In the corresponding clause in the Irish statute, 4 & 5 Will. 4, c. 92, s. 69, the following qualification is added, "but such powers of disposition shall not enable a married woman to dispose of lands, or any estate therein, where the settlement or other instrument under which she may be entitled to the same shall contain a valid restriction against the anticipation thereof by such married woman." This has been said to be an expression by the legislature of what was meant by the English act (*Baggett v. Meux*, 1 Phil. 628). As regards powers of appointment, it was held under the Irish statute, that a restraint imposed on a life interest would not prevent the release of a power (*Heath v. Wickham*, 5 L. R. Ir. 285; see as to England, *Re Chisholm*, *Hemphill v. Hemphill*, 1901, 2 Ch. 82, *ante*, p. 319). As to how far other statutory powers of disposing of a married woman's property are affected by a restraint on anticipation, see S. E. Act, 1877, s. 50, *post*; S. L. Act, 1882, s. 61, *post*.

Irish statute.
Restraint on anticipation.

- (1) *Other Statutory Powers of Married Women*...321.
- (2) *Dominion of Married Women over Property by means of Powers*...322.
- (3) *Different Kinds of Powers, their Release and Extinguishment*...322.
- (4) *Separate Use, and Restraint on Anticipation*...323.

(1)

By the custom of London, confirmed by statute 34 & 35 Hen. 8, c. 22, Other statutory powers. and of several other cities and boroughs, as Norwich, &c., &c., a married woman, on being privately examined before the mayor, may bind herself by a deed acknowledged and inrolled (Hob. 225; Com. Dig. London (N. 3); 2 Inst. 673; 1 Prest. Abst. 336; Roper on Husband and Wife, 531; 4 Cruise's Dig. tit. xxxii. ch. 2, pl. 33). By statute 32 Hen. 8, c. 28, the husband and wife were empowered to make leases of the wife's lands (see *Doe v. Weller*, 7 T. R. 478). This act has been repealed by S. E. Act, 1856, s. 53, and certain powers of leasing a married woman's lands are given by

3 & 4 Will. 4, the S. E. Act, 1877, s. 46, *post*; see also S. L. Act, 1882, s. 61, *post*. By c. 74, s. 78. Infants' Prop. Act, 1830, s. 12, power was given to a married woman under an order of court to surrender leases and take new leases (extended to Ireland, 5 & 6 Will. 4, c. 17).

(2)
Dominion of married women over their property by means of powers.

Prior to the M. W. P. Act, 1882, the disabilities of married women at common law, independent of statute or particular customs, to alien their property, whether real or personal, either by deed or will, were well known (see Harg. Co. Litt. 111 b, n (4)). The wife of a man who had abjured the realm, or been transported, might act as if her husband were dead (Co. Litt. 132; 2 Vern. 104; 3 P. Wms. 37). Through the medium of powers and trusts, however, a married woman was long allowed to have, both at law and in equity, the full dominion over property independent of her husband. A wife might, without her husband, execute a naked authority to sell lands whether given before or after coverture, and though no special words were used to dispense with the disability of coverture (Co. Litt. 112 a, and n. (6)). The rule was the same where both an *interest* and an authority passed to the wife, if the authority was collateral to and did not flow from the interest, because then the two were unconnected, as if they were vested in different persons (Rep. temp. Finch. 346). As, too, a *feme covert* might convey lands in execution of a mere power, so she might with equal effect in performance of a *condition*, where land was vested in her on condition to convey to others (W. Jones, 137, 138). As regards estates of freehold which a married woman had as trustee, no effectual conveyance could formerly be made by her without fine or recovery, nor, after the present act, without a deed duly acknowledged (1 Prest. on Abs. 337; *Re Caine*, 10 Q. B. D. 284; see *Avery v. Griffin*, 6 Eq. 606). This has now been altered by the M. W. P. Act, 1907, sect. 1, *post*.

Powers of appointment to married women.

Before the M. W. P. Act, 1882, a power of disposing of real estate was often given to a married woman (1) by way of trust, *e.g.*, by a proper conveyance of an estate to trustees in trust for her for life, and afterwards in trust for such person as she should appoint; or (2) by way of power over a use, as where an estate was conveyed to the use of herself for life, remainder to the use of such persons as she should appoint (*Peacock v. Monk*, 2 Ves. sen. 191). Where by articles before marriage it was agreed that the wife should have a power of appointment over her property, the power was held well created and exerciseable (*Ripon v. Dawdning*, Amb. 565; *Wright v. Cadogan*, 1 Br. P. C. 486; Amb. 468; 2 Eden, 239; see *Doe v. Staple*, 2 T. R. 684; Sug. Pow. 158).

(3)
Different kinds of powers.

A power may be (1) *appendant*, when the exercise of it takes effect out of the estate of the donee, as a power of leasing; (2) *in gross*, when the exercise of it takes effect after the determination of the estate of the donee, as a power of a tenant for life to jointure; or (3) *simply collateral*, when the donee has no estate at all in the property the subject of the power (1 Saund. on Uses, 4th ed. 169; Sug. Pow. 8th ed. 46; Tudor, L. C. Conv. 4th ed. 539).

Exercise of powers by married women.

It has long been settled, that a married woman may execute a power whether *appendant*, in gross or simply *collateral* (*Harris v. Graham*, 1 Roll. Abr. 329, pl. 12; 2 Roll. Abr. 247, pl. 6; *Gibbons v. Moulton*, Finch, 346; *Daniel v. Upley*, Latch. 39; Godb. 327, pl. 419; *Tomlinson v. Dighton*, 1 P. Wms. 149; *Travel v. Travel*, 3 Atk. 711; cited 2 Ves. sen. 191; *Doe v. Eyre*, 5 C. B. 741, 745); unless a contrary intention appears in the instrument creating it (*Antrim v. Buckingham*, 1 Ch. Cas. 17). She may exercise power as well over a copyhold as a freehold estate (*Driver v. Thompson*, 4 Taunt. 294). See further Sug. Pow. 154, 8th ed.; *Wood v. Wood*, 10 Eq. 220.

Release of powers.

The Fines and Recoveries Act, s. 77 (*ante*, p. 317), provided a machinery whereby a married woman could release or extinguish certain powers as if she were a *feme sole*. And as regards release of powers by *femes sole*, it was settled, prior to the Conv. Act, 1881, that powers *appendant* or in gross

could be released (*Albany's case*, 1 Rep. 111; *Leigh v. Winter*, Sir W. Jones, 411; Sug. Pow. 8th ed. 82). But powers simply collateral could not (Co. Litt. 265 b; 11 Rep. 111 a; see *Weller v. Ker*, L. R. 1 H. L. Sc. 11; *Saul v. Pattinson*, 54 L. T. 670; 55 L. J. Ch. 831); unless the power was for the benefit of the donee (*West v. Berney*, 1 R. & M. 434). Further provisions as to releasing and disclaiming powers are now contained in Conv. Act, 1881, s. 52, *post*; Conv. Act, 1882, s. 6, *post*. Under the Conv. Act, 1881, s. 52, a married woman can release any power by deed unacknowledged (*Re Chisholm, Hemphill v. Hemphill*, 1901, 2 Ch. 82).

Formerly a power appendant or in gross could be extinguished by a fine or a recovery (*Digge's case*, 1 Rep. 173; *Bird v. Christopher*, Styles, 389; *King v. Melling*, 1 Vent. 225; *Tomlinson v. Dighton*, 1 P. Wms. 149; *Saville v. Blackett*, *ib.* 777); even where the power was for the benefit of the donee's children (*Bickley v. Guest*, 1 Russ. & M. 440; *Smith v. Death*, 5 Madd. 371; see, however, *Jesson v. Wright*, 2 Bligh, 15).

A power appendant to a life estate—including a power of leasing (*Simpson v. Bathurst*, 5 Ch. 193; *Lonsdale v. Lowther*, 1900, W. N. 165), a power to consent to a sale of the corpus (*Alexander v. Mills*, 6 Ch. 124; *Re Bedingfield and Herring*, 1893, 2 Ch. 332), or to consent to an advancement thereof to children (*Re Cooper, Cooper v. Slight*, 27 Ch. D. 565)—is not extinguished by an alienation of the donee's interest. It is immaterial whether the alienation is by the donee's assignment (*Alexander v. Mills*, *sup.*; *Ren v. Bulkeley*, 1 Dougl. 292; *Simpson v. Bathurst*, 5 Ch. 193), or upon his bankruptcy (*Holdsworth v. Goose*, 29 Beav. 111; *Eisdale v. Hammersley*, 31 Beav. 255; *Doe v. Britain*, 2 B. & Ald. 93; *Hole v. Escott*, 2 Keen, 444). The power, however, cannot be exercised without the consent of the alienee (*Re Cooper, Cooper v. Slight*, 27 Ch. D. 565; *Re Bedingfield and Herring*, 1893, 2 Ch. 332), unless the power is expressly reserved upon the alienation (*Warburton v. Farne*, 16 Sim. 625; *Long v. Rankin*, Sug. Pow. 8th ed. 899; *Morgan v. Rutson*, 16 Sim. 234; see *Re Wright and Marshall*, 28 Ch. D. 93); or the exercise of it does not derogate from the donee's grant, as in the case of a power to appoint new trustees (*Hardaker v. Moorhouse*, 26 Ch. D. 417).

A power in gross may be exercised notwithstanding the alienation of the donee's interest (*Parsons v. Parsons*, 9 Mod. 464), whether by his assignment (*Re Stone*, 1 R. 8 Eq. 621), or by means of a clause of forfeiture on bankruptcy (*Wickham v. Wing*, 2 H. & M. 436; *Re Aylwin*, 16 Eq. 585; see *Jones v. Winwood*, 3 M. & W. 653; *Haswell v. Haswell*, 2 D. F. & J. 456; *Re Evans*, 1897, 1 I. R. 410).

The trustee in bankruptcy can exercise a power which the bankrupt could have exercised for his own benefit (Bankcy. Act, 1883, s. 44 (ii.)). This does not include a power to grant a renewed lease (*Simpson v. Bathurst*, 5 Ch. 208). Nor a husband's right to administer to his wife's estate (*Re Turner*, 12 P. D. 18). Nor it seems the right of releasing for the benefit of the bankrupt's estate a limited power of appointment (*Re Rose*, 1904, 2 Ch. 348; 1905, 1 Ch. 94). In the case of a general power of appointing by deed or will, which is vested in the bankrupt, this cannot be exercised by the trustee after the bankrupt's death (*Nichols v. Nixey*, 29 Ch. D. 1005), nor where a married woman has been made bankrupt under the M. W. P. Act, 1882 (*Ex p. Gilchrist*, 17 Q. B. Div. 521). In the case of a general power of appointing by will only in pursuance of which a will was made before bankruptcy by a man who died undischarged, the appointed fund was not divisible among the creditors in the bankruptcy but passed to the executor (*Re Guedalla, Lee v. Guedalla*, 1905, 2 Ch. 331). A judicial separation does not prevent a wife from joining in the exercise of any joint power given to herself and her husband (Matrim. Causes Act, 1857, s. 26).

See further as to the extinguishment of powers, Sug. Pow. 8th ed. 57 *et seq.*; Farwell, 11 *et seq.* 2nd ed.

A further power conferred on a married woman by the general law (independently of the M. W. P. Acts, 1870 and 1882, which see *post*, pp. 340, separate use

3 & 4 Will. 4,
c. 74, s. 78.

Extinguish-
ment of
powers—

appendant;

in gross.

Bankruptcy.

Judicial
separation.

(4)

Trust for
separate use

3 & 4 Will. 4, c. 74, s. 78. 346) was the power of disposing of separate estate, whether real or personal. Thus, by the general law, a married woman, in the absence of any clause

of married
woman.
Realty.

against alienation, can deal with the equitable interest in real property to which she is entitled to her separate use, as if she were a *feme sole* (*Taylor v. Meads*, 4 D. J. & S. 597; *Hall v. Waterhouse*, 5 Giff. 64; *Pride v. Bubb*, 7 Ch. 64; *Cooper v. Macdonald*, 7 Ch. Div. 288; *Adams v. Gamble*, 12 Ir. Ch. R. 102; see *Major v. Lansley*, 2 R. & M. 355). Her power exists not only as to strangers, but as to her husband (*Logan v. Birkett*, 1 M. & K. 220). As to the legal estate in such property where there are no trustees, see the note to sect. 91, *post*, p. 332.

Personalty.

Again, by the general law, a married woman entitled to personal property to her separate use, without any restraint on alienation, may not only receive and apply to her separate use the income, but dispose of the corpus, either by an act *inter vivos* or by will (*Rich v. Cockell*, 9 Ves. 369; *Fettiplace v. Gorges*, 1 Ves. jun. 46; 3 Br. C. C. 8; see also *Peacock v. Monk*, 2 Ves. sen. 191; *Hearle v. Greenbank*, 3 Atk. 696; 1 Ves. sen. 298). And her power of disposition extends to reversionary interests in personalty settled to her separate use as well as to interests in possession (*Keene v. Johnstone*, 1 Jones & Carey, I. R. 255; *Sturgis v. Corp*, 13 Ves. 190; see *King v. Lucas*, 23 Ch. Div. 712); and to contingent as well as vested interests (*Lechmere v. Brotheridge*, 32 Beav. 353; but see *Batt v. Cuthbertson*, 4 Dr. & War. 392; *Stamford Co. v. Ball*, 10 W. R. 196); but not to property to which she has no title whatever at the date of the disposition (*Smith v. Lucas*, 18 Ch. D. 545). As to gifts to a husband by his wife of her separate personalty whether capital or income, see *Woodward v. Woodward*, 3 D. J. & S. 672; *Re Flamank*, *Wood v. Cock*, 40 Ch. D. 461; *Edwards v. Cheyne* (No. 2), 13 App. Cas. 385. There was a presumption of resulting trust for the wife's benefit where her separate income had been applied in purchasing land in the husband's name (*Mercier v. M.*, 1903, 2 Ch. 98). A purchase in joint names is dealt with in *Re Scott*, *Palmer v. Vicher*, 97 L. T. 537. As to an assignment of leaseholds by a wife to her husband, see *Re Marlborough*, *Davis v. Whitehead*, 1894, 2 Ch. 133.

Contracts
binding sepa-
rate estate.

Further, by the general law the contract of a married woman bound her separate estate, when it appeared that such contract was made with reference to and upon the faith or credit of that estate (*Johnson v. Gallagher*, 3 D. F. & J. 515; *London Chartered Bank v. Lemprière*, L. R. 4 P. C. 597; *Wainford v. Heyl*, 20 Eq. 324); such a contract, however, being enforceable only against so much of the separate estate to which at the time of the contract the married woman was entitled, free from restraint, as remained at the time of judgment (*Pike v. Fitzgibbon*, 17 Ch. Div. 454). See as to property appointed by her the note to M. W. P. Act, 1882, sect. 4, *post*, p. 353.

Creation of
separate use.

No particular form of words was necessary to create separate use (*Stanton v. Hall*, 2 R. & M. 175). As to what words would do so, see *Massy v. Rowen* (L. R. 4 H. L. 288); *Re Peacock* (10 Ch. D. 490); *Bland v. Dawes* (17 Ch. D. 794), and the cases there referred to; *Williams v. Waters* (14 M. & W. 166); *Acton v. White* (1 Sim. & Stu. 429); *Carnegie v. Carnegie* (22 W. R. 783). A trust for separate use will not be inferred from the existence of a restraint on alienation (*Stogdon v. Lee*, 1891, 1 Q. B. 661). An immediate gift by a husband to his wife was said to raise a presumption of separate use; but not in the case of an interest commencing after his death (*Re Turner*, *Turner v. Fitzroy*, 66 L. T. 758). As to wearing apparel given by a husband to his wife, see *Masson v. De Fries*, 1909, 2 K. B. 831; quoted, p. 347, *post*.

As to whether a trust for separate use can be created by parol, see, in the case of real estate, *Dye v. Dye* (13 Q. B. Div. 147); and in the case of personal estate, *Simmons v. Simmons* (6 Ha. 352); *Warden v. Jones* (2 De G. & J. 76); *Re Whitehead* (14 Q. B. Div. 419) (cases of ante-nuptial agreements); and *Haddon v. Fladgate* (27 L. J. Prob. 21, a post-nuptial agreement).

Duration of
separate use.

There is no such thing as separate property of an unmarried woman (*Pelton v. Harrison*, 1891, 2 Q. B. 425; *Re Price*, *Stafford v. Stafford*, 28

Ch. D. 712; *Axford v. Reid*, 22 Q. B. Div. 553; *Clarke v. Hastie*, 16 Times L. R. 23; see, however, *Re Wheeler, Briggs v. Ryan*, 1899, 2 Ch. 722). But a trust for separate use will apply to any existing coverture and to all subsequent covertures (*Tullett v. Armstrong*, 4 My. & Cr. 377; *Re Gaffee*, 1 Mac. & G. 541; *Hawkes v. Hubback*, 11 Eq. 5). Such a trust may be destroyed during discovery, e.g., by conversion of the property (*Wright v. Wright*, 2 J. & H. 647). And on its creation it may be confined to an existing coverture (*Moore v. Morris*, 4 Drew. 33; *Stogdon v. Lee*, 1891, 1 Q. B. 661), or to future covertures (*King v. Lucas*, 23 Ch. Div. 712; see *Steedman v. Poole*, 6 Ha. 193).

A restraint may be imposed on the alienation or anticipation of property given to a woman for her separate use (*Tullett v. Armstrong*, 4 M. & Cr. 377; *Baggett v. Meux*, 1 Phil. 627). Such a restraint can never exist except as an accessory to a gift for separate use (*Stogdon v. Lee*, 1891, 1 Q. B. 670; *Pike v. Fitzgibbon*, 17 Ch. Div. 464); but the character of separate property arising under the M. W. P. Act, 1882, is sufficient to support it (*Re Lumley, Ex p. Hood-Barrs*, 1896, 2 Ch. 690). The principle recognised in *Pike v. Fitzgibbon (sup.)* is that a married woman can in no way dispose by way of anticipation of property subject to such a restraint. She cannot dispose of it by making an engagement authorising another person to intercept it (*Re Glanvill, Ellis v. Johnson*, 31 Ch. Div. 539; see the form of judgment in *Scott v. Morley*, 20 Q. B. Div. 132). She cannot do so even by practising a fraud (*Stanley v. Stanley*, 7 Ch. D. 589; *Bateman v. Faber*, 1898, 1 Ch. 144, 151). Nor can she bind her restrained property by estoppel (*Bateman v. Faber, sup.*). She cannot be compelled to elect in respect of restrained property (*Re Wheatley, Smith v. Spence*, 27 Ch. D. 606; *Re Vardon*, 31 Ch. Div. 275); even where subsequently to the instrument of gift coming into operation she becomes discovert (*Haynes v. Foster*, 1901, 1 Ch. 361; see, however, *Hamilton v. Hamilton*, 1892, 1 Ch. 396). If she is the "true owner" of restrained property, she cannot "consent" to its being in the "order or disposition" of a bankrupt (*Re Mills*, 1895, 2 Ch. 564). The restraint may control a married woman's statutory powers of disposition (see note, *ante*, p. 321). The restraint did not prevent a married woman from releasing a power (*Re Chisholm, Hemphill v. Hemphill*, 1901, 2 Ch. 82), nor from barring an entail (*Cooper v. Macdonald*, 7 Ch. D. 288); nor, where the fee is given to her, does it make the land settled land, so as to give her the powers of a tenant for life under the S. L. Acts (*Bates v. Kesterton*, 1896, 1 Ch. 159). The effect may be to prevent alienation only during a particular period (*Re Bown*, 27 Ch. Div. 411; see *Re Spencer, Thomas v. Spencer*, 30 Ch. D. 183). A restraint on anticipation will be void if it transgresses the rule against perpetuities (*Re Ridley, Buckton v. Hay*, 11 Ch. D. 645; *Cooper v. Laroche*, 17 Ch. D. 368; *Shute v. Hogge*, 58 L. T. 546; see *Re Game, Game v. Tennent*, 1907, 1 Ch. 276, and cases there referred to).

The restraint may be imposed on any property whether real (*Baggett v. Meux*, 1 Phil. 627) or personal (*Ib.*), e.g. an annuity secured by a personal covenant (*Macnaghten v. Paterson*, 1907, A. C. 492), and whether the property be absolute or for life (*Baggett v. Meux*, 1 Phil. 627). Where the restraint is attached to an absolute bequest, the question whether it is effectual does not depend on whether the gift is of an income-bearing fund or of a sum of cash (see this distinction taken in the older cases, *Re Ellis*, 17 Eq. 409; *Re Benton, Smith v. Smith*, 19 Ch. D. 277; *Re Clarke*, 21 Ch. D. 748); but on whether the testator has shown an intention that the trustees are to keep the fund and pay only the income to the married woman, or, on the other hand, an intention that the capital shall be paid to her (*Re Bown, O'Halloran v. King*, 27 Ch. Div. 411). Accordingly, if the intention be that the capital shall be paid to her, this may be done (*Ib.*; *Re Fearon, Hotchkin v. Mayor*, 45 W. R. 232; *Re Milward Steedman v. Hobday*, 87 L. T. 476; *Russell v. Lawder*, 1904, 1 I. R. 328; see *Re Croughton*, 8 Ch. D. 460); but payment will be refused if this intention is absent (*Re Grey, Acason v. Greenwood*, 34 Ch. Div. 712; *Re Tippet and Newbold*, 37 Ch. Div. 444; *Re Holmes, Hallows v. Holmes*, 67 L. T. 335; see *Re Currey, Gibson v. Way*, 32 Ch.

3 & 4 Will. 4,
c. 74, s. 78.

Restraint on
anticipation.
Operation of.

Property
on which
imposed.

3 & 4 Will. 4, D. 361, a case of real estate; and see *Re Bankes*; *Reynolds v. Ellis*, 1902, c. 74, s. 78. 2 Ch. 333).

What words will create a restraint on anticipation.

No particular form of words is necessary to impose a restraint on anticipation, the question being one of intention (*Baker v. Bradley*, 25 L. J. Ch. 7). As to what words will create a restraint, see *Harrop v. Howard* (3 Hare, 624); *Moore v. Moore* (1 Coll. 54); *Medley v. Horton* (8 Jur. 853); *Brown v. Bamford* (1 Phil. 620); *Field v. Evans* (15 Sim. 375); *Harnett v. Macdougall* (8 Beav. 187); *Steedman v. Poole* (6 Hare, 193); *Re Ross* (1 Sim. 190); *Sturgis v. Corp* (13 Ves. 190); *Parkes v. White* (11 Ves. 222); *Alexander v. Young* (6 Hare, 393); *Goulder v. Camm* (1 D. F. & G. 146); *Re Lavender* (1898, 1 Ir. R. 175). A life estate in land without impeachment of waste is not inconsistent with a restraint on anticipation (*Re Lumley, Ex p. Hood-Barrs*, 1896, 2 Ch. 690), except in a case of waste (*Ib.*; *Clive v. Clive*, 7 Ch. 433).

Duration of the restraint.

A restraint on anticipation is in force only during coverture (*Barton v. Briscoe*, Jac. 603; *Brown v. Pocock*, 2 M. & K. 189; *Massey v. Parker*, Id. 174; *Woodmeston v. Walker*, 2 R. & M. 197; *Re Young*, 18 Beav. 199), and does not therefore prevent a disposition by will (*Re Grey, Acason v. Greenwood*, 34 Ch. Div. 714; *Re Currey, Gibson v. Way*, 56 L. T. 80). The restraint continues in force after a decree for judicial separation or a protection order, except (during the separation or protection) as to property acquired after the decree or order (*Waite v. Morland*, 38 Ch. Div. 135; *Hill v. Cooper*, 1893, 2 Q. B. 85). If property be given to a woman for her separate use subject to a restraint on anticipation, the restraint will operate during any existing or subsequent coverture (*Tullett v. Armstrong*, 4 M. & C. 377; see *Hamilton v. Hamilton*, (1892) 1 Ch. 396; *Stroud v. Edwards*, 77 L. T. 280). It may, however, be destroyed by the acts done during discovery, e.g. by the woman converting the property from its original form (*Wright v. Wright*, 2 J. & H. 647), or by entering into a covenant to settle it (*Re Wood, Wood v. Hooper*, 61 L. T. 197). On the creation of the restraint it may be confined to a particular coverture (*Re Gaffee*, 1 Mac. & G. 541; *Shafto v. Butler*, 19 W. R. 595). The restraint does not affect income of a married woman which has accrued due (*Hood-Barrs v. Heriot*, 1896, A. C. 174). A judgment can be enforced against income which has accrued due at the date of the judgment whether it has come to her hands or not (*Ib.*), but cannot be enforced against income which accrues afterwards (*Bolitho v. Gidley*, 1905, A. C. 98).

Dispensing with the restraint.

When a trustee has committed a breach of trust at the request of a *cestui que trust* who is a married woman restrained from anticipation, the court may, under sect. 45 of the Trustee Act, 1893 (*post*, where see note), impound her interest to indemnify him. Restrained property may in some cases be made available for payment of costs (Solicitors Act, 1860, sect. 28; M. W. P. Act, 1893, s. 2 (*post*, p. 366)). The court may also in certain cases dispense with the restraint, under sect. 39 of the Conv. Act, 1881, *post*. Independently of these provisions, the court cannot dispense with the restraint, even where it would be for the benefit of the married woman (*Robinson v. Wheelwright*, 6 D. M. & G. 535; *Peillon v. Brooking*, 25 Beav. 218; *Re Glanvill, Ellis v. Johnson*, 31 Ch. Div. 532; see *Michell v. Michell*, 1891, P. 208); even in cases of fraud (*Arnold v. Woodhams*, 16 Eq. 29; *Stanley v. Stanley*, 7 Ch. D. 589).

In the case of an executory trust for the separate use of a married woman, the court has directed a restraint on anticipation to be inserted in the settlement (*Turner v. Sargent*, 17 Beav. 515; *Dunnill v. Dunnill*, 1 R. 6 Eq. 323; *Loch v. Bagley*, 4 Eq. 122; *Re Parrott, Walter v. Parrott*, 33 Ch. Div. 274). See further as to the restraint, the notes to the M. W. P. Act, 1882, *post*, pp. 346 *et seq.*

Restraint on alienation in the case of men and unmarried women.

Neither a *feme sole* nor a man can be restrained from disposing by way of anticipation of any property to which she or he is entitled (*Pike v. Fitzgibbon*, 17 Ch. Div. 464; see *Brandon v. Robinson*, 18 Ves. 429, the case of a life interest; and *Re Fitzgerald, Surman v. Fitzgerald*, 1904, 1 Ch. 573, the case of a Scotch "alimentary provision"). Further, a gift over upon an

attempt to alien an absolute interest previously given is void as a condition, both in the case of real and personal estate (*Re Dugdale, Dugdale v. Dugdale*, 38 Ch. D. 180; *Re Machu*, 21 Ch. D. 838; *Hunt-Foulston v. Furber*, 3 Ch. D. 285). But such a gift over will be good if it follows a life interest (*Dugdale v. Dugdale, sup.*; *Hurst v. Hurst*, 21 Ch. D. 278). So property may be well limited to a man until he shall become bankrupt, and after his bankruptcy over (*Brandon v. Robinson*, 18 Ves. 433). The effect of gifts for life determinable on bankruptcy or alienation was discussed in *Samuel v. Samuel* (12 Ch. D. 158); *Robertson v. Richardson* (30 Ch. D. 623); *Metcalfe v. Metcalfe* (1891, 3 Ch. 1); *Sartoris v. Sartoris* (1892, 1 Ch. 11); *Re Cotgrave, Mynors v. Cotgrave*, 1903, 2 Ch. 705; *Re Baker, B. v. B.*, 1904, 1 Ch. 157).

A condition in a feoffment or grant not to alien to any person is void (6 Rep. 41 b; see *Bradley v. Peixoto*, Tudor's L. C. Conv. 514, 4th ed.). A grantee may, however, be restrained from aliening to a particular person (alienation of *Large's case*, 2 Leon. 82; 3 Leon. 182; *Muschamp's case*, Bridgm. 134). So, a devise in fee on condition that the devisees should not alien, except to their sisters or their children, is good (*Doe v. Pearson*, 6 East, 172; *Cuthbert v. Purrier*, Jac. 417; *Ross v. Ross*, 1 Jac. & W. 158; *Re Macleay*, 18 Eq. 186; *Martin v. Martin*, 19 L. R. Ir. 72; see, however, *Attwater v. Attwater*, 18 Beav. 330). But a condition in absolute restraint of alienation during a particular time is void (*Rosher v. Rosher*, 26 Ch. D. 801).

79. Every deed to be executed by a married woman for any of the purposes of this act, except such as may be executed by her in the character of protector for the sole purpose of giving her consent to the disposition of a tenant in tail, shall, upon her executing the same, or afterwards, be produced and acknowledged by her as her act and deed before a judge of one of the superior courts at Westminster, or before [*two of the perpetual commissioners, or two special commissioners*], to be respectively appointed as hereinafter provided.

For the words in italics the following have been substituted, "one of the perpetual commissioners or one special commissioner" (Conv. Act, 1882, s. 7, sub-s. (1), *post*, p. 333).

An acknowledgment may be received by a judge of a county court in England or Wales (County Courts Act, 1888, s. 184).

A married woman and her husband may convey land for the purpose of sites for schools by deed, without any acknowledgment thereof (School Sites Acts, 1841, s. 5).

As to acknowledgments being taken by persons interested, see Conv. Act, 1882, s. 7, sub-s. (3), and rules under that section (*post*, pp. 333, 334). And as to the effect of an acknowledgment, see *Tennant v. Welch*, 37 Ch. D. 622; *Roberts v. Cooper*, 1891, 2 Ch. 347, and the other cases quoted *post*, p. 335.

80. Such judge or commissioners aforesaid, before he or they shall receive the acknowledgment by any married woman of any deed by which any disposition, release, surrender, or extinguishment shall be made by her under this act, shall examine her, apart from her husband, touching her knowledge of such deed, and shall ascertain whether she freely and voluntarily consents to such deed, and, unless she freely and voluntarily consent to such deed, shall not permit her to acknowledge the same; and in such case such deed shall, so far as relates to the execution thereof by such married woman, be void.

3 & 4 Will. 4,
c. 74, s. 78.

Condition
restraining
alienation of
realty.

Every deed
by a married
woman, not
executed by
her as pro-
tector, to be
acknowledged
by her before
a judge, &c.

Acknowledg-
ments may
be received
by judge of
county court.

The judge,
&c., before
receiving
such acknow-
ledgment, to
examine her
apart from
her husband.

3 & 4 Will. 4,
c. 74, s. 80.

As to the examination of a married woman, see *post*, p. 335. No person connected with the husband ought to be present when a married woman's examination as to her consent is taken (*Re Bendysh*, 26 L. J., Chan. 814; see, however, *Re Lewis*, 24 W. R. 103). The court directed the officers to file an acknowledgment of a married woman who was deaf and dumb (*Re Harper*, 6 M. & G. 732).

Court cannot
order married
woman to
convey under
this act.

The court has no jurisdiction to compel a conveyance under this act by a married woman (*Jordan v. Jones*, 2 Phil. 170; *Field v. Moore*, 7 D. M. & G. 691). In such cases, however, the married woman may usually be established to be a trustee, and a vesting order obtained under the Trustee Acts (Dart, V. & P. 6th ed. 1347; see *Billing v. Webb*, 1 De G. & S. 716).

As to the
appointment
of perpetual
commission-
ers for each
county or
place, and
the making
out and keep-
ing of the
lists of the
commission-
ers and the
delivery of
copies.

81. For the purpose of providing convenient means of taking acknowledgments by married women of the deeds to be executed by them as aforesaid, the Lord Chief Justice of the Court of Common Pleas at Westminster shall from time to time appoint such proper persons as he shall think fit, for every county, riding, division, soke or place, for which there may be a clerk of the peace, to be perpetual commissioners for taking such acknowledgments, and such commissioners shall be removable by and at the pleasure of the said Lord Chief Justice; and lists of the names of such commissioners for the time being, with the names of their place of residence, and the counties, ridings, divisions, sokes, or places for which they shall be respectively appointed to act, shall from time to time be made out and be kept by the officer of the Court of Common Pleas at Westminster with whom the certificates of the acknowledgments by married women are to be lodged as hereinafter mentioned; and such officer shall from time to time transmit, without fee or reward, to the clerk of the peace for each county, riding, division, soke or place, or his deputy, a copy of the list to be so from time to time made out for that county, riding, division, soke or place, and such officer shall deliver a copy signed by him, of the list for the time being for any county, riding, division, soke or place, to any person applying for the same; and the clerk of the peace for each county, riding, division, soke or place, or his deputy, shall deliver a copy, signed by him, of the list last transmitted to him as aforesaid to any person applying for the same.

The appointment is now made by the Lord Chief Justice of England (44 & 45 Vict. c. 68, s. 26). As to entering the names on the lists, see Solicitors Act, 1860, s. 30.

Power of per-
petual com-
missioners
not confined
to any par-
ticular place.

82. Provided always, that any person appointed commissioner for any particular county, riding, division, soke or place, shall be competent to take the acknowledgment of any married woman wheresoever she may reside, and wheresoever the lands or money in respect of which the acknowledgment is to be taken may be.

The commissioner who takes the acknowledgment in England need not be appointed for the county in which the acknowledgment is taken

(*Blackmur v. Blackmur*, 3 Ch. D. 633; see formerly *Webster to Carline*, 3 & 4 Will. 4, 4 M. & G. 27). c. 74, s. 82.

The commissioners for taking acknowledgments have a lien for their fees on the instruments in their possession (*Ex p. Grove*, 3 Bing. N. C. 364).

83. In those cases where, by reason of residence beyond seas, or ill-health, or any other sufficient cause, any married woman shall be prevented from making the acknowledgment required by this act before a judge, or any of the perpetual commissioners to be appointed as aforesaid, it shall be lawful for the Court of Common Pleas at Westminster, or any judge of that court, to issue a commission specially appointing any person therein named to be commissioner to take the acknowledgment by any married woman to be therein named of any such deed as aforesaid: provided always, that every such commission shall be made returnable within such time, to be therein expressed, as the said court or judge shall think fit.

If, from being beyond seas, &c., a married woman be prevented from making the acknowledgment, special commissioners to be appointed

Provisions as to taking abroad acknowledgments required for the purpose of enrolling deeds in Chancery were contained in 15 & 16 Vict. c. 86, s. 22 (see *Re Smith*, 43 L. T. 438). These have been repealed by Commrs. for Oaths Act, 1889, which contains fresh provisions (see sects. 6 and 11).

The court will not enlarge the time for returning a special commission for taking an acknowledgment, where it has been executed after the return day named therein (*Re Carter*, 9 C. B. N. S. 701; see, however, *Re Grierson*, I. R. 4 C. L. 232); unless its return has been unavoidably delayed (*Re Van Ufford*, 9 C. B. N. S. 789); as by reason of the remoteness of the residences of the parties (*Re Booth*, 5 C. B. N. S. 540); or by reason of the loss of the documents in the post (*Ex p. White*, L. R. 8 C. P. 106). In the last case a duplicate commission was sent.

When time for returning commission will be enlarged.

Where the signatures of the commissioners differed from the names in the commission, affidavits of identity were required (*Re Booth*, 5 C. B. N. S. 541; *Re Price*, 17 C. B. 708; *Re Smith*, 10 C. B. N. S. 344; *Re Edsall*, L. R. 10 C. P. 472). Where the acknowledgment had been taken under peculiar circumstances before two gentlemen who were not named in the commission, the court allowed the commission to be amended by inserting their names therein (*Re Stubbs*, 4 M. & G. 609). The court allowed a commission for taking the acknowledgment of a married woman to go out with a blank for her christian name, which was unknown (*Re Appleton*, 1 C. B. 477); but when the commission is returned, the court will require strict proof of her identity (*Re Atherton*, 3 Dowl. & L. 26). So, also, where the husband's name was not known (*Re Legge*, 15 C. B. 364). It is not necessary to state in a certificate under this section the specific place at which the acknowledgment has been taken; it is enough if the deed appear to have been executed within the terms of the commission (*Ex p. Hutchinson*, 17 L. J. C. P. 111).

Variances between signatures of commissioners and names in commission.

As to *prima facie* evidence of the sealing of a deed acknowledged by a married woman before special commissioners appointed under this section, see *Re Sandilands* (L. R. 6 C. P. 411).

84. When a married woman shall acknowledge any such deed as aforesaid, the judge or commissioners taking such acknowledgment shall sign a memorandum, to be indorsed on or written at the foot or in the margin of such deed.

When a married woman shall acknowledge a deed, the person taking the acknowledgment

The latter part of this section, and sects. 85—88 inclusive, which referred to certificates of acknowledgments and affidavits verifying the same, have

3 & 4 Will. 4, c. 74, s. 84. been repealed (Conv. Act, 1882, s. 7, *post*, p. 333), and have accordingly been omitted (see as to the repealed sections, Shelford's R. P. Stat. 8th ed., pp. 388 *et seq.*). The memorandum should be in the form given in rule 3 of the new rules made under sect. 7 of the Conv. Act, 1882, *post*, which form has been substituted for the form originally given in sect. 84. As to the effect of the memorandum, see Conv. Act, 1882, s. 7, sub-s. (2), *post*, p. 333.

shall sign a memorandum to the effect here mentioned.

Sect. 89 gave power to make rules as to taking acknowledgments and as to fees. The power of making rules as regards acknowledgments (under this section and sect. 7 of the Conv. Act, 1882) is now vested in the Rule Committee (Judicature Act, 1879, s. 22).

For the present rules as to taking examinations, and as to fees, see *post*, p. 335 *et seq.*

A married woman to be separately examined on the surrender of an equitable estate in copyholds, as if such estate were legal.

90. In every case in which a husband and wife shall, either in or out of court, surrender into the hands of the lord of the manor any lands held by copy of court roll, parcel of the manor, and in which she alone, or she and her husband in her right, may have an equitable estate, the wife shall, upon such surrender being made, be separately examined by the person taking the surrender in the same manner as she would have been if the estate to which she alone, or she and her husband in her right, may be entitled in such lands were an estate at law instead of a mere estate in equity; and every such surrender, when such examination shall be taken, shall be binding on the married woman and all persons claiming under her; and all surrenders heretofore made of lands similarly circumstanced, where the wife shall have been separately examined by the person taking the surrender, are hereby declared to be good and valid.

The case of a legal estate in copyholds is in certain cases excluded from the act by the final proviso in sect. 77, *ante*, p. 318.

A *feme covert* who surrenders copyhold lands ought previously to be examined separately from her husband by the steward of the manor, although by special custom such examination may be made before two customary tenants (*Driver v. Thompson*, 4 Taunt. 293; see 1 Watk. on Cop. by Cov. 89). Special customs must be strictly observed (*Doe v. She'tyn*, 3 Ad. & Ell. 265). It seems that a special custom may authorise a surrender by the wife alone, with the assent of the husband (*Taylor v. Phillips*, 1 Ves. sen. 229; 1 Watk. on Cop. 64). But a custom is bad for the wife to dispose of her copyhold estate by surrender without the husband's assent (*Stevens v. Tyrrell*, 2 Wils. 1; see *White v. Driver*, 4 Taunt. 294; *Doe v. Bartle*, 5 B. & Ald. 492), or without separate examination (*George v. Jew. Ambler*, 629; *Johnson v. Clark*, 1908, 1 Ch. 310). A surrender of a copyhold estate, after secret examination by the steward, to the use of a married woman's husband, in his presence and with his consent, testified by his immediate admittance, was valid (*Scamon v. Maw*, 3 Bing. 378). A surrender by the wife of a copyholder with his consent, and after having been separately examined, was held effectual to bar her right to freebench (*Wood v. Lambirth*, 1 Phil. 8). See further, Scriven on Copyholds, 90, 7th ed. As to whether previously to this act a married woman could have conveyed an equitable interest in copyholds by fine, see Scriven, 50, 52, 7th ed.

Court of Common Pleas, in the case of a husband

91. Provided always, that if a husband shall in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from

any other cause be incapable of executing a deed, or of making a surrender of lands held by copy of court roll, or if his residence shall not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the Court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said court shall seem meet, to dispense with the concurrence of the husband in any case in which his concurrence is required by this act or otherwise; and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order in regard to lands of any tenure, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a *feme sole*, and when done, executed, or made by her shall (but without prejudice to the rights of the husband as then existing independently of this act) be as good and valid as they would have been if the husband had concurred: provided always, that this clause shall not extend to the case of a married woman where under this act the Lord High Chancellor, Lord Keeper or Lords Commissioners for the custody of the great seal, or other the person or persons intrusted with the care and commitment of the custody of the persons and estates of persons found lunatic, idiot, or of unsound mind, or His Majesty's High Court of Chancery, shall be the protector of the settlement in lieu of her husband.

3 & 4 Will. 4,
c. 74, s. 91.

being lunatic, &c., may dispense with his concurrence, except where the Lord Chancellor or other persons entrusted with lunatics, or the Court of Chancery, shall be the protector of a settlement in lieu of the husband.

Application for orders under this section should now be made to the King's Bench Division of the High Court (see Jud. Act, 1873, ss. 16 and 34; Order in Council of 16 Dec. 1880; *Re Caine*, 10 Q. B. D. 284; *Re Giles*, 1894, W. N. 73; 70 L. T. 757), though it may be that the Chancery Division has jurisdiction under special circumstances (*Ib.*; *Re Hart*, 1882, W. N. 36).

This section gives no authority to the court to grant a dispensation order unless the land is actually contracted to be sold or conveyed (*Re Graham*, 13 W. R. 782; see, however, *Re Hart*, 1882, W. N. 36). Where the concurrence of the husband is dispensed with under this section, the deed need not be acknowledged (*Goodchild v. Dougal*, 3 Ch. D. 650). A dispensation order under this section does not deprive the husband of his common law rights in the property (*Fowke v. Draycott*, 29 Ch. D. 996). If an order is obtained by fraud it may be set aside (*Ex p. Cockerell*, 4 C. P. D. 39).

Where the application is on the ground that the husband is of unsound mind, the affidavit must show in distinct terms, or by necessary inference, that the husband is a lunatic at the time of the application (*Re Turner*, 3 C. B. 166). The court refused to act upon an affidavit merely stating that the husband and wife were living apart, and that the former was in a very nervous and excitable state, and that it was believed that it would be very difficult, if not wholly impossible, to procure the execution by him of any deed, but required an affidavit showing an ineffectual application to him for the purpose (*Re Murphy*, 4 M. & G. 635; *Re Clare*, 49 L. J. C. P. 557). The affidavit as to mental condition should be by a medical man (*Re Reeves*, 24 W. R. 848; *Re Clare*, *sup.*).

Orders have been made in the following cases:—Where the husband had absconded after committing an act of bankruptcy, and had never been abroad—

Husband of
unsound
mind.

3 & 4 Will. 4, c. 74, s. 91. heard of since (*Ex p. Gill*, 1 Bing. N. R. 168; see Cruise's Dig. vol. vii. p. 1, 4th ed.). Where the husband had resided abroad for more than twenty years with another woman (*Ex p. Shirley*, 5 Bing. N. S. 226). dispensation granted; Where the husband had absconded from home, and had since sailed for a foreign port, and had been made a bankrupt (*Ex p. Stone*, 9 Dowl. P. C. 843). Where it appeared that the parties lived together only seventeen weeks after marriage, when the husband went away, and the wife after many inquiries was not able to find him (*Anon.*, 2 Jur. 945). Where the affidavit stated that about two months previously the husband went to Australia with the intention of never returning (*Re Kelsey*, 16 C. B. 197). dispensation refused. The court refused to dispense with the concurrence of a husband in the following cases:—Where the wife's affidavit merely stated that her husband entered a government steamer in January, 1844, and that the last the wife had heard of him was, that in January, 1845, he was on board another government steamer at New Zealand; and that she believed it was his intention never to return (*Ex p. Gilmore*, 3 C. B. 967). Where it appeared that the husband was in correspondence with the wife, and remitting sums of money for her support, however small (*Re Squires*, 17 C. B. 176). Where, in 1852, the husband went to Australia and had not been heard of since 1857, and the wife deposed to her belief that he would never return to this country, it also appearing that no application had been made to him to concur (*Re Eden*, 5 C. B. N. S. 232). Upon the mere statement that the husband, a seaman, had gone abroad, and had not been heard of for some years, and that the wife had been informed that he was dead. The affidavit must show some reasonable ground for presuming the statement to be true (*Ex p. Taylor*, 7 C. B. 1).

Husband and wife separated.

Under the words of the section as to living apart, orders have been made in the following cases:—Where she and her husband lived separate from each other, and he had been found lunatic by inquisition (*Ex p. Thomas*, 4 M. & Scott, 331). Where the husband left his wife, and she had never heard of him since, and his present residence was altogether unknown to her; and where, if the application were not granted, the wife would be liable to incur a forfeiture (*Ex p. Shuttleworth*, 4 M. & Scott, 332, n. (b); see *Re Hart*, 1882, W. N. 36). Where she held the property as trustee for sale, and they were living apart, and the husband contributed to her support, but refused to concur except on payment (*Re Caine*, 10 Q. B. D. 284). Where the husband had deserted the wife, but they were in communication (*Ex p. Sutcliffe*, 29 L. T. 747; see, however, *Re Horsfall*, 3 M. & G. 132). An order was refused where the wife had left her husband in consequence of his violence (*Re Price*, 13 C. B. N. S. 286). In addition to an affidavit that the parties were living apart, the court has required a further affidavit that the husband has refused to concur (*Ex p. Trenery*, 1 C. B. N. S. 187), and that he contributes nothing to the wife's support (*Ex p. Fish*, 9 C. B. N. S. 715; *Re Carburton*, 16 W. R. 84; *Re Fletcher*, 17 W. R. 319; *Ex p. Robinson*, L. R. 4 C. P. 205). An order having been made upon the usual affidavit that the husband and wife were living apart by mutual consent, the court refused to rescind the order after it had been acted upon, and the rights of third parties had intervened, upon the application of the husband, who swore that though he resided apart from his wife (upon an allowance made to him out of her separate estate) he occasionally visited and slept with her (*Re Rogers*, L. R. 1 C. P. 47).

Wife's separate property.

In cases not within the M. W. P. Act, 1882, where there are no trustees of separate property, the husband is trustee of the legal estate (*Bennet v. Davis*, 2 P. Wms. 316). Orders under this section to enable a married woman to convey the legal estate in her separate property have been made in the following cases:—Where the husband was a minor (*Re Haigh*, 2 C. B. N. S. 198). Where he had absconded, and had not been heard of for eighteen years, although it also appeared that she had in the meantime married again (*Ex p. Yarnall*, 17 C. B. 189). Where the husband lived separate from his wife and had refused to execute the deed (*Re Perrin*, 14 C. B. 420; *Re Woodcock*, 1 C. B. 437). As to conveyance of

separate property by a married woman when living apart by a sentence of judicial separation without alimony, see *Ex p. Andrews* (19 C. B. N. S. 371). As to the equitable interest in a married woman's separate property, see *ante*, p. 324.

The court will not dispense with the affidavit of the married woman herself (*Ex p. Bruce*, 9 Dowl. P. C. 840), and if speechless, she must be examined (*Re Williams*, 1 M. & G. 881). The affidavit is sufficient if sworn (where the party is residing abroad) before an officer, whom the certificate of a notary public certifies to be a person empowered by law to take affidavits (*Re Schiff*, 1 Dowl. & L. 911). The affidavit must describe the deponent as "the wife of, &c.," even though circumstances are disclosed showing a well-grounded belief that the husband is dead (*Ex p. Sparrow*, 12 C. B. 334; *Re Noy*, 7 Scott, N. R. 434; *Re Anderson*, 2 C. B. N. S. 811). The affidavit must contain the addition or description of the husband (*Re Gardner*, 1 C. B. N. S. 215; see also *Re Firth*, 1872, W. N. 220).

An order under this section was made in the following form:—"It is ordered that the said Ann Tanner Duffill be at liberty, by deed or sur- render, to dispose of, release, surrender or extinguish all her estate and interest of and in the hereditaments and premises in the said affidavit mentioned, to such person or persons as she may think fit, without the concurrence of her said husband, it appearing to the court, by the said affidavit, that the said Henry Holland Duffill is living apart from his said wife by sentence of divorce" (*Ex p. Duffill*, 5 M. & G. 378).

See, in connection with the final proviso in the above section, sects. 24, 33, and *Re Wainwright* (1 Phil. 258).

3 & 4 Will. 4,
c. 74, s. 91.

Affidavits.

Form of rule
to dispense
with hus-
band's con-
currence.

II.—THE CONVEYANCING ACT, 1882, s. 7.

45 & 46 Vict.
c. 39, s. 7.

7.—(1.) In section seventy-nine of the Fines and Recoveries Act, and section seventy of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this act, be substituted for the words "two of the perpetual commissioners, or two special commissioners," the words "one of the perpetual commissioners, or one special commissioner"; and in section eighty-three of the Fines and Recoveries Act, and section seventy-four of the Fines and Recoveries (Ireland) Act, there shall, by virtue of this act, be substituted for the word "persons" the word "person," and for the word "commissioners" the words "a commissioner"; and all other provisions of those acts, and all other enactments having reference in any manner to the sections aforesaid, shall be read and have effect accordingly.

Acknowledg-
ment of deeds
by married
women.

(2.) Where the memorandum of acknowledgment by a married woman of a deed purports to be signed by a person authorised to take the acknowledgment, the deed shall, as regards the execution thereof by the married woman, take effect at the time of acknowledgment, and shall be conclusively taken to have been duly acknowledged.

(3.) A deed acknowledged before or after the commencement of this act by a married woman, before a judge of the High Court of Justice in England or Ireland, or before a judge of a county court in England, or before a chairman in Ireland, or before a perpetual commissioner or a special commissioner, shall

45 & 46 Vict.
c. 39, s. 7.

not be impeached or impeachable by reason only that such judge, chairman, or commissioner was interested or concerned either as a party, or as solicitor, or clerk to the solicitor for one of the parties, or otherwise in the transaction giving occasion for the acknowledgment; and general rules shall be made for preventing any person interested or concerned as aforesaid from taking an acknowledgment; but no such rule shall make invalid any acknowledgment; and those rules shall, as regards England, be deemed rules of court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and shall, as regards Ireland, be deemed rules of court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, for England and Ireland respectively, at any time after the passing of this act, to take effect on or after the commencement of this act.

39 & 40 Vict.
c. 59.

44 & 45 Vict.
c. 68.

40 & 41 Vict.
c. 57.

(4.) The enactments described in the schedule to this act are hereby repealed.

(5.) The foregoing provisions of this section, including the repeal therein, apply only to the execution of deeds by married women after the commencement of this act.

(6.) Notwithstanding the repeal or any other thing in this section, the certificate, if not lodged before the commencement of this act, of the taking of an acknowledgment by a married woman of a deed executed before the commencement of this act, with any affidavit relating thereto, shall be lodged, examined, and filed in the like manner and with the like effects and consequences as if this section had not been enacted.

(7.) There shall continue to be kept in the proper office of the Supreme Court of Judicature an index to all certificates of acknowledgments of deeds by married women lodged therein, before or after the commencement of this act, containing the names of the married women and their husbands, alphabetically arranged, and the dates of the certificates and of the deeds to which they respectively relate, and other particulars found convenient; and every such certificate lodged after the commencement of this act shall be entered in the index as soon as may be after the certificate is filed.

(8.) An office copy of any such certificate filed before or after the commencement of this act shall be delivered to any person applying for the same; and every such office copy shall be received as evidence of the acknowledgment of the deed to which the certificate refers.

SCHEDULE.

45 & 46 Vict.
c. 39, s. 7.

REPEALS.

Sect. 7 (4).

3 & 4 Will. 4, c. 74... in part.	The Fines and Recoveries Act—in part; namely,— Section eighty-four, from and including the words “and the same judge,” to the end of that section. Sections eighty-five to eighty-eight inclusive.
4 & 5 Will. 4, c. 92... in part.	The Fines and Recoveries } in part; namely,— (Ireland) Act — — — } Section seventy-five, from and including the words “and the same judge,” to the end of that section. Sections seventy-six to seventy-nine, inclusive.
17 & 18 Vict. c. 75...	An Act to remove doubts concerning the due ac- knowledgments of deeds by married women in certain cases.
41 & 42 Vict. c. 23...	The Acknowledgment of deeds by married women (Ireland) Act, 1878.

Under the above section and sect. 89 of Fines and Recoveries Act, 1833, the following rules have been made :—

RULES UNDER THE ACT FOR THE ABOLITION OF FINES AND RECOVERIES,
AND SECTION 7 OF THE CONVEYANCING ACT, 1882.

1. No person authorised or appointed under the act 3 & 4 Will. 4, c. 74 Rules as to
(in these rules referred to as the Fines and Recoveries Act), to take the acknowledgments of deeds by married women shall take any such acknow-
ledgment if he is interested or concerned either as a party or as solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the acknowledgment.

2. Before a commissioner shall receive an acknowledgment, he shall inquire of the married woman separately and apart from her husband and from the solicitor concerned in the transaction whether she intends to give up her interest in the estate to be passed by the deed without having any provision made for her; and where the married woman answers in the affirmative and the commissioner shall have no reason to doubt the truth of her answer, he shall proceed to receive the acknowledgment (c); but if it shall appear to him that it is intended that provision is to be made for the married woman, then the commissioner shall not take her acknowledgment until he is satisfied that such provision has been actually made by some deed or writing produced to him; or if such provision shall not have been actually made before, then the commissioner shall require the terms of the intended provision to be shortly reduced into writing, and shall verify the same by his signature in the margin, at the foot, or at the back thereof.

(c) If the married woman answers in the affirmative, the purchase-money becomes the absolute property of the husband, even though it is never reduced into possession by him, but remains outstanding for any purpose (*Tenant v. Welch*, 37 Ch. D. 622). The examination of a married woman was taken into consideration on a question affecting her equity to a settlement (*Roberts v. Cooper*, 1891, 2 Ch. 335). See also as to the importance of her examination, *Cahill v. Cahill*, 8 App. Cas. 428.

Rules.

The following cases were decided on the old rule for which the above has been substituted, viz. *Re Foster* (7 C. B. 120); *Ex parte Webber* (5 C. B. 179); *Re Dowling* (18 C. B. N. S. 223); *Re Dixon* (4 C. B. 631); *Re Dallas* (10 C. B. N. S. 346). See the statement of these cases in Shelf. R. P. Stat. 8th ed. 401.

3. The memorandum to be endorsed on or written at the foot or in the margin of a deed acknowledged by a married woman shall be in the following form in lieu of the form set forth in section 84 of the Fines and Recoveries Act:

This deed was this day produced before me and acknowledged by therein named to be her act and deed [*or* their several acts and deeds] previous to which acknowledgment [*or* acknowledgments] the said was [*or* were] examined by me separately and apart from her husband [*or* their respective husbands] touching her [*or* their] knowledge of the contents of the said deed and her [*or* their] consent thereto and [each of them] declared the same to be freely and voluntarily executed by her.

4. When an acknowledgment is taken by any person other than a judge the following declaration shall be added to the memorandum of acknowledgment:

And I declare that I am not interested or concerned either as a party or as a solicitor or clerk to the solicitor for one of the parties or otherwise in the transaction giving occasion for the said acknowledgment.

5. A memorandum of acknowledgment purporting to be signed according to any of the following forms shall be deemed to be a memorandum purporting to be signed by a person, authorised to take the acknowledgment:—

(Signed) A. B.

A Judge of the High Court of Justice in England,
or A Judge of the County Court of ,
or A perpetual Commissioner for taking acknowledgments of deeds by married women,
or The special Commissioner appointed to take the aforesaid acknowledgment.

But this rule is not to derogate from the effect of any memorandum purporting to be signed by a person authorised to take the acknowledgment, though not signed in accordance with any of the above forms.

6. Nothing in the five preceding rules contained shall make invalid any acknowledgment which would have been valid if these rules had not been enacted.

7. Every commission appointing a special commissioner to take an acknowledgment by a married woman shall be returned to the office of the registrar of certificates of acknowledgments of deeds by married women, and shall be there filed. An index shall be prepared and kept in the said office, giving the names and addresses of the married women named in all such commissions filed in the said office after the 31st December, 1882. The same rules shall apply to searches in the index so to be prepared as to searches in the other indexes and registers kept in the Central Office.

8. The costs to be allowed to solicitors in respect of the matters herein-after mentioned, when not otherwise regulated by the general orders in force for the time being under the Solicitors' Remuneration Act, 1881, or by special agreement, shall be as follows; anything in the Rules of the Supreme Court as to costs, dated the 12th August, 1875, to the contrary notwithstanding:—

Charges under the Act 3 & 4 Will. 4, c. 74 (The Fines and Recoveries Act).

Rules.

	£	s.	d.
For the indorsements on deeds required by the Fines and Recoveries Act, to be entered on the court rolls of manors of the memorandum of production and memorandum of entry on court rolls, to be signed by the lord steward or deputy steward, each indorsement of memorandum 5s., together - - - - -	0	10	0
For the entries on the court rolls of deeds and the indorsements thereon, at per folio of 72 words - - - - -	0	0	6
For taking the consent of each protector of settlement of lands - - - - -	0	13	4
For taking the surrender by each tenant in tail of lands - - - - -	0	13	4
For entries of such surrenders or the memorandums thereof in the court rolls, at per folio of 72 words - - - - -	0	0	6

9. The following rules and orders are hereby repealed, except as to certificates not lodged before the 1st January, 1883, of acknowledgments by married women of deeds executed before the 1st January, 1883, and the affidavits relating thereto:—

The General Rules of the Court of Common Pleas, Hil. Term, 1834.

The General Rules of the Court of Common Pleas, Trin. Term, 1834.

The General Order of the Court of Common Pleas, dated the 24th November, 1862.

The General Order of the Court of Common Pleas, dated the 13th January, 1863.

10. These rules shall take effect from and after the 31st December, 1882.

For the old rules and the practice cases decided upon them, see Shelf. R. P. Stat. 8th ed. 400 *et seq.* And as to the fees payable in respect of acknowledgments, see the order as to court fees made in January, 1883, Shelf. R. P. Stat. 9th ed. 310.

III.—THE MARRIED WOMEN'S REVERSIONARY INTERESTS ACT, 1857.

20 & 21 VICT. c. 57.

An Act to enable Married Women to dispose of Reversionary Interests in Personal Estate. [25th August, 1857.]

Be it enacted as follows :

20 & 21 Vict.
c. 57, s. 1.

1. After the thirty-first day of December, one thousand eight hundred and fifty-seven, it shall be lawful for every married woman by deed to dispose of (*d*) every future or reversionary interest, whether vested or contingent, of such married woman, or her husband in her right, in any personal estate whatsoever, to which she shall be entitled under any instrument made after the said thirty-first day of December, one thousand eight hundred and fifty-seven (*e*) (except such a settlement as after mentioned), and also to release or extinguish any power (*f*) which may be vested in or limited or reserved to her in regard to any such personal estate, as fully and effectually as she could do if she were a feme sole, and also to release and extinguish her right

Married women may dispose of reversionary interests in personal estate, and release powers over such estate, and also their rights to a settlement out of such

20 & 21 Vict.
c. 57, s. 1.

estate in
possession.

or equity to a settlement out of any personal estate to which she, or her husband in her right, may be entitled in possession under any such instrument as aforesaid, save and except that no such disposition, release or extinguishment shall be valid unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: provided always, that nothing herein contained shall extend to any reversionary interest to which she shall become entitled by virtue of any deed, will or instrument, by which she shall be restrained from alienating or affecting the same.

Married
woman
unable to
dispose of
reversionary
choses in
action not
settled to her
separate use,
except under
20 & 21 Vict.
c. 57.

(d) For a married woman's power of disposition over reversionary interests in personalty settled to her separate use, see the note to Fines and Recoveries Act, s. 78, *ante*, p. 324. As regards her reversionary interests in personalty not settled to her separate use, it was well established before the present act, that a husband could not assign or release his wife's reversionary choses in action so as to bind her surviving (*Honner v. Morton*, 3 Russ. 65); and the fact of her joining in the assignment made no difference (*Purdew v. Jackson*, 1 Russ. 1; *Cresswell v. Dewell*, 4 Giff. 460; see *Winter v. Easum*, 2 D. J. & S. 272; *Bolitho v. Hillyar*, 34 Beav. 180; *Rogers v. Acaster*, 14 Beav. 445; *Hore v. Becher*, 12 Sim. 465; *Fitzgerald v. Fitzgerald*, L. R. 2 P. C. 87). Nor could a married woman by election part with her reversionary choses in action (*Williams v. Mayne*, I. R. 1 Eq. 519; see *Harle v. Jarman*, 1895, 2 Ch. 419; quoted, *ante*, p. 319). A husband and wife could not effectually dispose of the life interest of the wife in a fund not settled to her separate use beyond the duration of the coverture (*Stiffe v. Everitt*, 1 M. & C. 37; *Re Godfrey*, I. R. 1 Eq. 533). A husband and son, having surrendered their respective interests in a fund to the wife, for the purpose of enabling her to assign it to the son, the court refused to permit a merger (*Whittle v. Henning*, 2 Phill. C. C. 731; *Story v. Tonge*, 7 Beav. 91; *Hanchett v. Briscoe*, 22 Beav. 496; see, however, 14 Sim. 592—599; *Bishop v. Colebrooke*, 16 Sim. 39; and see *Re Davenport*, *Turner v. King*, 1895, 1 Ch. 361, a case since the M. W. P. Act, 1882, and dealing with separate property). As to binding by covenant in an ante-nuptial settlement the reversionary interests acquired by a married woman during coverture but not falling into possession until after its termination, see *Lloyd v. Prichard*, 1908, 1 Ch. 265.

Cases under
section.

An assignment under this act ought not to be regarded as that of the husband and wife according to their respective interests (*Re Batchelor*, *Sloper v. Oliver*, 16 Eq. 485). The real disposing party is the wife (*Re Jakeman*, 23 Ch. D. 351). Where the property assigned consisted of a wife's reversionary interest under a will, the assignment prevented the executors from exercising any right of retainer over the interest assigned in respect of a debt due from the husband to the testator (*Re Batchelor*, *sup.*; compare the effect on such retainer of the wife's equity to a settlement: *Re Briant*, *Poulter v. Shackel*, 39 Ch. D. 471). A policy of insurance effected by a married woman in her own name may be disposed of under this act (*Witherby v. Rackham*, 60 L. J. Ch. 511; 39 W. R. 393; see *Re Turner*, *Turner v. Fitzroy*, 66 L. T. 758). But mere possibilities or expectancies are not within this act (*Allcard v. Walker*, 1896, 2 Ch. 369).

If the Infant Settlements Act, 1855, applies to post-nuptial settlements, it does not enable a married woman to evade the formalities of this act (*Seaton v. Seaton*, 13 App. Cas. 70).

An acknowledgment under this act by a married woman of an assignment was taken into consideration even where the act did not apply (*Roberts v. Cooper*, 1891, 2 Ch. 335).

(e) An appointment of a reversionary interest in personalty by deed after 1857, under a special power in a deed dated before 1857, does not bring the

interest within this act, even if the prior life interest is assigned at the same time (*Re Butler*, 1. R. 3 Eq. 138); nor did the powers of the act apply where the reversionary interest arose under a will dated before 1857, but the testator had made a codicil (not confirming the will) since 1857 (*Re Elcom, Layborn v. Grover Wright*, 1894, 1 Ch. 303). But where a woman was entitled to a reversionary interest created before 1857, and after 1857 while unmarried re-settled that interest, the power of the act applied (*Re Bennett, Capes v. Ferrand*, 73 L. T. 17).

(f) As to the various kinds of powers, their suspension and extinction, Powers. and as to the execution of powers by married women, see the note to Fines and Recoveries Act, s. 78, *ante*, p. 322).

2. Every deed to be executed in England or Wales by a married woman for any of the purposes of this act shall be acknowledged by her, and be otherwise perfected, in the manner by the act 3 & 4 Will. 4, c. 74, prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land; and every deed to be executed in Ireland by a married woman for any of the purposes of the act shall be acknowledged by her and be otherwise perfected in the manner by the act 4 & 5 Will. 4, c. 92, prescribed for the acknowledgment and perfecting of deeds disposing of interests of married women in land: and all and singular the clauses and provisions in the said acts concerning the disposition of lands by married women, including the provisions for dispensing with the concurrence of the husbands of married women, in the cases in the said acts mentioned shall extend and be applicable to such interests in personal estate, and to such powers as may be disposed of, released, or extinguished by virtue of this act, as fully and effectually as if such interests or powers were interests in or powers over land.

An order was made under this act, enabling a married woman, without the concurrence of her husband, to dispose of a reversionary interest in government stock (*Re Rogers*, L. R. 1 C. P. 47). If such an order be obtained by fraud or suppression of facts it will be set aside (*Ex p. Cockerell*, 4 C. P. D. 39).

3. Provided always, that the powers of disposition given to a married woman by this act shall not interfere with any power which independently of this act may be vested in or limited or reserved to her, so as to prevent her from exercising such power in any case, except so far as by any disposition made by her under this act she may be prevented from so doing, in consequence of such power having been suspended or extinguished by such disposition.

4. Provided always, that the powers of disposition hereby given to a married woman shall not enable her to dispose of any interest in personal estate settled upon her by any settlement or agreement for a settlement made on the occasion of her marriage.

20 & 21 Vict.
c. 57, s. 1.

Deeds to be acknowledged by married women in the manner required by 3 & 4 Will. 4, c. 74, for disposing of interests in or powers over land in England or Wales; in Ireland, as by 4 & 5 Will. 4, c. 92.

The powers of disposition given by this act not to interfere with any other powers.

Act not to extend to settlements of married women upon marriage.

20 & 21 Vict. c. 57, s. 4. An agreement in contemplation of marriage was executed by the husband and wife to settle a money fund of the wife's for her separate use—to return to the husband if he should survive. The court considered that the wife was to have the absolute interest in the event of her surviving, and that the case fell within the exception contained in this section (*Clarke v. Green*, 2 H. & M. 474).

Not to extend to Scotland.

5. This act shall not extend to Scotland.

IV.—THE MARRIED WOMEN'S PROPERTY ACT, 1870.

33 & 34 VICT. c. 93.

An Act to amend the Law relating to the Property of Married Women. [9th August, 1870.]

33 & 34 Vict. c. 93, s. 1. WHEREAS it is desirable to amend the law of property and contract with respect to married women:

Be it enacted as follows:

Earnings of married women to be deemed their own property.

1. The wages and earnings of any married woman acquired or gained by her after the passing of this act in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband, and also any money or property so acquired by her through the exercise of any literary, artistic, or scientific skill, and all investments of such wages, earnings, money, or property, shall be deemed and taken to be property held and settled to her separate use, independent of any husband to whom she may be married, and her receipts alone shall be a good discharge for such wages, earnings, money, and property.

This act has been repealed, saving all acts done and rights or liabilities acquired thereunder (M. W. P. Act, 1882, s. 22, *post*, p. 364).

Law before the section.

Under the law before this act a husband might in his own name recover his wife's wages (*Dengate v. Gardiner*, 4 M. & W. 7), or the profits of a business carried on by her (*Savile v. Sweeny*, 4 B. & Ad. 524). And payment to her of her own earnings was not good, unless she had her husband's authority to receive them (*Offley v. Clay*, 2 M. & G. 172). As to a married woman's separate trading before this act under her husband's agreement, see 2 Bright's Husband and Wife, 292; and under the custom of the city of London, see 2 Bright, 76.

Cases under the section.

The question whether a trade was carried on by a married woman separately from her husband was held to be one of fact, to be determined on the circumstances of the case (*Petty v. Anderson*, 3 Bing. 170; *Small-piece v. Daves*, 7 C. & P. 40; *Lovell v. Newton*, 4 C. P. D. 7; *Laporte v. Cortick*, 31 L. T. 434; 23 W. R. 131; *Whittaker v. Whittaker*, 46 L. T. 802; 30 W. R. 787; *Re Dearmer, James v. Dearmer*, 53 L. T. 905). All the stock-in-trade and property connected with the trade was protected by this section, as well as the earnings (*Ashworth v. Outram*, 5 Ch. Div. 923). The earnings were equitable assets (*Re Poole, Thompson v. Bennett*, 6 Ch. D. 739). This section did not protect the earnings from an unlawful industry (*Mason v. Mitchell*, 34 L. J. Ex. 68). As to the liability of the husband in respect of a separate trade of his wife, see *Re Shepherd* (39 L. T. 652). And as to a married woman's bankruptcy, see the note to sect. 1, sub-s. 5, of the M. W. P. Act, 1882, *post*, p. 352.

[By sect. 2, deposits in savings banks and government annuities in the name of a married woman were deemed to be her separate property, subject to a power for the court to order payment to the husband when his money had been used without his consent. By sect. 3, a married woman or woman about to be married might require any sum she was entitled to in the public funds to be placed in her name as a married woman entitled to her separate use, and while so entered it was to be deemed her separate property, subject to a power for the court to order transfer to the husband of investments made with his money without his consent. (For orders under this section, see *Re Bartholomew*, 23 L. T. 433; *Re Butlin*, *Ib.* 523; *Re Tanner*, 1874, W. N. 198; *Howard v. Bank of England*, 19 Eq. 295.) Sect. 4 contained similar provisions in regard to shares, debentures, &c. in joint stock companies (see *R. v. Carnatic R. Co.*, L. R. 8 Q. B. 299; and as to previous law, *Re Matthewman*, 3 Eq. 788; *Butler v. Cumpston*, 7 Eq. 16; *Dalton v. Midland R. Co.*, 13 C. B. 474). Sect. 5 contained similar provisions in regard to a woman's interest in industrial and other societies. Sect. 6 provided for the case of investments made in fraud of creditors. See, now, as to these matters, sects. 6—10 of the M. W. P. Act, 1882.]

33 & 34 Vict.
c. 93, s. 1.
Sects. 2—6.

7. Where any woman married after the passing of this act shall, during her marriage become entitled to any personal property as next of kin or one of the next of kin of an intestate, or to any sum of money not exceeding two hundred pounds under any deed or will, such property shall, subject and without prejudice to the trusts of any settlement affecting the same, belong to the woman for her separate use, and her receipts alone shall be a good discharge for the same.

Personal property not exceeding 200*l.* coming to a married woman to be her own.

The words "become entitled" include the case of a reversionary legacy falling into possession (*Lane v. Oakes*, 30 L. T. 726; 22 W. R. 709). The limit of 200*l.* applies only to sums given by deed or will (*Re Voss, King v. Voss*, 13 Ch. D. 504). Where a married woman was entitled under the same will to a reversionary legacy and also to a share of residue, which, taken separately, were each of them less than 200*l.*, but taken together exceeded 200*l.* they were not aggregated, but each was made "separate" by the section (*Re Davies, Harrison v. Davis*, 1897, 2 Ch. 204).

Before this act, a legacy left to a married woman in general terms must have been paid to her husband (*Palmer v. Trevor*, 1 Vern. 262). Where, however, she had obtained a protection order under 20 & 21 Vict. c. 85, s. 25, payment to herself was ordered (*Re Kingsley*, 6 W. R. 849; *Re Rainsdon*, 4 Drew. 446).

The inaccuracy of the marginal note to this section should be observed. The marginal note forms no part of the act (*Sutton v. S.*, 22 Ch. D. 511; *Claydon v. Green*, L. R. 3 C. P. 511; *Re Venour, Venour v. Sellon*, 2 Ch. D. 522; *A.-G. v. G. E. R. Co.*, 11 Ch. Div. 461, 465). But the title is an important part of the Act (*Fielding v. Morley*, 1899, 1 Ch. 41), and should be looked at to ascertain its objects (*R. v. Cockerton*, 1901, 1 Q. B. 731; *Jones v. Sherrington*, 1908, 2 K. B. 547). The scope of an Act may be limited by the title (*Fielding v. Morley, sup.*) or not (*Re Groos*, 1904, P. 273). The preamble also may be referred to where the enacting words of the sections are not clear (*Re Griffith, Carr v. Griffith*, 12 Ch. D. 661; see further *Re Harkness and Allsopp*, 1896, 2 Ch. 361; *Powell v. Kempton Co.*, 1897, 2 Q. B. 265; *A.-G. v. Margate Co.*, 1900, 1 Ch. 749).

8. Where any freehold, copyhold, or customaryhold property shall descend upon any woman married after the passing of this act as heiress or co-heiress of an intestate, the rents and profits of such property shall, subject and without prejudice to the

Freehold property coming to a married woman, rents

33 & 34 Vict. trusts of any settlement affecting the same, belong to such
c. 93, s. 8. woman for her separate use, and her receipts alone shall be a
and profits — good discharge for the same.
only to be
her own.

This section does not enable a married woman to convey the fee simple of descended freeholds by an unacknowledged deed. The "rents and profits" are only such as can be personally enjoyed by her (*Johnson v. Johnson*, 35 Ch. D. 345; see *Re Voss, King v. Voss*, 13 Ch. D. 504).

[Sect. 9 contained provisions for settling questions between husband and wife. See now sect. 17 of the *M. W. P. Act*, 1882.]

Married
woman may
effect policy
of insurance.

10. A married woman may effect a policy of insurance upon her own life or the life of her husband for her separate use, and the same and all benefit thereof, if expressed on the face of it to be so effected, shall enure accordingly, and the contract in such policy shall be as valid as if made with an unmarried woman.

As to insur-
ance of a
husband for
benefit of his
wife.

A policy of insurance effected by any married man on his own life, and expressed upon the face of it to be for the benefit of his wife or of his wife and children, or any of them, shall enure and be deemed a trust for the benefit of his wife for her separate use, and of his children, or any of them, according to the interest so expressed, and shall not, so long as any object of the trust remains, be subject to the control of the husband or to his creditors, or form part of his estate. When the sum secured by the policy becomes payable, or at any time previously, a trustee thereof may be appointed by the Court of Chancery in England or in Ireland according as the policy of insurance was effected in England or in Ireland, or in England by the judge of the county court of the district, or in Ireland by the chairman of the civil bill court of the division of the county in which the insurance office is situated, and the receipt of such trustee shall be a good discharge to the office. If it shall be proved that the policy was effected and premiums paid by the husband with intent to defraud his creditors, they shall be entitled to receive out of the sum secured an amount equal to the premiums so paid.

Old law.

Independently of this Act it has been held that a wife has an insurable interest in the life of her husband (*Reed v. Royal Exchange Co.*, Peake's Add. Cases, 70), and a husband in that of his wife (*Griffiths v. Fleming*, 1909, 1 K. B. 805).

As to policies effected since 1st January, 1883, see the further provisions of sect. 11 of *M. W. P. Act*, 1882 (*post*, p. 357). The following cases have been decided under the above section of the Act of 1870.

Cases under
this section.

Where the husband substituted for a policy he already had a policy expressed to be for the benefit of his wife, the latter was within this section (*Holt v. Everall*, 2 Ch. Div. 266). Under a policy expressed to be for the benefit of wife and children, the wife and children took as joint tenants (*Re Seyton, Seyton v. Satterthwaite*, 34 Ch. D. 511; *Re Davies*, 1892, 1 Ch. 90). Where the trust was for the wife and children as the husband should appoint, but no appointment was made, the wife and children took in equal shares (*Re Edwards*, 41 L. T. 434). An after taken wife is within

the trust created by the words of this act (*Re Parker*, 1906, 1 Ch. 526). But on the words of a particular policy she did not participate (*Re Griffith*, 1903, 1 Ch. 739). Policies under this act were not a satisfaction of a covenant to settle money on the settlor's wife and children (*Cartwright v. C.*, 1903, 2 Ch. 306). 33 & 34 Vict.
c. 93, s. 10.

On an application under this section to appoint trustees there is no jurisdiction to declare the rights of the parties (*Re Adams*, 23 Ch. D. 525; but see *Re Mellor*, 6 Ch. D. 127). When the husband became of unsound mind, trustees were appointed and authorised to surrender the policy for a fully paid one of less amount (*Schultze v. Schultze*, 56 L. T. 231). A single trustee will not be appointed (*Ib.*; *Re Howson*, 1885, W. N. 213). As to a policy effected by a husband for the benefit of his wife who was subsequently convicted of murdering him, see *Cleaver v. Mutual Association* (1892, 1 Q. B. 147). In the case of policies effected under this act, sect. 11 of the M. W. P. Act, 1882, does not apply, and on the death of the husband a trustee must be appointed under this section; the petition being entitled under the Act of 1870 only (*Re Adams*, 23 Ch. D. 525; *Re Turnbull, T. v. T.*, 1897, 2 Ch. 415; *Re Kuyper*, 1899, 1 Ch. 38; see *contra*, *Re Soutar*, 26 Ch. D. 236). The application may be made by petition (*Re Atkinson*, 13 R. 285).

[Sect. 11 contained provisions as to a married woman suing. See now the M. W. P. Act, 1882, s. 1, sub-s. (2), and note, p. 348, *post*.]

12. A husband shall not, by reason of any marriage which shall take place after this act has come into operation, be liable for the debts of his wife contracted before marriage, but the wife shall be liable to be sued for, and any property belonging to her for her separate use shall be liable to satisfy, such debts as if she had continued unmarried. Husband not to be liable on his wife's contracts before marriage.

According to the old law a husband was liable at law for the debts of his wife contracted before marriage (2 Bright, Husband and Wife, 2). And in equity her separate property was liable to satisfy such debts (*Biscoe v. Kennedy*, 1 Bro. C. C. 17, n.; *Chubb v. Stretch*, 9 Eq. 555). Old law.

Having regard to sects. 22 and 13 of the M. W. P. Act, 1882, this section and the decisions thereunder remain of importance with respect to women married before the last-mentioned act. Under this section such a married woman's separate property was made liable at law to satisfy debts contracted by her before marriage. The section was held to extend to property settled to her separate use without power of anticipation (*Sanger v. S.*, 11 Eq. 470; *London Bank v. Bogle*, 7 Ch. D. 773; *Re Hedgely, Small v. Hedgely*, 34 Ch. D. 379; *Axford v. Reid*, 22 Q. B. Div. 548). See as to women married since 1882, *Birmingham v. Lane*, 1904, 1 K. B. 38. An order under the Debtors Act, 1869 (32 & 33 Vict. c. 62), s. 5, may be made upon such a married woman (*Dillon v. Cunningham*, L. R. 8 Ex. 23). As to her arrest in execution for a debt contracted *dym sola*, see *Nagle v. O'Donnell* (I. R. 7 C. L. 79). A judgment may also be given against a married woman under R. S. C. Ord. 14, r. 1, without proof of the existence of separate estate (*Downe v. Fletcher*, 21 Q. B. D. 11). But this section does not make her liable to the bankruptcy law (*Re Grissell*, 12 Ch. Div. 484; *Ex p. Holland, Re Heneage*, 9 Ch. 307; see *Day v. Freunel*, 35 L. T. 551; *R. v. Robinson*, L. R. 1 C. C. 80). Where a woman joined with a surety in making a promissory note which fell due and on which judgment was recovered before her marriage, the surety who had paid the full amount after her marriage could not recover against the husband (*Conlon v. Moore*, I. R. 9 C. L. 190). As to the liability of the husband in the case of marriages from 1874 to 1882, see M. W. P. Act, 1874 (*post*, p. 344). And in the case of marriages after 1882, see M. W. P. Act, 1882, s. 14 (*post*, p. 359). Cases under this section.

33 & 34 Vict.
c. 93, s. 15.

[Sects. 13 and 14 rendered a married woman liable for the maintenance of her husband and children. See now sects. 20 and 21 of the *M. W. P. Act*, 1882, *post*, p. 364.]

Commence-
ment of act.

15. This act shall come into operation at the time of the passing of this act.

Act not to
extend to
Scotland.
Short title.

16. This act shall not extend to Scotland.

17. This act may be cited as the Married Women's Property Act, 1870.

This act was intended to protect married women in the enjoyment of the rights of property, and has not by a side wind given them political or municipal rights (*R. v. Harrald*, L. R. 7 Q. B. 361).

V.—THE MARRIED WOMEN'S PROPERTY ACT, 1870, AMENDMENT ACT, 1874.

37 & 38 VICT. c. 50.

An Act to amend the Married Women's Property Act (1870).

[30th July, 1874.]

37 & 38 Vict.
c. 50, s. 1.

WHEREAS it is not just that the property which a woman has, at the time of her marriage should pass to her husband, and that he should not be liable for her debts contracted before marriage, and the law as to the recovery of such debts requires amendment:

Be it enacted as follows:

Husband and
wife may be
jointly sued
for her debts
before
marriage.

1. So much of the Married Women's Property Act, 1870, as enacts that a husband shall not be liable for the debts of his wife contracted before marriage is repealed so far as respects marriages which shall take place after the passing of this act, and a husband and wife married after the passing of this act may be jointly sued for any such debt.

This Act has been repealed saving all acts done and rights or liabilities acquired thereunder (*M. W. P. Act*, 1882, sect. 22, *post*, p. 364).

Extent to
which hus-
band liable.

2. The husband shall, in such action and in any action brought for damages sustained by reason of any tort committed by the wife before marriage or by reason of the breach of any contract made by the wife before marriage, be liable for the debt or damages respectively to the extent only of the assets hereinafter specified; and in addition to any other plea or pleas may plead that he is not liable to pay the debt or damages in respect of any such assets as hereinafter specified; or, confessing his liability to some amount, that he is not liable beyond what he so confesses; and if no such plea is pleaded the husband shall be deemed to have confessed his liability so far as assets are concerned.

The liability of the husband under this act ceases on the death of his wife (*Bell v. Stocker*, 10 Q. B. D. 129). An Englishman marrying a native of Jersey, where a husband is liable for his wife's antenuptial debts, is protected in England by this act (*De Greuchy v. Wills*, 4 C. P. D. 363). Notwithstanding this act a husband was, under sect. 78 of the Companies Act, 1862, liable as a contributory in his own right on shares registered in the name of his wife, though acquired by her before her marriage (*Ex p. Hatcher*, 12 Ch. D. 284). See now, as to women married before the M. W. P. Act, 1882, Companies (Consolidation) Act, 1908, sect. 128; Buckley, 9th ed., 298, 68. And see as to the law under the M. W. P. Act, 1882, sects. 7 and 13 of that Act, *post*, pp. 355, 359.

37 & 38 Vict.
c. 50, s. 2.

Under this section it is sufficient to allege in the statement of claim that the husband is liable for the debts, without alleging that he has received assets from his wife (*Matthews v. Whittle*, 13 Ch. D. 811).

3. If it is not found in such action that the husband is liable in respect of any such assets, he shall have judgment for his costs of defence, whatever the result of the action may be against the wife.

If husband without assets he shall have judgment for costs.

Creditors were allowed to add to their debt and recover against the wife costs which they had to pay to the husband under this section (*London Bank v. Bogle*, 7 Ch. D. 773).

4. When a husband and wife are sued jointly, if by confession or otherwise it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband and wife, and as to the residue, if any, of such debt or damages, the judgment shall be a separate judgment against the wife.

Joint and separate judgment against husband and wife for debt.

5. The assets in respect of and to the extent of which the husband shall in any such action be liable are as follows:

Assets for which husband liable.

- (1.) The value of the personal estate in possession of the wife which shall have vested in the husband:
- (2.) The value of the choses in action of the wife which the husband shall have reduced into possession, or which with reasonable diligence he might have reduced into possession:
- (3.) The value of the chattels real of the wife which shall have vested in the husband and wife:
- (4.) The value of the rents and profits of the real estate of the wife which the husband shall have received, or with reasonable diligence might have received:
- (5.) The value of the husband's estate or interest in any property real or personal, which the wife in contemplation of her marriage with him shall have transferred to him or to any other person:
- (6.) The value of any property, real or personal, which the wife in contemplation of her marriage with the husband shall with his consent have transferred to any person with the view of defeating or delaying her existing creditors:

Provided that when the husband after marriage pays any debt of his wife or has a judgment *bonâ fide* recovered against

37 & 38 Vict.
c. 50, s. 5. him in any such action as is in this act mentioned, then to the extent of such payment or judgment the husband shall not in any subsequent action be liable.

Extent of act. 6. This act shall not extend to Scotland.

Short title. 7. This act may be cited as the Married Women's Property Act (1870) Amendment Act, 1874.

VI.—THE MARRIED WOMEN'S PROPERTY ACT, 1882.

45 & 46 VICT. c. 75.

An Act to consolidate and amend the Acts relating to the Property of Married Women. [18th August, 1882.]

45 & 46 Vict.
c. 75, s. 1. Be it enacted as follows :

Married
woman to be
capable of
holding pro-
perty and of
contracting
as a *feme sole*.

1. (1) A married woman shall, in accordance with the provisions of this act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a *feme sole*, without the intervention of any trustee (*e*).

(2.) A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a *feme sole*, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise (*f*).

(3.) *Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown* (*g*).

(4.) *Every contract entered into by a married woman with respect to and to bind her separate property shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire* (*g*).

(5.) Every married woman carrying on a trade separately from her husband shall, in respect of her separate property, be subject to the bankruptcy laws in the same way as if she were a *feme sole* (*h*).

The phraseology of this act appears to have been taken from Lord Thurlow's judgment in *Hulme v. Tenant*, 1 Br. C. C. 16 (*Farwell, Powers*, 158).

Sub-sect. (1).

(*e*) Sub-sect. (1) is to be construed along with sects. 2 and 5 (*Re Cuno, Mansfield v. M.*, 43 Ch. Div. 12). Accordingly, in the case of a woman married before 1883, sub-sect. (1) applies only to property acquired since 1882 (*ib.*; sect. 5, *post*; *Re Harris*, 28 Ch. D. 171). Similarly, it has been

held to apply only to what is done by the married woman during coverture in relation to property of which during coverture she is possessed (*Re Price, Stafford v. S.*, 28 Ch. D. 712). A gift or conveyance to a married woman and her husband since the act creates a joint tenancy, not a tenancy by entireties as before the act, the share of the wife being for her separate use (*Re Jupp, Jupp v. Buckwell*, 39 Ch. D. 148; *Thornley v. T.*, 1893, 2 Ch. 229). But the capacity of a married woman is only altered as between herself and her husband; so in the case of a gift to a husband and wife and a third person, the construction, as regards the amount taken by the husband and wife, is not altered by the act (*Re Jupp, sup.*; *Re March, Mander v. Harris*, 27 Ch. Div. 166, 170; see *Re Dixon, Byram v. Tull*, 42 Ch. D. 306; *Re Gue, Smith v. Gue*, 61 L. J. Ch. 510; 67 L. T. 823). In the disposition of land to which she is beneficially entitled the act (where it applies) has abolished the necessity of the husband's concurrence and an acknowledged deed (*Re Drummond & Davie*, 1891, 1 Ch. 531). This rule governs the case of real estate conveyed to her by way of mortgage to secure money which was her separate property (*Re Brooke & Fremlin*, 1898, 1 Ch. 647); and also the case of real property held by her as trustee or personal representative (M. W. P. Act, 1907, sect. 1).

The "separate property" referred to in the act does not include an unexercised general power of appointment by deed or will (*Ex p. Gilchrist*, 17 Q. B. Div. 521; compare sect. 4, *post*).

The separate use arising by virtue of this act is sufficient to support a restraint on anticipation (*Re Lumley, Ex p. Hood-Barrs*, 1896, 2 Ch. 690).

Where money was bequeathed in trust as to the income for a woman married since 1882 for life, and as to the capital as she should appoint by will, and in default for her executors, administrators and assigns, it was held that the reversion was under the act her separate property, and that on her releasing her power the two interests would coalesce, and she would be absolutely entitled (*Re Davenport, Turner v. King*, 1895, 1 Ch. 361; see *Re Williams, Williams v. Grant*, 76 L. T. 150).

Since this act wearing apparel given by a husband to his wife is *prima facie* her separate property (*Masson v. De Fries*, 1909, 2 K. B. 831). As regards paraphernalia it was pointed out that under the old common law all the wife's personal chattels were the husband's property. As an exception the common law gave a widow paraphernalia (something over and above dower), namely a right after her husband's death to keep as her own property certain personal chattels of which she had had the use during coverture. The husband's common law rights having been destroyed by the present act, the above exception was said by *Farwell, L.J.*, to exist no longer (*Masson v. De Fries*, 1909, 2 K. B. 836).

The provisions of this act relating to the wills of married women are sect. 1, sub-sect. (1), and sect. 4; see also sect. 23, and M. W. P. Act, 1893, s. 3, *post*, p. 365. Sect. 1, sub-sect. (1), did not enable a married woman by a will made during coverture to dispose of property acquired after coverture (*Re Price, Stafford v. S.*, 28 Ch. D. 709; see *Re Cuno, Mansfield v. M.*, 43 Ch. Div. 12; see now M. W. P. Act, 1893, s. 3, *post*, p. 367). A married woman can by will make a good gift for the maintenance of a churchyard (*Re Douglas, Douglas v. Simpson*, 1905, 1 Ch. 279). A direction for payment of debts in the will of a married woman made the arrears of a restrained annuity assets for paying damages for a breach of her covenant (*Sprange v. Lee*, 1908, 1 Ch. 424). Having regard to the testamentary power conferred by statute on a married woman, her will can now raise a case of election against her husband (*Re Harris, Leacroft v. Harris*, 1909, 2 Ch. 206).

As to the effect of this act on a will dated prior to its passing, see *Re Bowen, James v. J.* (1892, 2 Ch. 291); and as to the wills of married women independently of this act, and the present form of probate of wills of married women, see note to sect. 8 of the Wills Act, *post*.

As regards the beneficial title to a married woman's property after her death, it has been decided that, notwithstanding this act, a husband is entitled to recover from his wife's executor separate personalty undisposed of by her (*Re Lambert, Stanton v. Lambert*, 39 Ch. D. 626), and

45 & 46 Vict.
c. 75, s. 1.

Para-
phernalia.

Wills and
intestacy.

45 & 46 Vict. also non-separate choses in action not reduced into possession during the
c. 75, s. 1. coverture (*Smart v. Tranter*, 43 Ch. Div. 587). On the death intestate of

a married woman, her separate leaseholds may be taken by her husband, without taking out administration, subject, however, to any contracts binding them (*Surman v. Wharton*, 1891, 1 Q. B. 491); see *Re Bellamy, Elder v. Pearson*, 25 Ch. D. 620). A husband is still entitled to curtesy in real estate as to which his wife has died intestate (*Hope v. H.*, 1892, 2 Ch. 336).

Sub-sect. (2).

(f) The word "contract" in the M. W. P. Act, 1882, includes the acceptance of the office of trustee or executrix (sect. 24, *post*). It was said that the words of sub-sect. (2) do not create any personal liability; they only subject the married woman to a "proprietary liability"—i.e., in respect of her separate property (*Scott v. Morley*, 20 Q. B. Div. 128; *Draycott v. Harrison*, 17 Q. B. D. 153. But see as to this *Pelton v. Harrison*, 1892, 1 Q. B. 118; *Holby v. Hodgson*, 24 Q. B. Div. 103).

Joint contracts by married woman.

Under this sub-section a married woman can with her husband enter into a joint contract with a stranger (*Hoare v. Niblett*, 1891, 1 Q. B. 781). Such a joint liability cannot be implied from the fact that a married woman, who is residing with her husband and has herself separate estate, orders necessities for the household (*Morel v. Westmoreland*, 1903, 1 K. B. 78; 1904, A. C. 11; compare *Re Shaw, Shaw v. Jones*, 94 L. T. 93). In such a case there is a *primâ facie* presumption of the husband's liability (*Ib.*), which, however, can be rebutted in various ways (*Ib.*; *Manby v. Scott*, 2 Sm. L. C.).

Where such a joint liability exists, judgment recovered against the husband bars a second action against the wife (*Hoare v. Niblett, sup.*). The present rules of practice, however, provide that in certain cases a plaintiff who in one action is suing A and B as joint contractors may, after judgment against A, continue to prosecute the action against B (Ord. 14, r. 5; Ord. 13, r. 4). But if the action asserts a liability which is alternative, and not joint, judgment against A is conclusive evidence of an election not to proceed against B (*Morel v. Westmoreland, sup.*; *French v. Howie*, 1906, 2 K. B. 674).

As regards contracts with her husband, the rule before the act was that a married woman could during coverture contract with him so as to bind her separate estate (*Vansittart v. V.*, 4 K. & J. 70); and this has not been altered by the act (*Butler v. B.*, 16 Q. B. Div. 374). A *bonâ fide* purchase by the wife from the husband of goods which are paid for out of her separate estate, and remain in the conjugal domicile, will be good against the husband's creditors (*Ramsay v. Margrett*, 1894, 2 Q. B. 18). A husband and wife can contract as strangers as to the ownership of chattels in their joint possession (*Masson v. De Fries*, 1909, 2 K. B. 839), and such a contract may be inferred from their dealing (*Hunt v. H.*, 25 T. L. R. 132). An arrangement entered into by a wife with her husband, upon her assigning leaseholds to him was dealt with, *Re Marlborough, Davis v. Whitehead*, 1894, 2 Ch. 133. As to the effect of contracts by married women, see further the cases decided under sub-sects. (3) and (4) of this section (now repealed), *post*, p. 351; and M. W. P. Act, 1893, s. 1 (*post*, p. 365).

Married

woman suing.

A married woman may present a petition under the Trustee Act (*Re Outwin*, 48 L. T. 410; 31 W. R. 374). She may also consent to a petition under the S. E. Act, 1877 (*post*); see *Riddell v. Errington* (26 Ch. D. 220); in which case she need not, if she was married since 1882, be examined as regards any property whenever acquired (*Ib.*); nor, if she was married previously, as regards property acquired since 1882 (*Re Harris*, 28 Ch. D. 171; *Re Batt*, 1897, 2 Ch. 65). Sect. 12 (*post*) gives her remedies for the protection of her separate property. Thus she may sue alone in respect of a trespass on a house which is her separate property (*Weldon v. De Bathe*, 14 Q. B. Div. 339; *Symonds v. Hallett*, 24 Ch. Div. 346; *Heimbs v. Newcastle Society*, 76 L. T. 109); or in respect of a tort committed before the present act (*Weldon v. Winslow*, 13 Q. B. Div. 784; *Lowe v. Fox*, 15 Q. B. Div. 667; *James v. Barraud*, 31 W. R. 786; *Severance v. Civil Service Association*, 48 L. T. 485), or in respect of her separate interest in a partnership firm (*Eddowes v. Argentine*, 63 L. T. 364). As to suing to recover a separate legacy, see *Re Robinson, Pindar v. Robinson*, 1885, W. N. 147.

For the purpose of such an action she became discovert within the meaning of the Limitation Act, 1623, s. 7 (*ante*, p. 228), upon the commencement of the present act (*Lowe v. Fox, sup.*; *Weldon v. Neal*, 51 L. T. 289; 32 W. R. 828).

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c. 75, s. 1.

As against her husband she can without a trustee sue him on his covenant in a separation deed (*Sweet v. S.*, 1895, 1 Q. B. 12), or for an account of her separate rents and profits (*Thornley v. T.*, 1893, 2 Ch. 229), or for detention of her goods (*Larner v. L.*, 1905, 2 K. B. 539, see *R. v. Murray*, 1906, 2 K. B. 385). And where a husband forcibly detained his wife's separate money, she could sue his executors for its return (*Wassell v. Leggatt*, 1895, 1 Ch. 554). Her power of suing her husband for a tort is limited by sect. 12 (*post*). And she cannot sue him for malicious prosecution (*Tinkley v. T.*, 24 T. L. R. 691), or for slander (*Young v. Y.*, 5 Fraser, 330).

Where an injunction is claimed her sole undertaking in damages must be accepted (*Pike v. Cave*, 62 L. J. Ch. 937; 68 L. T. 650; *Re Prynnne*, 53 L. T. 465); and such an undertaking can be enforced by the husband (*Hunt v. H.*, 54 L. J. Ch. 289). She will not be ordered to give security for costs on the ground of poverty (*Re Thompson, Stevens v. Thompson*, 38 Ch. Div. 317; as to costs of an appeal, see *Whittaker v. Kershaw*, 44 Ch. Div. 296). She cannot, however, act as guardian *ad litem* or next friend (*Re Somersct, Thynne v. St. Maur*, 34 Ch. D. 465). Damages for personal injuries awarded to a wife are her separate property, notwithstanding that her husband was co-plaintiff (*Beasley v. Roney*, 1891, 1 Q. B. 509). A plaintiff who is a married woman should be so described (*Re Poinons, Sutton v. Martin*, 1891, W. N. 139).

The effect of sub-sect. (2) is to allow a married woman to be sued in respect of anything in respect of which a man could be sued, subject to this, woman being that her power to contract is limited, and the remedy is confined to her separate estate (*Whittaker v. Kershaw*, 45 Ch. Div. 329); and the fact that she has no separate estate except subject to a restraint on anticipation does not prevent her being sued (*Ib.*; see *Braunstein v. Lewis*, 64 L. T. 265). She may be sued by an executor to refund a legacy (*Ib.*). She may be sued by her husband for money lent after marriage (*Butler v. B.*, 16 Q. B. Div. 374), but not for money lent before marriage (*S. C.*, 14 Q. B. D. 831). Her husband's power of suing her in tort is limited by sect. 12 (*post*). She may be sued for torts committed after marriage, either alone or jointly with her husband (*Seroka v. Kattenburg*, 17 Q. B. D. 177; see *Earle v. Kingscote*, 1900, 2 Ch. 585; *Beaumont v. Kaye*, 1904, 1 K. B. 292; *Ouenod v. Leslie*, 1909, 1 K. B. 880). Judgment may be ordered against her, under R. S. C. Ord. 14 (*Downe v. Fletcher*, 21 Q. B. D. 11; *Perks v. Mylrea*, 1884, W. N. 64), or under R. S. C. Ord. 16, r. 52, as a third party, and in respect of a liability created before this act (*Gloucestershire Co. v. Phillippis*, 12 Q. B. D. 533).

For the law before this act as to judgment in common law actions against married women, see *Scott v. Morley* (20 Q. B. Div. 123, 124); and for the against judgments in Chancery actions as regards her separate estate, see *McLenny v. Davies* (10 Eq. 92); *Picard v. Hine* (5 Ch. 278). The proper form of judgment against a married woman in ordinary cases, after the Act of 1882, was settled by the Court of Appeal in *Scott v. Morley* (20 Q. B. Div. 120). It directs that the sum recovered be payable out of her separate property, and not otherwise; and that execution be limited to her separate property not subject to restriction against anticipation, unless by reason of sect. 19 the property is liable to execution notwithstanding such restriction (see *Bursill v. Tanner*, 13 Q. B. D. 691; *Nichols v. Morgan*, 16 L. R. Ir. 409; *Brown v. Morgan*, 12 L. R. Ir. 122). There is no jurisdiction to make an order that she pay the amount recovered within a fixed time (*Hulbert v. Cathcart*, 1894, 1 Q. B. 244). The form of judgment in *Scott v. Morley* was held appropriate in an action brought against a widow on a contract made during coverture (*Softlaw v. Welch*, 1899, 2 Q. B. 419). The same form was also held appropriate in an action to compel a married woman administratrix to make good a devastavit (*Re Turnbull, Turnbull v. Nicholas*, 1900,

Scott v. Morley
form.

45 & 46 Vict. 1 Ch. 180). It was said that a judgment against a married woman under c. 75, s. 1. this section was a judgment against her personally, but payable only out of her separate property (*Holtby v. Hodgson*, 24 Q. B. Div. 103; *Pelton v. Harrison*, 1892, 1 Q. B. 118).

In common form.

Since the M. W. P. Act, 1882, it has been held that judgment in common form can be obtained against a married woman personally in respect of an antenuptial debt (*Robinson v. Lynes*, 1894, 2 Q. B. 577). But such judgment cannot be enforced against restrained property except where such restraint was contained in a settlement by a married woman of her own property (*Birmingham v. Lane*, 1904, 1 K. B. 35; see *Downe v. Fletcher*, 21 Q. B. D. 11; *Maloney v. Harvey* (1895, 2 Ir. R. 169). Where judgment in common form was recovered against a married woman who had obtained a protection order, a receiver was refused of restrained property which had vested in her before the order (*Hill v. Cooper*, 1893, 2 Q. B. 85; see *Waite v. Morland*, 38 Ch. D. 135). An order directing a married woman administratrix to pay into court money belonging to the intestate and shown to be in her possession (there being no devastavit) should be in common form (*Re Turnbull, Turnbull v. Nicholas*, 1900, 1 Ch. 180). Where a married woman is rated as owner of house property, she is liable (in proceedings against her to recover poor rate) to distress, and imprisonment in default of a sufficient distress (*Re Allen*, 1894, 2 Q. B. 924).

Enforcing judgments against married women.

A judgment in the *Scott v. Morley* form is not a final judgment against the married woman on which bankruptcy proceedings can be founded (*Ex p. Coulson*, 20 Q. B. D. 251; *Ex p. Lester*, *Re Lynes*, 1893, 2 Q. B. 113; *Re Elliott*, 1900, 2 Ir. R. 439), even after the death of her husband (*Re Hewett*, *Ex p. Levene*, 1895, 1 Q. B. 328). She may be ordered to attend for examination as to her means (*Holtby v. Hodgson*, *sup.*; *Aylesford v. G. W. Ry.*, 41 W. R. 42). But no other person can be examined (*Hood-Barrs v. Heriot*, *Ex p. Blyth*, 1896, 2 Q. B. 338). A married woman cannot be committed under sect. 5 of the Debtors Act, 1869, for default in payment (*Scott v. Morley*, *sup.*; *Draycott v. Harrison*, 17 Q. B. D. 147; *Re Turnbull, Turnbull v. Nicholas*, *sup.*; see *Johnson v. Brown*, 20 L. R. Ir. 443, where a married woman was committed). On a judgment in the *Scott v. Morley* form, a garnishee order may be obtained under R. S. C. Ord. 45, r. 1 (*Holtby v. Hodgson*, 24 Q. B. Div. 103; *Barnett v. Howard*, 1900, 2 Q. B. 784), but it cannot, *semble*, be enforced against land over which she has an unexercised general power of appointment by deed or will (*Ex p. Gilchrist*, 17 Q. B. Div. 521). So a judgment against a husband and wife, payable so far as she was concerned out of her separate estate, was not enforceable by *elegit* against land subject to a general power of appointment (not exercised) vested jointly in the husband and wife (*Goatley v. Jones*, 1909, 1 Ch. 557). A judgment against a married woman in the *Scott v. Morley* form may be enforced against arrears of restrained income accrued due at the date of the judgment whether paid over or not (*Hood-Barrs v. Heriot*, 1896, A. C. 174); but not against income which accrues due after that date (*Bolitho v. Gidley*, 1905, A. C. 98). A writ of sequestration in a divorce action is not limited in its terms, but will not affect property subject to a restraint until after decree absolute (*Hyde v. H.*, 13 P. Div. 173). A woman cannot alienate either permanent alimony under the Divorce Act, 1857 (*Re Robinson*, 27 Ch. D. 160), or permanent maintenance under the Divorce Act, 1866 (*Watkins v. W.*, 1896, P. 222), or an allowance under 58 & 59 Vict. c. 39, sect. 5 (*Paquine v. Snary*, 1909, 1 K. B. 688). As to enforcing judgments against restrained property, see further the note to sect. 1 of the M. W. P. Act, 1893 (*post*, p. 366).

Where a creditor delayed entering judgment until an instalment of income had just become due a receiver was refused (*Colyer v. Isaacs*, 77 L. T. 198). The court refused to appoint a receiver of furniture settled on the husband and wife in *Whitaker v. Cohen* (69 L. T. 451). Orders have been enforced against separate property by an inquiry and a receiver (*Re Peace and Waller*, 24 Ch. Div. 405; *Perks v. Mylrea*, 1884, W. N. 64).

Where in an action on a married woman's covenant, the defendant paid

money into court on being allowed to defend, the successful plaintiff was held in any event entitled to the money (*Bird v. Barstow*, 1892, 1 Q. B. 94). 45 & 46 Vict.
c. 75, s. 1.

As to costs of proceedings instituted by a married woman, see M. W. P. Act, 1893, *post*, p. 366. An appeal by a married woman will, if it fail, be dismissed with costs in the usual way (*Perrins v. Bellamy*, 68 L. J. Ch. 397). Costs ordered to be paid by a married woman can be recovered out of any unrestrained separate property to which she is entitled at the date of the order (*Cox v. Bennett*, 1891, 1 Ch. 617). As to arrears of restrained income, see cases quoted, *sup.*, p. 350. Where an action by a married woman was dismissed with costs to be taxed and payable out of her separate property, a receiver of the only separate property she had was appointed before taxation (*Cummins v. Perkins*, 1899, 1 Ch. 16). As to actions before this act, see *Re Glanville, Ellis v. Johnson* (31 Ch. Div. 532). A married woman need not give security for costs (*Threlfall v. Wilson*, 8 P. D. 18; *Severance v. Civil Service Association*, 48 L. T. 485), even if she has no separate estate (*Re Isaac, Jacob v. Isaac*, 30 Ch. Div. 418; see *Re Robinson, Pindar v. Robinson*, 1885, W. N. 147), except in the case of an appeal (*Whittaker v. Kershaw*, 44 Ch. Div. 296; *Weldhen v. Scattergood*, 1887, W. N. 69), but not on an appeal against an order of attachment (*Hood-Barrs v. Heriot*, 1896, 2 Q. B. 375). If she sues by a next friend, the next friend may be ordered to give security (*Re Thompson, Stevens v. Thompson*, 38 Ch. Div. 317). In the case of a judgment against a married woman an order to set off costs may be made under Ord. 65, r. 27, sub-sect. (21) (*Pelton v. Harrison*, 1892, 1 Q. B. 118).

Costs.

(g) As to the power of a married woman, independently of this act, to deal by way of contract with her non-separate land, and with her separate estate, real and personal, see *ante*, pp. 319, 324. Sub-sects. (3) and (4) were repealed by the M. W. P. Act, 1893, s. 4, and replaced by sect. 1 of that Act (*post*, p. 365). The note next following contains the cases decided on the repealed sub-sections. Contracts.

Sub-sects. (2), (3) and (4) were held not to apply to a contract made before 1883 (*Conolan v. Leyland*, 27 Ch. D. 632; *Turnbull v. Forman*, 15 Q. B. Div. 234; *Roper v. Doncaster*, 39 Ch. D. 482; *contra, Bursill v. Tanner*, 13 Q. B. D. 691). In order to bind her separate property by contract, it was held under sub-sect. (3) that a married woman must have some free separate property at the date of the contract, otherwise she could not contract (*Palliser v. Gurney*, 19 Q. B. Div. 521; *Braunstein v. Lewis*, 64 L. T. 265; *Re Shakespear, Deakin v. Lakin*, 30 Ch. D. 169; *Stogdon v. Lee*, 1891, 1 Q. B. 661). The onus was on the person suing on the contract to prove that she had separate property at that date (*Palliser v. Gurney, sup.*; see *Re Fieldwick, Johnson v. Adamson*, 1909, 1 Ch. 1). And it was said that the statement of claim should contain an allegation to that effect (*Tetley v. Griffith*, 57 L. T. 673). The test of liability was whether at the date of the contract the married woman had separate property with respect to which she could reasonably be deemed to have contracted (*Leak v. Driffield*, 24 Q. B. D. 101; see *Bonner v. Lyon*, 38 W. R. 541; *Everett v. Paxton*, 65 L. T. 383; *Re Fieldwick, sup.*). It was held not sufficient that she was then possessed of clothes (*Ib.*), or of inalienable property (*Harrison v. Harrison*, 13 P. Div. 180), in which last case it was said that the inalienability of the property showed "the contrary" within sub-sect. (3) (see *Draycott v. Harrison*, 17 Q. B. D. 147; *Myles v. Burton*, 14 L. R. Ir. 259). As to property over which a married woman has an unexercised power of appointment, see *Ex p. Gilchrist, Re Armstrong* (17 Q. B. Div. 521); *Re Roper, Roper v. Doncaster* (39 Ch. D. 482). Decisions
under sub-
sects. (3) and
(4), now
repealed.

Under sub-sect. (4) it was also held that separate property of a married woman having once become bound by her contract during coverture was not freed by ceasing to be "separate" on her husband's death (*Pelton v. Harrison*, 1891, 2 Q. B. 426). And that where the separate property was subject to a restraint on anticipation it was not brought within sub-sect. (4) by reason of the subsequent death of the husband (*Beckett v. Tasker*, 19 Q. B. D. 7; *Pelton v. Harrison*, 1891, 2 Q. B. 422). The property

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c. 75, s. 1.

Sub-sect. (5).
Bankruptcy.

referred to in sub-sect. (4) must have been acquired during coverture (*Ib.*); but it was sufficient if it had been acquired during a second coverture (*Jay v. Robinson*, 25 Q. B. Div. 467).

(h) A married woman with separate property, not trading separate from her husband, is not subject to the bankruptcy laws (*Ex p. Coulson*, 20 Q. B. D. 249). And a receiving order cannot be made against her after marriage, even on a petition presented before marriage (*Re A Debtor*, 1898, 2 Q. B. 576).

A trade belonging exclusively to a married woman, is a trade carried on by her separately from her husband, even where it is managed by him partially (*Re Worsley*, 1901, 1 K. B. 309) or wholly (*Re Simon*, 1909, 1 K. B. 201). Carrying on a farm is not "carrying on a trade" (*Re Long*, 1905, 2 I. R. 343). See, further, the note to sect. 1 of the M. W. P. Act, 1870, *ante*, p. 340.

As regards the initiation of bankruptcy proceedings, a bankruptcy notice cannot be issued upon a judgment (in the *Scott v. Morley* form) recovered against a married woman in respect of trade debts (*Re Lynes*, 1893, 2 Q. B. 113; see *Re Hewett*, 1895, 1 Q. B. 328), nor upon a judgment in ordinary form against the firm under the name of which she is trading (*Re Handford*, 1899, 1 Q. B. 566). But a bankruptcy petition may be presented against her (*Re Dagnall*, 1896, 2 Q. B. 407), and on such a petition a receiving order can be made in respect of debts incurred while trading, even after the married woman has ceased to trade (*Ib.*; *Re Worsley*, 1901, 1 Q. B. 309). To give the Court jurisdiction to make a married woman a bankrupt it is not necessary to prove the existence of separate property at the time when the receiving order is made (*Re Simon*, 1909, 1 K. B. 205).

"Separate property" in this sub-section does not include property over which a married woman has an unexercised general power of appointment (*Ex p. Gilchrist*, 17 Q. B. Div. 521; see *Goatley v. Jones*, 1909, 1 Ch. 557); and she cannot be compelled to exercise such a power for the benefit of creditors (*Ib.*); but it does include a life estate under a settlement where there is no restraint on anticipation (*Ex p. Boyd*, 21 Q. B. Div. 264). Where a married woman entitled to a restrained life interest and trading separately from her husband became bankrupt in 1891, and her husband subsequently died, it was held that under sub-sect. (5) and sect. 19 the whole life interest vested in the bankruptcy trustee subject only to the restraint on anticipation, and on such restraint ceasing by the husband's death the bankruptcy trustee was entitled (*Re Wheeler, Briggs v. Ryan*, 1899, 2 Ch. 722; compare the different rule established in the case of judgment creditors; *Beckett v. Tasker*, 19 Q. B. D. 7; *Pelton v. Harrison*, 1891, 2 Q. B. 422; *Softlaw v. Welch*, 1899, 2 Q. B. 419; and see *Pike v. Fitzgibbon*, 17 Ch. D. 463).

Property of
a woman
married after
the act to be
held by her as
a *feme sole*.

2. Every woman who marries after the commencement of this act shall be entitled to have and to hold as her separate property and to dispose of in manner aforesaid all real and personal property which shall belong to her at the time of marriage, or shall be acquired by or devolve upon her after marriage, including any wages, earnings, money, and property gained or acquired by her in any employment, trade, or occupation, in which she is engaged, or which she carries on separately from her husband, or by the exercise of any literary, artistic, or scientific skill.

The effect of this section is to add the incident of separate use to the interest of the married woman in any property which belongs to her at the time of marriage (*Re Onslow, Plowden v. Gayford*, 39 Ch. D. 622), or accrues afterwards (*Re Davenport, Turner v. King*, 1895, 1 Ch. 361). This separate use is sufficient to support a restraint on anticipation (*Re Lumley, Ex p. Hood-Barrs*, 1896, 2 Ch. 696). It also renders separate examination

unnecessary (*Riddell v. Errington*, 26 Ch. D. 220; see *Re Batt*, 1897, 2 Ch. 65). This section extends to the enlarging by a married woman after her marriage of a base fee which had been disposed of by her to a purchaser before her marriage (*Re Drummond and Davie*, 1891, 1 Ch. 524). See further, the note to sect. 1, sub-sect. 1, *ante*, p. 347. And as to separate trading, see the notes to sect. 1 of the M. W. P. Act, 1870 (*ante*, p. 340), and to sect. 1, sub-sect. 5 of the M. W. P. Act, 1882, *ante*, p. 352.

By Matrimonial Causes Act, 1857, s. 21, a wife deserted by her husband may apply to a police magistrate or justices in petty sessions for an order to protect any money or property she may acquire by her own lawful industry; and by virtue of the order such earnings and property will belong to her as if she were a *feme sole*.

3. Any money or other estate of the wife lent or entrusted by her to her husband for the purpose of any trade or business carried on by him, or otherwise, shall be treated as assets of her husband's estate in case of his bankruptcy, under reservation of the wife's claim to a dividend as a creditor for the amount or value of such money or other estate after, but not before, all claims of the other creditors of the husband for valuable consideration in money or money's worth have been satisfied.

"Other estate" included furniture (*Re Donaldson*, 1902, 2 I. R. 310). As regards money, the wife claiming to prove in her husband's bankruptcy must, generally speaking, show that money lent by her to the husband was not lent for the purpose of his trade (*Re Genese*, 16 Q. B. D. 700; see *Re Cronmire*, 1901, 1 Q. B. 480). She may prove in competition with creditors for money lent to a partnership of which her husband is a member (*Re Tuff*, 19 Q. B. D. 88); or for money lent to the husband for private purposes (*Re Tidswell*, 56 L. J. Q. B. 548; *Mackintosh v. Pogose*, 1895, 1 Ch. 505; *Re Clark, Ex p. Schulze*, 1898, 2 Q. B. 330; see, however, *Alexander v. Barnhill*, 21 L. R. Ir. 511). Property mortgaged by a wife to secure a debt owing by her husband to a third party, and subsequently applied in discharge of it, is not lent or entrusted to him within this section (*Alexander v. Barnhill, sup.*; see *Re Cronmire*, 1901, 1 Q. B. 480; *Mercier v. M.*, 1903, 2 Ch. 98). Where a husband, who had borrowed his wife's separate estate for his own business, died insolvent, having appointed his wife executrix, she could retain the debt (*Re May, Crawford v. May*, 45 Ch. D. 499; *Re Simpson*, 1 Ir. R. 530; *Re Ambler, Woodhead v. Ambler*, 1905, 1 Ch. 697); but where she was not her husband's representative, and his estate was administered by the court, she was postponed (*Re Leng, Tarn v. Emmerson*, 1895, 1 Ch. 652; *contra, Moore v. Smith*, 1895, 1 Ir. R. 512).

As to how far the act is retrospective, see *Re Home* (54 L. T. 301). As to the rights of a husband lending money to a wife for her business, see *Butler v. Butler* (14 Q. B. D. 831; 16 Q. B. D. 374).

4. The execution of a general power by will by a married woman shall have the effect of making the property appointed liable for her debts and other liabilities in the same manner as her separate estate is made liable under this act.

The antenuptial debts of a married woman can be recovered out of property appointed by her under a general testamentary power (*Re Parkin, Hill v. Schwarz*, 1892, 3 Ch. 510).

As to engagements entered into by her during coverture on the credit of her separate estate, it was said by *Kay, J.*, that according to the law before the present act, property appointed by will under a general power was not assets for payment thereof, whether the power of appointment was by deed or will, or by will only (*Re Roper, Roper v. Doncaster*, 39 Ch. D. 488, 491; see *Ex p. Gilchrist, Re Armstrong*, 17 Q. B. D. 532); inasmuch as such

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c. 75, s. 2.

Loans by wife
to husband.

Execution of
general
power:

Recovery of a
married
woman's
debts out
of property
appointed by
her will.
Antenuptial
debts.

45 & 46 Vict.
c. 75, s. 4.

Postnuptial
debts.
Rule before
M. W. P. Act,
1882.

Rule under
M. W. P. Act,
1882.

Rule under
M. W. P. Act,
1893.

Cases under
the present
section.

Property
acquired after
the act by a
woman
married
before the
act to be
held by her as
a *feme sole*.

property could not be said to have been her separate property at the time of the engagement (see *Pike v. FitzGibbon*, 17 Ch. D. 454, quote *ante*, p. 324).

This *dictum* of Kay, J., however, is opposed to decisions holding that property appointed under a general power was assets for payment of these engagements where the power was either a power to appoint by deed or will (*London & Chartered Bank v. Lempriere*, 4 P. C. 572; *Mayd v. Field*, 3 Ch. D. 587); or by will only (*Re Harvey, Godfrey v. Harben*, 13 Ch. D. 216; *Hodges v. Hodges*, 20 Ch. D. 749). See the criticism on the last-mentioned cases (39 Ch. D. 489, 490).

In cases within the M. W. P. Act, 1882, but not within the M. W. P. Act, 1893, *post*, the above section makes property appointed by will under a general power assets applicable for payment of the postnuptial debts of a married woman, where at the time she contracted the debt she had some separate property (see *Palliser v. Gurney*, 19 Q. B. Div. 521). But not where she had no separate property at that time (*Re Fieldwick, Johnson v. Adamson*, 1909, 1 Ch. 1). See as to the order of application, *Re Williams, Green v. Burgess*, 59 L. T. 310.

In cases within the M. W. P. Act, 1893, the appointed property is assets for payment of her postnuptial debts whether at the time of the contract she had separate property or not (M. W. P. Act, 1893, sect. 1, *post*, p. 365).

The present section was held to apply:—where a sum was expressed to be appointed in satisfaction of a debt in fact owing from another person, which debt was paid by him after the death of the testatrix (*Re Hodgson, Darley v. Hodgson*, 1899, 1 Ch. 666); where the married woman's debts had been incurred before the M. W. P. Act, 1882, under a protection order (*Re Hughes, Brandon v. Hughes*, 1898, 1 Ch. 529).

Before the M. W. P. Act, 1882, it was held that sect. 27 (as to general powers) of the Wills Act, 1837 (*post*), applied to the wills of married women (*Bernard v. Minshull*, Johns. 296). Sect. 24 now also applies to them (M. W. P. Act, 1893, s. 3, *post*, p. 367, where see note).

In the case of persons other than married women the execution of a general testamentary power makes the appointed property assets for payment of the appointor's debts (*Fleming v. Buchanan*, 3 D. M. G. 976; Land Transf. Act, 1897, s. 1, sub-s. 2, *post*).

A married woman's funeral expenses were payable out of property appointed by her will (*Re M'Myn, Lightbown v. M'Myn*, 33 Ch. D. 575).

5. Every woman married before the commencement of this act shall be entitled to have and to hold and to dispose of in manner aforesaid as her separate property all real and personal property, her title to which, whether vested or contingent, and whether in possession, reversion, or remainder, shall accrue after the commencement of this act, including any wages, earnings, money, and property so gained or acquired by her as aforesaid.

The words "her title" mean the title which first accrued to her, whether vested, contingent, in possession, in remainder, or in reversion (*Reid v. Reid*, 31 Ch. Div. 411; *Re Tucker, Emmanuel v. Parfitt*, 52 L. T. 923; 33 W. R. 932; *Re Adames*, 53 L. T. 198; 33 W. R. 834; *Re Hobson, Webster v. Rickards*, 55 L. J. Ch. 300; 34 W. R. 195; *Re Tench, Ex p. McCormack*, 15 L. R. Ir. 406). Where, accordingly, the title in reversion accrued before the act, but the property fell into possession after the act, the section did not apply (*Reid v. Reid, sup.*; compare the construction placed on a covenant to settled after acquired property, *Re Bland, Bland v. Perkins*, 1905, 1 Ch. 4). Nor was the section made applicable by reason of a conversion into money after the act (*Re Bacon, Toovey v. Turner*, 1907, 1 Ch. 475).

A mere *spes successionis* claimed by A. as one of a possible class of next of kin, is not a contingent title within this section (*Re Parsons, Stockley v. Parsons*, 45 Ch. D. 51 (*Re Simpson, S. v. S.*, 1904, 1 Ch. 1; *contra, Re Beaupré*, 21 L. R. Ir. 397). As to how far this section affects settlements, see sect. 19 (*post*, p. 362).

This section applies to money recovered by the verdict of a jury, even in an action in which the husband is co-plaintiff (*Beasley v. Roney*, 1891, 1 Q. B. 509). 45 & 46 Vict. c. 75, s. 5.

As to the power of a woman married before this act over separate property acquired before this act, see *ante*, p. 324.

6. All deposits in any post-office or other savings-bank, or in any other bank, all annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, and all sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England, or of any other bank, which at the commencement of this act are standing in the sole name of a married woman, and all shares, stock, debentures, debenture stock, or other interests of or in any corporation, company, or public body, municipal, commercial, or otherwise, or of or in any industrial, provident, friendly, benefit, building, or loan society, which at the commencement of this act are standing in her name, shall be deemed, unless and until the contrary be shown, to be the separate property of such married woman; and the fact that any such deposit, annuity, sum forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Governor and Company of the Bank of England or of any other bank, share, stock, debenture, debenture stock, or other interest as aforesaid, is standing in the sole name of a married woman, shall be sufficient *prima facie* evidence that she is beneficially entitled thereto for her separate use, so as to authorise and empower her to receive or transfer the same, and to receive the dividends, interest, and profits thereof, without the concurrence of her husband, and to indemnify the Postmaster-General, the Commissioners for the Reduction of the National Debt, the Governor and Company of the Bank of England, the Governor and Company of the Bank of Ireland, and all directors, managers, and trustees of every such bank, corporation, company, public body, or society as aforesaid, in respect thereof.

As to stock, &c., to which a married woman is entitled.

As to the probate of the will of a married woman having money standing in her name in the savings bank, see *Harding v. Sutton* (59 L. T. 839). As to investments held by a married woman as trustee, see sect. 18 (*post*, p. 362).

7. All sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England or of any other bank, and all such deposits and annuities respectively as are mentioned in the last preceding section, and all shares, stock, debentures, debenture stock, and other interests of or in any such corporation, company, public body, or society as aforesaid, which after the commencement of this act shall be allotted to or placed, registered, or transferred in or into or made to stand in the sole name of any married woman shall be deemed, unless and until the contrary be shown, to be her separate property, in respect of which so far as any

As to stock, &c., to be transferred, &c., to a married woman.

45 & 46 Vict.
c. 75, s. 7.

liability may be incident thereto her separate estate shall alone be liable, whether the same shall be so expressed in the document whereby her title to the same is created or certified, or in the books or register wherein her title is entered or recorded, or not.

Provided always, that nothing in this act shall require or authorise any corporation or joint stock company to admit any married woman to be a holder of any shares or stock therein to which any liability may be incident, contrary to the provisions of any act of parliament, charter, bye-law, articles of association, or deed of settlement regulating such corporation or company.

Where shares standing in a married woman's name represented savings from her separate estate, her husband was not liable as a contributory (*Belcher's Case*, 1883, W. N. 94). But a deposit made by a wife in her own name out of remittances by her husband belonged to him (*Birkett v. B.*, 24 Times L. R. 284).

In the case of a woman married before the commencement of the present Act her husband may be a contributory in respect of shares acquired by her before that date (Companies Consolidation Act, 1908, s. 128; see *Ex parte Hatcher*, 12 Ch. D. 284; quoted *ante*, p. 345). Her name alone should not be placed on the list (*Lang's Case*, 4 App. Cas. 562; compare *Re London and Bombay Bank*, 18 Ch. D. 581).

Investments
in joint names
of married
women and
others.

8. All the provisions hereinbefore contained as to deposits in any post-office or other savings-bank, or in any other bank, annuities granted by the Commissioners for the Reduction of the National Debt or by any other person, sums forming part of the public stocks or funds, or of any other stocks or funds transferable in the books of the Bank of England, or of any other bank, shares, stock, debentures, debenture stock, or other interests of or in any such corporation, company, public body, or society as aforesaid respectively, which at the commencement of this act shall be standing in the sole name of a married woman, or which, after that time, shall be allotted to, or placed, registered, or transferred to or into, or made to stand in, the sole name of a married woman, shall respectively extend and apply, so far as relates to the estate, right, title, or interest of the married woman, to any of the particulars aforesaid which, at the commencement of this act, or at any time afterwards, shall be standing in, or shall be allotted to, placed, registered, or transferred to or into, or made to stand in, the name of any married woman jointly with any persons or person other than her husband.

As to stock,
&c., standing
in the joint
names of a
married
woman
and others.

9. It shall not be necessary for the husband of any married woman, in respect of her interest, to join in the transfer of any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society as aforesaid, which is now or shall at any time hereafter be standing in the sole name of any married woman, or in the joint names of such married woman and any other person or persons not being her husband.

10. If any investment in any such deposit or annuity as aforesaid, or in any of the public stocks or funds, or in any other stocks or funds transferable as aforesaid, or in any share, stock, debenture, or debenture stock of any corporation, company, or public body, municipal, commercial, or otherwise, or in any share, debenture, benefit, right, or claim whatsoever in, to, or upon the funds of any industrial, provident, friendly, benefit, building, or loan society, shall have been made by a married woman by means of moneys of her husband, without his consent, the court may, upon an application under section seventeen of this act, order such investment, and the dividends thereof, or any part thereof, to be transferred and paid respectively to the husband; and nothing in this act contained shall give validity as against creditors of the husband to any gift, by a husband to his wife, of any property, which, after such gift shall continue to be in the order and disposition or reputed ownership of the husband, or to any deposit or other investment of moneys of the husband made by or in the name of his wife in fraud of his creditors; but any moneys so deposited or invested may be followed as if this Act had not passed.

45 & 46 Vict.
c. 75, s. 10.

Fraudulent
investments
with money
of husband.

11. A married woman may by virtue of the power of making contracts hereinbefore contained effect a policy upon her own life or the life of her husband for her separate use; and the same and all benefit thereof shall enure accordingly.

Moneys payable under
policy of
assurance not
to form part
of estate of
the insured.

A policy of assurance effected by any man on his own life, and expressed to be for the benefit of his wife, or of his children, or of his wife and children, or any of them, or by any woman on her own life, and expressed to be for the benefit of her husband, or of her children, or of her husband and children, or any of them, shall create a trust in favour of the objects therein named, and the moneys payable under any such policy shall not, so long as any object of the trust remains unperformed, form part of the estate of the insured, or be subject to his or her debts: Provided, that if it shall be proved that the policy was effected and the premiums paid with intent to defraud the creditors of the insured, they shall be entitled to receive, out of the moneys payable under the policy, a sum equal to the premiums so paid. The insured may by the policy, or by any memorandum under his or her hand, appoint a trustee or trustees of the moneys payable under the policy, and from time to time appoint a new trustee or new trustees thereof, and may make provision for the appointment of a new trustee or new trustees thereof, and for the investment of the moneys payable under any such policy. In default of any such appointment of a trustee, such policy, immediately on its being effected, shall vest in the insured and his or her legal personal representatives, in trust for the purposes aforesaid. If, at the time of the death of the insured, or at any time afterwards, there shall be no trustee, or it shall be expedient to appoint a new trustee or

45 & 46 Vict. c. 75, s. 11. new trustees, a trustee or trustees or new trustee or new trustees may be appointed by any court having jurisdiction under the provisions of the Trustee Act, 1850, or the acts amending and extending the same. The receipt of a trustee or trustees duly appointed, or, in default of any such appointment, or in default of notice to the insurance office, the receipt of the legal personal representative of the insured shall be a discharge to the office for the sum secured by the policy, or for the value thereof, in whole or in part.

13 & 14 Vict. c. 60.

See the note to sect. 10 of the M. W. P. Act, 1870 (*ante*, p. 342). The present section does not apply to policies effected under sect. 10 of the M. W. P. Act, 1870 (*Re Turnbull, T. v. T.*, 1897, 2 Ch. 415; *Re Kuypers*, 1899, 1 Ch. 38). Upon a motion to appoint a trustee there is no jurisdiction to decide the rights of the widow and children *inter se* (*Re Graham*, 29 L. R. Ir. 498).

A policy was effected by a husband and wife for benefit of the survivor, each contributing to the premium, and the wife died first; the insurance was valid as within the above words "a policy effected by any woman on her own life" (*Griffiths v. Fleming*, 1909, 1 K. B. 805). Where a policy was effected by a husband and expressed to be for the benefit of his wife and children in conformity with this act, a second wife and her child participated with the children of the first marriage, all taking as joint tenants (*Re Browne*, 1903, 1 Ch. 188; see *Re Parker*, 1906, 1 Ch. 526). Compare the construction placed on powers to appoint income to a wife (*Re Hancock Malcolm v. Burford Hancock*, 1896, 2 Ch. 173) and to jointure (*Marlborough v. Marlborough*, 1901, 1 Ch. 165).

Where a wife was convicted of murdering her husband, neither she nor anyone claiming under her could claim the amount of a policy effected by the husband for her benefit, but there was a resulting trust in favour of the husband's estate (*Cleaver v. Mutual Association*, 1892, 1 Q. B. 147).

A policy effected by a wife on her own life for the benefit of her husband belonged where the husband predeceased his wife to his executor (*Prescott v. P.*, 1906, 1 I. R. 155).

Remedies of married woman for protection and security of separate property.

12. Every woman, whether married before or after this act, shall have in her own name against all persons whomsoever, including her husband, the same civil remedies, and also (subject, as regards her husband, to the proviso hereinafter contained) the same remedies and redress by way of criminal proceedings, for the protection and security of her own separate property, as if such property belonged to her as a feme sole, but, except as aforesaid, no husband or wife shall be entitled to sue the other for a tort. In any indictment or other proceeding under this section, it shall be sufficient to allege such property to be her property: and in any proceeding under this section a husband or wife shall be competent to give evidence against each other, any statute or rule of law to the contrary notwithstanding: Provided always, that no criminal proceeding shall be taken by any wife against her husband by virtue of this act while they are living together, as to or concerning any property claimed by her, nor while they are living apart, as to or concerning any act done by the husband while they were living together, concerning property claimed by the wife, unless such property shall have been wrongfully taken by the husband when leaving or deserting, or about to leave or desert, his wife.

As to the civil proceedings which can be commenced by a married woman, see *ante*, p. 348. As regards criminal proceedings it has been held that in an indictment for stealing her separate goods they cannot be laid as the property of her husband (*R. v. Murray*, 1906, 2 K. B. 385). A married woman cannot criminally prosecute her husband for personal libel on herself (*R. v. London*, 16 Q. B. D. 772; see *Tinkley v. T.*, 24 Times L. R. 691). See also as to the proviso in the section, *Lemon v. Simmons* (36 W. R. 350; 57 L. J. Q. B. 260).

45 & 46 Vict.
c. 75, s. 12.

13. A woman after her marriage shall continue to be liable in respect and to the extent of her separate property for all debts contracted, and all contracts entered into or wrongs committed by her before her marriage, including any sums for which she may be liable as a contributory, either before or after she has been placed on the list of contributories, under and by virtue of the acts relating to joint stock companies; and she may be sued for any such debt and for any liability in damages or otherwise under any such contract, or in respect of any such wrong; and all sums recovered against her in respect thereof, or for any costs relating thereto, shall be payable out of her separate property; and, as between her and her husband, unless there be any contract between them to the contrary, her separate property shall be deemed to be primarily liable for all such debts, contracts, or wrongs, and for all damages or costs recovered in respect thereof: Provided always, that nothing in this act shall operate to increase or diminish the liability of any woman married before the commencement of this act for any such debt, contract, or wrong, as aforesaid, except as to any separate property to which she may become entitled by virtue of this act, and to which she would not have been entitled for her separate use under the acts hereby repealed or otherwise, if this act had not passed.

Wife's ante-nuptial debts and liabilities.

The words "before the marriage" mean before the existing marriage, including the period of any previous marriage and the interval between the two marriages (*Jay v. Robinson*, 25 Q. B. Div. 472); and the word "debt" includes both common law debts contracted by a woman whilst she is a *feme sole*, and debts contracted under the act in respect of her separate property (*Ib.* p. 474). A husband cannot under this section sue his wife in respect of loans made by him to her before marriage (*Butler v. B.*, 14 Q. B. D. 836). Judgment can be recovered against a married woman personally for an antenuptial debt (*Robinson v. Lynes*, 1894, 2 Q. B. 577). In the case of women married since 1882, where a restraint exists, this section must be read in conjunction with sect. 19, which may prevent the property being made available to satisfy an antenuptial debt (*Birmingham v. Lane*, 1904, 1 K. B. 38).

14. A husband shall be liable for the debts of his wife contracted, and for all contracts entered into and wrongs committed by her, before marriage, including any liabilities to which she may be so subject under the acts relating to joint-stock companies as aforesaid, to the extent of all property whatsoever belonging to his wife which he shall have acquired or become entitled to from or through his wife, after deducting therefrom any payments made by him, and any sums for which judgment

Husband to be liable for his wife's debts contracted before marriage to a certain extent.

45 & 46 Vict.
c. 75, s. 14.

may have been *bonâ fide* recovered against him in any proceeding at law, in respect of any such debts, contracts, or wrongs for or in respect of which his wife was liable before her marriage as aforesaid; but he shall not be liable for the same any further or otherwise; and any court in which a husband shall be sued for any such debt shall have power to direct any inquiry or proceedings which it may think proper for the purpose of ascertaining the nature, amount, or value of such property: Provided always, that nothing in this act contained shall operate to increase or diminish the liability of any husband married before the commencement of this act for or in respect of any such debt or other liability of his wife as aforesaid.

The husband is still liable for the wrongs committed by his wife after marriage (*Seroka v. Kattenburg*, 17 Q. B. D. 177; see *Earle v. Kingscote*, 1900, 2 Ch. 585; *Cuenod v. Leslie*, 1909, 1 K. B. 880). Judgment recovered against a wife, who has no separate property, in respect of an antenuptial debt, is no defence to an action against the husband for the same debt (*Beck v. Pierce*, 23 Q. B. Div. 316). A husband married since 1882 may be sued alone for his wife's antenuptial debts, whether she be alive or dead (*Ib.* p. 321). If the wife is sued alone she cannot require her husband to be joined, and if he is sued alone, he cannot require her to be joined (*Ib.*). Under the Stat. Lim. time runs in favour of the husband in respect of an antenuptial debt of the wife from the cause of action, not the marriage, and no acknowledgment or part payment by the wife after marriage will alter this (*Ib.* p. 322).

Suits for
antenuptial
liabilities.

15. A husband and wife may be jointly sued in respect of any such debt or other liability (whether by contract or for any wrong) contracted or incurred by the wife before marriage as aforesaid, if the plaintiff in the action shall seek to establish his claim, either wholly or in part, against both of them; and if in any such action, or in any action brought in respect of any such debt or liability against the husband alone, it is not found that the husband is liable in respect of any property of the wife so acquired by him or to which he shall have become so entitled as aforesaid, he shall have judgment for his costs of defence, whatever may be the result of the action against the wife if jointly sued with him; and in any such action against husband and wife jointly, if it appears that the husband is liable for the debt or damages recovered, or any part thereof, the judgment to the extent of the amount for which the husband is liable shall be a joint judgment against the husband personally and against the wife as to her separate property; and as to the residue, if any, of such debt and damages, the judgment shall be a separate judgment against the wife as to her separate property only.

As to this joint judgment, see *Beck v. Pierce* (23 Q. B. Div. 321).

Act of wife
liable to
criminal
proceedings.

16. A wife doing any act with respect to any property of her husband, which, if done by the husband with respect to property of the wife, would make the husband liable to criminal proceedings by the wife under this act, shall in like manner be liable to criminal proceedings by her husband.

The stealing by a wife of her husband's property is made a criminal offence by this act (*R. v. Payne*, 1906, 1 K. B. 97; see *R. v. James*, 1902, 1 K. B. 540). 45 & 46 Vict. c. 75, s. 16.

Doubts having arisen on the subject of evidence (see *R. v. Brittledon*, 12 Q. B. Div. 266), it was enacted that in any criminal proceeding against a husband or wife authorised by the present act, the husband and wife respectively should be competent and admissible witnesses, and (except when defendant) compellable to give evidence (M. W. P. Act, 1884). See also sect. 4 of the Criminal Evidence Act, 1898.

17. In any question between husband and wife as to the title to or possession of property, either party, or any such bank, corporation, company, public body, or society as aforesaid in whose books any stocks, funds, or shares of either party are standing, may apply by summons or otherwise in a summary way to any judge of the High Court of Justice in England or in Ireland, according as such property is in England or Ireland, or (at the option of the applicant irrespectively of the value of the property in dispute) in England to the judge of the county court of the district, or in Ireland to the chairman of the civil bill court of the division in which either party resides, and the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court (as the case may be) may make such order with respect to the property in dispute, and as to the costs of and consequent on the application as he thinks fit, or may direct such application to stand over from time to time, and any inquiry touching the matters in question to be made in such manner as he shall think fit: Provided always, that any order of a judge of the High Court of Justice to be made under the provisions of this section shall be subject to appeal in the same way as an order made by the same judge in a suit pending or on an equitable plaint in the said court would be; and any order of a county or civil bill court under the provisions of this section shall be subject to appeal in the same way as any other order made by the same court would be, and all proceedings in a county court or civil bill court under this section in which, by reason of the value of the property in dispute, such court would not have had jurisdiction if this act or the Married Women's Property Act, 1870, had not passed, may, at the option of the defendant or respondent to such proceedings, be removed as of right into the High Court of Justice in England or Ireland (as the case may be) by writ of certiorari or otherwise as may be prescribed by any rule of such High Court; but any order made or act done in the course of such proceedings prior to such removal shall be valid, unless order shall be made to the contrary by such High Court: Provided also, that the judge of the High Court of Justice or of the county court, or the chairman of the civil bill court, if either party so require, may hear any such application in his private room: Provided also, that any such bank, corporation, company, public body, or society as aforesaid, shall, in the matter

Questions between husband and wife as to property to be decided in a summary way.

45 & 46 Vict. of any such application for the purposes of costs or otherwise,
c. 75, s. 17. be treated as a stakeholder only.

Applications under this section have been made by originating summons as regards a public-house (*Gaynor v. G.*, 1901, 1 L. R. 217), also by motion in divorce actions, as regards furniture (*Phillips v. P.*, 13 P. D. 220), and as regards paraphernalia (*Tasker v. T.*, 1895, P. 1). In such an action the registrar cannot under this section make an order to hand over property (*Wood v. W.*, 14 P. D. 157). Where there is no action the application should be by originating summons (see the form Dan. Ch. F. p. 1244, 5th ed., and Table of Titles in the Annual Practice).

Married
woman as an
executrix or
trustee.

18. A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued, and may transfer or join in transferring any such annuity or deposit as aforesaid, or any sum forming part of the public stocks or funds, or of any other stocks or funds transferable as aforesaid, or any share, stock, debenture, debenture stock, or other benefit, right, claim, or other interest of or in any such corporation, company, public body, or society in that character, without her husband, as if she were a feme sole.

A married woman who is an executrix or trustee may under the earlier part of this section sue or be sued in respect of the trust property, whatever its nature may be (*Re Harkness and Allsopp*, 1896, 2 Ch. 363). She can also dispose without her husband of real or personal property held by her as trustee or personal representative (M. W. P. Act, 1907, sect. 1, *post*; see as to the law before this act, *Re Harkness and Allsopp*, *sup.*). Similarly she can convey land as a "bare trustee" within sect. 16 of the Trustee Act, 1893 (*post*), without any acknowledgment or the concurrence of her husband (*Re Docwra, Docwra v. Faith*, 29 Ch. D. 693). So where she is a paid-off mortgagee (*Re Howgate and Osborn*, 1902, 1 Ch. 451). As to the form of order directing payment to a married woman trustee, see *Re Hawksworth* (1887, W. N. 113); and as to orders directing payment by her, see note to sect. 24, *post*.

Saving of
existing
settlements,
and the power
to make
future settle-
ments.

19. Nothing in this act contained shall interfere with or affect any settlement or agreement for a settlement made or to be made, whether before or after marriage, respecting the property of any married woman (*i*), or shall interfere with or render inoperative any restriction against anticipation at present attached or to be hereafter attached to the enjoyment of any property or income by a woman under any settlement, agreement for a settlement, will, or other instrument (*k*); but no restriction against anticipation contained in any settlement or agreement for a settlement of a woman's own property to be made or entered into by herself shall have any validity against debts contracted by her before marriage, and no settlement or agreement for a settlement shall have any greater force or validity against creditors of such woman than a like settlement or agreement for a settlement made or entered into by a man would have against his creditors (*l*).

(i) The earlier part of this section applies to all settlements, whether made before or after marriage, not only to what are popularly called marriage settlements (*Re Armstrong, Ex p. Boyd*, 21 Q. B. Div. 271). 45 & 46 Vict. c. 75, s. 19.

The words "interfere with or affect" mean "invalidate or render inoperative" (*Re Armstrong, Ex p. Boyd*, 21 Q. B. Div. 270, 273). The effect of the settlement is to be determined as it would have been under the old law. And no one who under that law could have taken any interest is to be deprived of such interest (*Re Onslow, Plowden v. Gayford*, 39 Ch. D. 625). Sect. 19 prevents the act from interfering with any settlement which would have bound the property if the act had not been passed (*Hancock v. H.*, 38 Ch. Div. 90). So, in the case of settlements before 1908, a husband's covenant in a settlement made in 1870, to settle property coming to him in right of his wife, was held notwithstanding sect. 5 (*ante*) to bind property bequeathed to her in 1883 (*Ib.*). Again, a covenant by the husband and wife, in a settlement prior to 1882, to settle property not limited to the wife's separate use, bound property acquired by her after 1882 (*Re Stonor*, 24 Ch. D. 195; *Re Whitaker, Christian v. Whitaker*, 34 Ch. Div. 227). And a settlement since 1882 by the intended husband and wife (the latter being an infant) of funds coming to the latter on her marriage was held binding though the wife on attaining twenty-one repudiated the settlement (*Stevens v. Trevor-Garrick*, 1893, 2 Ch. 307; *Buckland v. B.*, 1900, 2 Ch. 534). See now, as to settlements by the husband after 1907, sect. 2 of the M. W. P. Act, 1907, *post*, p. 368.

On the other hand, where a married woman was entitled to separate property under a settlement made before the act, the incidents annexed by the act to separate property (*e.g.*, the liability to alienation on bankruptcy) attached to it (*Re Armstrong, Ex p. Boyd*, 21 Q. B. Div. 264). Again, where a woman entitled under a settlement made in 1878 to a life interest, with remainder (in default of her testamentary appointment) to herself absolutely, re-married since 1882, she held all her interest as *feme sole* (*Re Onslow, Plowden v. Gayford*, 39 Ch. D. 622). And where since 1882 property is settled on a married woman subject to a restraint on anticipation, but without the words "for her separate use," the separate use arising under sects. 1 and 2 of the present Act will support the restraint (*Re Lumley, Ex p. Hood-Barrs*, 1896, 2 Ch. 690).

(k) As to the creation and effect of a restraint against anticipation, see *ante*, p. 325. And as to enforcing against restrained income judgments recovered against a married woman since the act, see the cases quoted *ante*, p. 350.

Where the restraint was contained not in a settlement made by a married woman of her own property but in a separation deed, the latter part of the section did not apply, and the earlier words prevented the restrained income from being made available to satisfy her antenuptial debt (*Birmingham v. Lane*, 1904, 1 K. B. 35).

(l) The latter part of the section has no operation on settlements made before the act (*Beckett v. Tasker*, 19 Q. B. D. 12; *Smith v. Whitlock*, 34 W. R. 414; 55 L. J. Q. B. 286). The words "before marriage" mean before her existing marriage, and include the period of a previous marriage and the interval between the two marriages (*Jay v. Robinson*, 25 Q. B. Div. 472). The word "debts" includes both common law debts contracted by a woman whilst a *feme sole*, and debts contracted under the act in respect of her separate property (*Ib.* 474).

20. Where in England the husband of any woman having separate property becomes chargeable to any union or parish, the justices having jurisdiction in such union or parish may, in petty sessions assembled, upon application of the guardians of the poor, issue a summons against the wife, and make and enforce such order against her for the maintenance of her husband out of such separate property as by the thirty-third Married woman to be liable to the parish for the maintenance of her husband.

45 & 46 Vict.
c. 75, s. 20.

31 & 32 Vict.
c. 122.

section of the Poor Law Amendment Act, 1868, they may now make and enforce against a husband for the maintenance of his wife if she becomes chargeable to any union or parish. Where in Ireland relief is given under the provisions of the acts relating to the relief of the destitute poor to the husband of any woman having separate property, the cost price of such relief is hereby declared to be a loan from the guardians of the union in which the same shall be given, and shall be recoverable from such woman as if she were a feme sole by the same actions and proceedings as money lent.

Married woman to be liable to the parish for the maintenance of her children.

21. A married woman having separate property shall be subject to all such liability for the maintenance of her children and grandchildren as the husband is now by law subject to for the maintenance of her children and grandchildren: Provided always, that nothing in this act shall relieve her husband from any liability imposed upon him by law to maintain her children or grandchildren.

See *Peters v. Cowie* (2 Q. B. D. 131); *Coleman v. Birmingham* (6 Q. B. D. 615).

Maintenance of parents.

As regards her parents, a married woman was not liable for their maintenance before 1909 (*Pontypool v. Buck*, 1906, 2 K. B. 896). But since 1908 where she has separate property she is subject to all such liability for the maintenance of her parent or parents as a *feme sole* is subject to (M. W. P. Act, 1908).

Repeal of
33 & 34 Vict.
c. 93.

37 & 38 Vict.
c. 50.

22. *The Married Women's Property Act, 1870, and the Married Women's Property Act, 1870, Amendment Act, 1874, are hereby repealed: Provided that such repeal shall not affect any act done or right acquired while either of such acts was in force, or any right or liability of any husband or wife, married before the commencement of this act, to sue or be sued under the provisions of the said repealed acts or either of them, for or in respect of any debt, contract, wrong, or other matter or thing whatsoever, for or in respect of which any such right or liability shall have accrued to or against such husband or wife before the commencement of this act.*

This section prevented sect. 11 of this act from applying to policies effected under the M. W. P. Act, 1870 (*Re Turnbull, T. v. T.*, 1897, 2 Ch. 415). The section was repealed by S. L. R. Act, 1898, as also the preamble to the present act, which being of a formal character has been omitted.

Legal representative of married woman.

23. For the purposes of this act the legal personal representative of any married woman shall in respect of her separate estate have the same rights and liabilities and be subject to the same jurisdiction as she would be if she were living.

A husband who takes separate property *jure mariti* is a "legal personal representative" within this section, and liable thereunder to the extent of the property so taken (*Surman v. Wharton*, 1891, 1 Q. B. 491).

24. The word "contract" in this act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. The word "property" in this act includes a thing in action.

45 & 46 Vict.
c. 75, s. 24.

Interpretation
of terms.

Before this act, the separate estate of a married woman was not in general liable for breaches of trust or torts committed by her (*Wainford v. Heyl*, L. R. 20 Eq. 321). Since the act, she may be ordered to make good a loss occasioned by her devastavit, for which purpose the order should be in the *Scott v. Morley* (20 Q. B. D. 120) form (*Re Turnbull, Turnbull v. Nicholas*, 1900, 1 Ch. 180). Where there is no devastavit, an order directing her to pay money into court should be in the common form (*Ib.*). Where letters of administration are granted to a married woman, it is not now necessary that her husband should join in the administration bond (*Re Ayres*, 8 P. D. 168).

25. The date of the commencement of this act shall be the first of January one thousand eight hundred and eighty-three.

Commencement of act.

26. This act shall not extend to Scotland.

Extent of act.

27. This act may be cited as the Married Women's Property Act, 1882.

Short title.

THE MARRIED WOMEN'S PROPERTY ACT, 1893.

56 & 57 VICT. C. 63.

1. Every contract hereafter entered into by a married woman, otherwise than as agent,

56 & 57 Vict.
c. 63, s. 1.

- (a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;
- (b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and
- (c) shall also be enforceable by process of law against all property which she may thereafter while discoverd be possessed of or entitled to;

Effect of
contracts by
married
women.

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

56 & 57 Vict.
c. 63, s. 1.

This act repeals sub-sections 3 and 4 of sect. 1 of the M. W. P. Act, 1882. The wording of the above section is directed to the repealed sub-sections and the decisions thereunder (*ante*, pp. 346, 351). The object was to correct or reverse *Stogdon v. Lee* (*ante*, p. 351), and to repeal the provision of the M. W. P. Act, 1882, which threw on a married woman the burden of showing that her contract did not bind her separate estate (*Paquin v. Beauclerk*, 1906, A. C. 163).

For the present section to apply, there must be a contract entered into for the first time after the passing of the act. An acknowledgment of a pre-existing debt is not sufficient (*Re Wheeler*; *Hankinson v. Haytor*, 1904, 2 Ch. 66). And the contract must have been entered into by the married woman "otherwise than as agent." Where a husband had authorised his wife to contract, so that in fact she did not contract "otherwise than as agent," the section did not apply, even where the contractee did not know of the husband's authority (*Paquin v. Beauclerk*, 1906, A. C. 148).

Under the M. W. P. Act, 1882, it was held that where an action on a contract made during coverture was brought against a woman after her husband's death, the form of judgment in *Scott v. Morley* (*ante*, p. 349) was appropriate (*Softlaw v. Welch*, 1899, 2 Q. B. 419). The husband's death rendered her property no longer separate, but this did not free it from liability. It also removed any restraint, but this did not subject it to liability (*Pelton v. Harrison*, 1891, 2 Q. B. 422, 426; see, however, as to this last point, *Re Wheeler*; *Briggs v. Ryan*, 1899, 2 Ch. 722, *ante*, p. 352). Under the present act the proviso in sect. 1 preserves unaltered the law as to restrained property (*Brown v. Dimbleby*, 1904, 1 K. B. 32). And where a married woman entitled to restrained income had during coverture entered into a contract, and after the termination of the coverture judgment was recovered against her in an action on the contract, instalments of the income accruing after such termination could not be rendered available to satisfy the judgment. So held where coverture terminated by the husband's death (*Brown v. Dimbleby*, 1904, 1 K. B. 28; where a receiver was asked of instalments not due), or by divorce (*Barnett v. Howard*, 1900, 2 Q. B. 784; where the instalments had accrued due before judgment). Qu. whether in the latter case the instalments were not available, according to *Hood-Barrs v. Heriot*, 1896, A. C. 174: see also as to restrained income accruing due after a divorce, *Hyde v. H.*, 13 P. Div. 173.

The question of the liability of the wife's estate after her death on a contract made during coverture was raised where she had purported to release her husband's covenant to pay restrained income and also not to sue for the same. After her death, the release being admittedly void, her executors sued for arrears of the income, and the husband having claimed damages for breach of the covenant not to sue, these arrears were held to be assets for payment of the damages by reason of a direction in her will for payment of her debts (*Sprange v. Lee*, 1908, 1 Ch. 484).

Costs may
be ordered
to be paid
out of prop-
erty subject
to restraint
on anticipa-
tion.

2. In any action or proceeding now or hereafter instituted by a woman or by a next friend on her behalf, the court before which such action or proceeding is pending shall have jurisdiction by judgment or order from time to time to order payment of the costs of the opposite party out of property which is subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise as may be just.

The "proceeding" must be one which initiates litigation; and so the section does not apply in the case of an appeal by a married woman defendant (*Hood-Barrs v. Cathcart*, 1894, 3 Ch. 376; *Hood-Barrs v. Heriot*, 1897, A. C. 177); nor to a petition in an action presented by a married woman defendant (*Hollington v. Dear*, 1895, W. N. 35; nor to a wife's summons in a divorce action relating to the custody of children (*Gordon v. G.*

1904, P. 163); nor to a probate action brought by an executor in consequence of a caveat entered by a married woman (*Moran v. Place*, 1896, P. 214). But the section does apply to a counterclaim by a married woman defendant (*Hood-Barrs v. Cathcart*, 1895, 1 Q. B. 873); to an application by a married woman plaintiff for a new trial (*Dresel v. Ellis*, 1905, 1 K. B. 594); to a written claim made by her to goods taken in execution and served on the sheriff (*Nunn v. Tyson*, 1901, 2 K. B. 487); and to an application by her to intervene in a probate action (*Crickitt v. C.*, 1902, P. 177). It applies even where the husband is co-plaintiff (*Huntly v. Gaskell*, 1905, 2 Ch. 656). The onus lies on the married woman to show that the restraint should be sustained to the prejudice of the person claiming costs (*Pawley v. P.*, 1905, 1 Ch. 596).

56 & 57 Vict.
c. 63, s. 2.

An order under this section may be made subsequently to the order directing payment of costs (*Hood-Barrs v. Cathcart*, 1895, 1 Q. B. 873). An order was made in *Paget v. P.* (1898, 1 Ch. 470). As to the form of order, see *Davies v. Treharris Brewery Co.* (1894, W. N. 198; 13 R. 219).

See also the power to charge the costs of a married woman on a fund preserved (Solicitors Act, 1860, s. 28).

3. Section twenty-four of the Wills Act, 1837, shall apply to the will of a married woman made during coverture whether she is or is not possessed of or entitled to any separate property at the time of making it, and such will shall not require to be re-executed or republished after the death of her husband.

Will of
married
woman.

As to the law before this act, see *Willock v. Noble*, L. R. 7 H. L. 580, and *Re Price, Stafford v. S.*, 28 Ch. D. 709, quoted *ante*, p. 347.

In the case of every married woman who dies after 5th December, 1893, this section applies to her will whether made before or after that date (*Re Wylie, Wylie v. Moffat*, 1895, 2 Ch. 116). It makes her will executed during coverture operate upon all that she has at her death (*Re James Hole v. Bethune*, 1910, 1 Ch. 157). A will "in exercise of all powers" was held to exercise the statutory power given by this section (*Ib.*).

Before the M. W. P. Act, 1882, it was held that sect. 27 of the Wills Act, 1837, applied to the wills of married women (*Bernard v. Minshull*, Johns. 296). As to the joint effect of sects. 24 and 27, see the cases quoted under sect. 27 of the Wills Act, 1837 (*post*).

4. Sub-sections (3) and (4) of section one of the Married Women's Property Act, 1882, are hereby repealed.

5. This act may be cited as the Married Women's Property Short title. Act, 1893.

6. This act shall not apply to Scotland.

Extent.

THE MARRIED WOMEN'S PROPERTY ACT, 1907.

7 EDW. VII. c. 18.

An Act to amend the Married Women's Property Act, 1882.

7 Edw. 7,
c. 18, s. 1.

[21st August, 1907.]

BE it enacted as follows:—

1.—(1.) A married woman is able, without her husband, to dispose of, or to join in disposing of, real or personal property

Dispositions
of trust

7 Edw. 7,
c. 18, s. 1.

estates by
married
women.

held by her solely or jointly with any other person as trustee or personal representative in like manner as if she were a feme sole.

(2.) This section operates to render valid and confirm all such dispositions made after the thirty-first day of December one thousand eight hundred and eighty-two, whether before or after the commencement of this act, but, where any title or right has been acquired through or with the concurrence of the husband before the commencement of this act, that title or right shall prevail over any title or right which would otherwise be rendered valid by this section.

Under the M. W. P. Act, 1882, it was held that a married woman who was trustee for sale of land, could not convey it to a purchaser except with the concurrence of her husband and by deed acknowledged (*Re Harkness and Allsopp*, 1896, 2 Ch. 358; see M. W. P. Act, 1882, s. 18; *ante*, p. 362).

Settlements
of a married
woman's
separate
property.

45 & 46 Vict.
c. 75.

2.—(1.) Notwithstanding section nineteen of the Married Women's Property Act, 1882, a settlement or agreement for a settlement made after the commencement of this act by the husband or intended husband, whether before or after marriage, respecting the property of any woman he may marry or have married, shall not be valid unless it is executed by her if she is of full age, or confirmed by her after she attains full age.

(2.) But if she dies an infant any covenant or disposition by her husband contained in the settlement or agreement shall bind or pass any interest in any property of hers to which he may become entitled on her death and which he could have bound or disposed of if this act had not been passed.

(3.) Nothing in this section shall render invalid any settlement or agreement for a settlement made or to be made under the provisions of the Infants Settlements Act, 1855.

18 & 19 Vict.
c. 43.

See notes to M. W. P. Act, 1882, s. 19 (*ante*, p. 363).

Married
woman en-
titled to prior
estate to be
protector of
settlement
alone.

3.—(1.) Where a married woman would, if single, be the protector of a settlement in respect of a prior estate, which is by virtue of the Married Women's Property Act, 1882, made her separate property, then she alone shall, in respect of that estate, be the protector of the settlement.

(2.) This section applies to disentailing assurances and surrenders made after the thirty-first day of December one thousand eight hundred and eighty-two, and as well before as after the commencement of this Act.

See sect. 24 of the Fines and Recoveries Act, 1833, *ante*, p. 287.

Short title;

4.—(1.) This Act may be cited as the Married Women's Property Act, 1907.

commence-
ment.

(2.) This Act shall come into operation on the first day of January one thousand nine hundred and eight.

(3.) This Act shall not extend to Scotland.

7 Edw. 7.
c. 18, s. 1.

(4.) This Act shall be construed with the Married Women's Property Acts, 1882, 1884, and 1893, and those Acts and this Act may be cited together as the Married Women's Property Acts, 1882 to 1907.

construction.
45 & 46 Vict.
c. 75.

47 Vict. c. 14.
56 & 57 Vict.
c. 63.

VII.—DOWER AND CURTESY.

THE DOWER ACT, 1833.

3 & 4 WILLIAM IV. CHAPTER 105.

§ 1. *Interpretation*...369.

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§ 11. *Agreement not to bar Dower enforceable*...377.

§ 12. *Priority of Legacies in lieu of Dower*...377.

§ 13. *Certain Forms of Dower abolished*...377.

§ 14. *Saving and Restraining Clause*...377.

Note on Curtesy...378.

BE it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; that is to say, the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal (except such as are not liable to dower), and to any share thereof; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing.

3 & 4 Will. 4,
c. 105, s. 1.

Meaning of
the words in
the act.

"Land."

Number.

The old law of dower gave to a surviving wife a right to have assigned to her for her life one-third of all the hereditaments of which her husband was solely seised in law (that is, had the legal property by descent, there being at the same time no possession), or, in fact, for an estate of inheritance in possession at any time during the marriage; with a few exceptions such as common *sans nombre* and personal annuities (see the statement of the old law of dower in the first Report of the R. P. Commrs. 16—19; Co. Litt. 32 a; *Lyster v. Mahony*, 1 Dru. & War. 236).

Old law of
dower.

The widow of a man to whom an estate was devised in fee, with a limitation over to the testator's heir, in case the devisee had no children or issue, was held to be entitled to dower (*Moody v. King*, 2 Bing. 447; *Smith v. Spencer*, 4 W. R. 729). She was not entitled to dower out of an estate *pur autre vie* (*Low v. Burron*, 3 P. W. 262; *Re Michell*, *Moore v. M.*, 1892, 2 Ch. 99). Where, however, land was limited to the husband *pur autre vie*, with certain contingent estates in remainder over, with ultimate remainder to him in fee, the land was held liable to dower (*Lemon v. Mark*, 1899, 1 I. R. 416; see *Re Michell*, *sup.*). Dower is due of mines wrought during coverture, but not of mines or strata unopened. If lands assigned for dower

Out of what
property a
woman is
entitled to
dower.

Mines.

3 & 4 Will. 4, c. 105, s. 1. contain an open mine, tenant in dower may work it for her own benefit (*Stoughton v. Leigh*, 1 Taunt. 401; *Dickin v. Hamer*, 1 Dr. & Sm. 284).

Timber.

And a dowress may claim one-third of the income of the proceeds arising from the royalties of mines opened after her husband's decease (*Dickin v. Hamer*, *sup.*), or of proceeds of timber cut after her husband's decease (*Bishop v. B.*, 5 Jur. 931; *Dickin v. Hamer*, *sup.*). Where land subject to dower was taken by a railway company, the dowress had the value of her dower paid to her out of the purchase-money (*Re Hall*, 9 Eq. 179). In another case one-third of the purchase-money was carried over to a separate account, the dividends being payable to the dowress for life (*Harrop v. Wilson*, 34 Beav. 166). See, further, as to the property out of which a woman is entitled to dower, and the requisites to dower, the note to sect. 2, *post*; Tudor's L. C. Conv. 112 *et seq.*, 4th ed.

Barring dower.

In consequence of two maxims of the common law—first, that no right can be barred until it accrues; and, secondly, that no right or title to an estate of freehold can be barred by a collateral satisfaction—it was impossible to bar a woman of her dower by any assignment or assurance of lands, either before or during the marriage (*Vernon's case*, 4 Rep. 1; Co. Litt. 36 b).

Legal jointures.

Dower, however, might be barred by a legal jointure. Before the passing of the Statute of Uses (27 Hen. 8, c. 10), the greater part of the lands in England having been conveyed to uses which were not liable to dower (*Dyer*, 266, pl. 7; 4 Rep. 1 b), it was usual to make a provision for the wife before marriage out of the husband's lands (3 Rep. 58 b; 4 Rep. 1 b; *Wilmot's Notes*, 184, 185). The Statute of Uses having transferred the legal estate to the *cestui que use*, all women then married would have become dowable of lands held to the use of their husbands, and retained their title to lands settled on them in jointure. To prevent that injustice, it is by the 6th section of the Statute of Uses declared, that a woman having an estate in jointure with her husband (five species of which are enumerated) shall not be entitled to dower; and the 9th section reserves to the wife a right to refuse a jointure or to claim her dower (see *Wilmot's Notes*, 184, &c.). The species of estates enumerated were proposed only as examples, and the courts in construction extended the statute to other instances within its principle, though not within its words (4 Rep. 2 a). By the effect of that statute, therefore, no widow could claim both jointure and dower. A jointure within that statute was defined to be a competent livelihood of freehold to the wife of lands and tenements, to take effect in profit or possession presently after the death of the husband, for the life of the wife at least, if she herself be not the cause of its determination or forfeiture (Co. Litt. 36 b, 37).

According to Lord Coke (Co. Litt. 36 b), there are six requisites to a strict legal jointure, viz., 1st. The provision for the wife must by original limitation take effect in possession or profit immediately after the husband's death (*Wood v. Shirley*, Cro. Jac. 488; see *Re De Hoghton, De H. v. De H.*, 1896, 2 Ch. 385). 2nd. It must be for the term of her own life or greater estate (*Dyer*, 97 b). 3rd. It must be made to herself, and no other for her. 4th. It must be made in satisfaction of the *whole*, and not of part, of her dower. 5th. It must be either expressed or averred to be in satisfaction of her dower (see 9 Mod. 152; 3 Atk. 8; 1 Ves. sen. 54; 4 Ves. 391). And 6th. It may be made either before or after marriage (4 Rep. 3).

Jointure before marriage is a peremptory bar of dower; jointure after marriage she has an option to renounce (1 Swanst. 429, n.); but a *feme covert* was held not competent during the coverture to elect between a jointure made to her after marriage and her dower at common law (*Frank v. Frank*, 3 M. & C. 171). A jointure settled on a wife by articles, to which she was not a party, will not deprive her of dower (*Buckingham v. Drury*, 3 Br. P. C. 497; *Daly v. Lynch*, *Ib.* 48); but an infant having before her marriage a jointure made to her in bar of dower, is thereby bound and barred by the stat. 27 Hen. 8, c. 10 (*Ib.*).

Equitable jointures.

In equity, a trust estate, an agreement to settle lands as a jointure (see

Warde v. W., 16 Beav. 103; *Wellesley v. W.*, 4 M. & Cr. 554), or a covenant from the husband for payment of an annuity to his wife, for life, in case she survived him, in full for her jointure and in bar of dower, in short, any provision, however precarious, and whether secured out of realty or personalty, which an adult before marriage accepts in lieu of dower, is a good jointure (*Buckingham v. Drury*, 5 Br. P. C. 570; 4 Br. C. C. 506; *Wilmot's Notes*, 177; *Charles v. Andrews*, 9 Mod. 152; *Williams v. Chitty*, 3 Ves. jun. 545; *Tinney v. T.*, 3 Atk. 8; *Carruthers v. C.*, 4 Br. C. C. 500; *Estcourt v. Estcourt*, 1 Cox, 20; *Simpson v. Gutteridge*, 1 Madd. R. 613; 4 Rep. 2 a, n. by Thomas; Harg. Co. Litt. 36 b, n. (5); Sugd. V. & P. 543, 544, 11th ed.; *Dyke v. Rendall*, 2 D. M. & G. 209). A future contingent provision, accepted by an adult female upon her marriage in lieu of dower, is in equity a valid bar to dower (*Re Herons*, 1 Flan. & K. 330; see *Power v. Sheil*, 1 Moll. 312; *Williams v. Chitty*, 3 Ves. 545; *Corbet v. C.*, 5 Russ. 254). So where the husband and his father, "for providing a competent jointure" for the wife, settled moneys for the benefit of the husband, his wife, and issue (*Dyke v. Rendall*, 2 D. M. & G. 209). And where a tenant in tail in remainder agreed to execute a legal postnuptial settlement, to secure a jointure (*Pennefather v. Pennefather*, 1 R. 6 Eq. 171). And where the intended husband covenanted that in case he should die in the lifetime of his intended wife, without issue by her, she should be entitled to one-half of his property at death (*Hamilton v. Jackson*, 2 J. & Lat. 295). In order, however, to exclude the right to dower, there must be either an express declaration or a plain intention (*Hamilton v. Jackson*, 2 J. & Lat. 299; *O'Rorke v. O'Rorke*, 17 L. R. Ir. 153). A grant of an annuity to the wife surviving did not bar dower, even out of the lands charged with the annuity (*Cody v. Cody*, 5 L. R. Ir. 620; see *Lemon v. Mark*, 1899, 1 I. R. 416).

A stipulation in a marriage settlement, that the provision thereby made for the wife was to be "in lieu of dower or thirds," was held, on the husband dying intestate, to bar the claim of his widow to a distributive share in his personal estate (*Thompson v. Watts*, 2 J. & H. 291; see *Sambourne v. Barry*, 1 R. 6 Eq. 28; *Gurly v. G.*, 8 Cl. & Fin. 743; *Re Burgess*, 11 Ir. Ch. R. N. S. 164; *Colleton v. Garth*, 6 Sim. 19; *Coyne v. Duigan*, 1894, 1 I. R. 138; *Re Hogan, H. v. H.* 1901, 1 Ir. R. 168).

As to the law of jointures, see 1 Rop. on Husband and Wife, by Bright, c. 10; Cruise's Dig. tit. 7; Bac. Abr. Dower and Jointure (G.); Gilb. on Uses, by Sugd. p. 321, &c.

As to how far attendant terms could have been used to bar a right to attendant dower, see *Mole v. Smith*, Jac. R. 496; *Radnor v. Vandebody*, Show. P. C. terms. 69; Pr. Ch. 65; *Swannock v. Lifford*, 2 Atk. 208; Ambl. 6; Co. Litt. 208 a, n.; *Willoughby v. W.*, 1 T. R. 763; *Maundrell v. M.*, 10 Ves. 246; *Wynn v. Williams*, 5 Ves. 130; Butl. Co. Litt. 290 b, n. l. s. 13; *Re Sleeman*, 4 Ir. Ch. R. 563; 8 & 9 Vict. c. 112, post; *Corry v. Cremorne*, 12 Ir. Ch. R. 136; *Anderson v. Pignet*, 8 Ch. 180, post; and as to when a court of equity would relieve against them, see *Dudley v. D.*, Prec. Ch. 241; *Radnor v. Rotherham*, ib. 65; *Williams v. Lambe*, 3 B. C. C. 264; *Wilkins v. Lynch*, 1 Hayes, Ir. R. 98.

The form of limitation to uses to bar dower formerly used is discussed, Gilb. on Uses, by Sugd. 321—325, n.; Fearn, 347, n. by Butl. 7th ed.; 2 Dav. Conv. 210; 3 Dav. Conv. 249, n. (o); *Collard v. Roe* (4 De G. & J. 525). A limitation to the old uses to bar dower will not deprive of her dower a woman married since the passing of the act (*Ery v. Noble*, 7 D. M. & G. 687; *Re Michell*, *Moore v. M.*, 1892, 2 Ch. 99).

The defence of purchase for value without notice failed as against a Purchase claim for dower (*Williams v. Lambe*, 3 Brown, C. C. 264; see *Collins* without v. *Archer*, 1 R. & M. 292; *Phillips v. P.*, 4 D. F. & J. 217; *Ind*, *Coope* notice. v. *Emmerson*, 12 App. Cas. 300).

Under 13 Edw. I, c. 34, a woman forfeits her dower by adultery, even though brought about by her husband's cruelty (*Hetherington v. Graham*, 6 Bing. 139; *Woodward v. Dowse*, 10 C. B. N. S. 722; *Bostock v. Smith*, 34 Beav. 57). Under the old law a divorce à vinculo matrimonii was a bar to

Where widow barred of distributive share in husband's personalty.

Uses to bar dower.

3 & 4 Will. 4. c. 105, s. 1. dower (*Frampton v. Stephens*, 21 Ch. D. 164), and so now is a decree for dissolution of marriage (*Ib.*). As to the effect of a divorce *à mensâ et thoro*, see *Rolfe v. Perry*, 11 W. R. 357; *Shute v. S.*, Prec. Ch. 111.

Bar by acknowledged deed.

Dower was extinguished by a deed duly acknowledged by the wife, even where her name was not inserted as a co-grantor (*Dent v. Clayton*, 12 W. R. 903).

Remedies for the recovery of dower.

The remedies for the recovery of dower before 1860 were by writs of dower. Since that year the usual remedy has been by action in Chancery. For instances of such actions, see *Sheaf v. Cave* (24 Beav. 259); *Bamford v. Bamford* (5 Hare, 203); *Marshall v. Smith* (5 Giff. 37); *Dawson v. Whitehaven* (6 Ch. Div. 218); *Meek v. Chamberlain* (8 Q. B. D. 31); see also the forms of orders, Seton, 6th ed., 955, 1546; *Kernaghan v. M'Nally* (11 Ir. Ch. Rep. N. S. 52). As to costs, see *Harris v. H.* (11 W. R. 62); *Stormont v. Wickens* (14 W. R. 192).

Limitation.

An action for the assignment of dower is not within the R. P. Lim. Acts, 1833 and 1874 (*Williams v. Thomas*, 1909, Ch. 713, overruling *Marshall v. Smith*, 5 Giff. 37). As to the arrears of dower which may be recovered, see *ante*, p. 196.

Freebench in case of copyholds.

The Dower Act does not apply to freebench (*Smith v. Adams*, 5 D. M. & G. 712). Freebench, in the absence of any custom to the contrary, does not attach even in right until the husband's death (*Benson v. Scott*, 12 Mod. 49; 2 Ves. sen. 633; *Godwin v. Winsmore*, 2 Atk. 526; *R. v. Lopen*, 2 T. R. 580; *Brown v. Raindle*, 3 Ves. jun. 256). And therefore any alienation by him alone, even by contract (*Hinton v. Hinton*, 2 Ves. sen. 631), to take effect in his lifetime, defeated the widow's claim (*Benson v. Scott*, 3 Lev. 385; *Goodwin v. Windmore*, 2 Atk. 526; *Farley's case*, Cro. Jac. 36; *Moor*, 758; *Dagworth v. Radford*, Sir W. Jones, 462; 1 Freem. 516; *Gilb. Ten.* 321; see 2 Watk. on Cop. 73—79; *Shelford on Copyholds*, pp. 68—72). And if a man surrendered copyholds to the use of his will, and then devised them, the widow did not take freebench (*Lacy v. Hill*, 19 Eq. 350). Now under sect. 3 of the Wills Act a devise without a surrender has the same effect (*Ib.*; see *Powdrell v. Jones*, 2 Sm. & G. 407, where a devise did not bar freebench, the special custom being that the title of the wife could only be destroyed by voluntary surrender; *Riddell v. Jenner*, 10 Bing. 29; *Doe v. Gwinnell*, 1 Q. B. 682). Where a purchaser of a copyhold took a surrender, but died before admittance, his widow was not entitled to freebench (*Smith v. Adams*, 5 D. M. & G. 712). *Secus*, where the heir of the purchaser had been admitted (*Vaughan v. Atkins*, 5 Burr. 2764). A widow was not entitled to freebench out of a moiety of copyholds to which her husband was entitled in remainder after a life estate (*Smith v. Adams*, 18 Beav. 499). Nor out of trust estates (*Forder v. Wade*, 4 Bro. C. C. 520). The widow of a tenant in tail was entitled to freebench, though the custom was confined to widows of tenants in fee (*Doe v. Sanders*, 3 Dougl. 303). Freebench was not barred by a settlement (*Willis v. W.*, 34 Beav. 340). See further *Scriven*, 69, *Elton*, 157.

Gavelkind.

The Dower Act extends to lands of gavelkind tenure (*Farley v. Bonham*, 2 J. & H. 177). By the custom of gavelkind, the wife, after the death of her husband, has for her dower a moiety of all lands of her husband so long as she continues chaste (*Robinson, Gav.*, 205—236; see *Re Maskell and Goldfinch*, 1895, 2 Ch. 525).

Widows to be entitled to dower out of equitable estates.

2. When a husband shall die, beneficially entitled to any land for an interest which shall not entitle his widow to dower out of the same at law, and such interest, whether wholly equitable, or partly legal and partly equitable (*m*), shall be an estate of inheritance in possession, or equal to an estate of inheritance in possession (other than an estate in joint tenancy) (*n*), then his widow shall be entitled in equity to dower out of the same land.

(m) For examples of interests partly legal and partly equitable equal to an estate of inheritance in possession, see *Re Michell*, *Moore v. M.* (1892, 2 Ch. 99). In that case, where the husband was at his death entitled to an equitable estate *pur autre vie*, and also a legal remainder expectant on the death of the *c. q. vie* without a second son, the widow took no dower. 3 & 4 Will. 4, c. 105, s. 2.

Before this act there was no dower out of equitable estates (*Dawson v. Whitehaven*, 6 Ch. Div. 221; *D'Arcy v. Blake*, 2 Sch. & Lef. 388; *Re Michell*, *Moore v. M.*, 1892, 2 Ch. 93). Old law.

Where an estate was subject to a mortgage *in fee* at the time of the marriage, and continued so during the coverture, the widow was not entitled to dower (*Dixon v. Saville*, 1 Br. C. C. 326). Where the husband was seised merely as a mortgagee or trustee, the wife was entitled to dower at law, but subject in equity to the same right of redemption or trust as her husband was liable to; but a court of equity would interfere to prevent a widow from taking advantage of her legal right (*Hinton v. H.*, 2 Ves. sen. 634; *Lloyd v. L.*, 4 Dru. & W. 370; see 2 Freem. 43, 71; 1 Burr. 117; Butl. Co. Litt. 205 a, n. (1), 11th ed.; *Lyster v. Mahony*, 1 Dru. & War. 242; *Flack v. Longmate*, 8 Beav. 420; *Knight v. Frampton*, 4 Beav. 10). Where a wife, married before the act, joined in a mortgage in fee of her husband's land, to release dower, she had no right to redeem (*Dawson v. Whitehaven*, 6 Ch. Div. 221). But where the husband died seised in fee, a subsequent mortgage by the heir in which the widow joined did not extinguish her right to dower or reconveyance (*Meek v. Chamberlain*, 8 Q. B. D. 31). Mortgages.

A woman is not entitled to dower out of a legal estate in remainder (*Lloyd v. L.*, 4 Dru. & W. 370), or out of estates of which the husband was seised in fee, subject at the time of his marriage to leases for lives, which did not expire during the coverture (*D'Arcy v. Blake*, 2 Sch. & Lef. 387; Fitz. Abr. Dower, pl. 184; Br. Abr. Dower, pl. 44; Co. Litt. 32 a; Co. Litt. 203 a, Harg. note; Perk. 333, 348; *Forder v. Wade*, 4 Br. C. C. 520). On the surrender in deed or in law of the life estate to the husband the right of dower will attach (1 Roll. Abr. 676, pl. 40). But if a rent be reserved on a lease for years, made before marriage, the wife will be entitled to recover dower of the third part of the rent immediately, and also of the land, with a *cessat executio* during the term (Prec. Ch. 250). And the wife of a man entitled to lands under a devise to him in fee or in tail, subject to a chattel interest for raising the testator's debts, is dowerable after payment of them (Co. Litt. 41 a; 8 Rep. 96 a; 2 Vern. 404). Where a husband was seised in fee subject to a trust term to secure life annuities and to pay himself half the surplus rents, his widow was entitled to have her dower set out (*Sheaf v. Cave*, 24 Beav. 259). Where a husband was entitled to an equitable estate in fee simple determinable in the event, which took place, of his dying without leaving issue living at his decease, his widow was, notwithstanding the operation of the executory devise over, entitled to dower (*Smith v. Spencer*, 4 W. R. 729). Reversions and remainders.

(n) The widow of a joint tenant in fee or in tail is not entitled to dower, because, upon the death of one of the joint tenants, the estate goes to the survivor, who is then in from the first grantor, and may plead the deed creating the estate as originally made to him, without naming his companion (Litt. s. 45; Co. Litt. 37 b, 30 a, 183 a). And if a joint tenant alien his share, his wife shall not be endowed (Fitz. N. B. 150; Br. Dow. pl. 30; Cro. Jac. 615). A widow of a tenant in common was in the circumstances held entitled to dower (*Reynard v. Spence*, 4 Beav. 103). Joint tenants.

3. When a husband shall have been entitled to a right of entry or action in any land, and his widow would be entitled to dower out of the same, if he had recovered possession thereof, she shall be entitled to dower out of the same, although her husband shall not have recovered possession thereof: provided that such dower be sued for or obtained Seisin shall not be necessary to give title to dower.

3 & 4 Will. 4, within the period during which such right of entry or action
c. 105, s. 3. might be enforced.

Right of
entry.

A right of entry is where a man, who has the possession of lands, is disseised or ousted, or, having a right to the possession, is kept out of it; in which case he may peaceably make an entry upon the lands, or bring an action of ejectment to recover possession (see Rosc. on Real Actions, 79, &c.; 1 Real Prop. Rep. 493). The time within which a right of entry must be prosecuted is now prescribed by R. P. Lim. Acts, 1833 and 1874 (see *ante*, p. 125 *et seq.*). As to the relation back of an actual entry, see *Ocean v. Ilford*, 1905, 2 K. B. 493.

Seisin.

"Seisin" (mentioned in the above marginal note) was described by Lord Mansfield as the completion of that investiture by which the tenant was admitted into the tenure, and without which no freehold could be constituted or pass (*Taylor v. Horde*, 1 Burr. 107). It was, however, a technical term, importing title as well as possession (*Lightwood*, Possession of Land, 42). It was twofold, viz.: either (1) a seisin in deed; or (2) a seisin in law (Co. Litt. 29 a; *Leach v. Jay*, 6 Ch. D. 499). A seisin in deed was when the person entitled to possession by virtue of the estate entered corporeally into possession (Challis R. P. 206; Butler's note to Co. Litt. 266 b); the possession of his tenant being for this purpose accounted to be his possession (*Ib.*; see *De Grey v. Richardson*, 3 Atk. 469). A seisin in law was when after a descent the person on whom the lands descended had not actually entered, and the possession continued vacant (Butler's note to Co. Litt. 266 b; Challis R. P. 207). See further the old decisions as to descents referred to *post*, pp. 383, 390. The distinction between seisin in deed and seisin in law existed not only in the case of corporeal but also of incorporeal hereditaments, such as rent charges, advowsons, remainders or reversions (Challis R. P. 206; see *Murray v. Thorniley*, 2 C. B. 223, 224). Thus a mere delivery of a deed of grant of a rent charge conferred no seisin in deed. The seisin in law of the rent charge which the grantee had by the grant was not sufficient to maintain a real action (Co. Litt. 160 a). For the purpose of obtaining a seisin in deed of the incorporeal hereditaments mentioned above, it was necessary to exercise some appropriate act of ownership, such as receiving the rents or presenting to the Church or granting a lease for life to take effect out of the remainder or reversion (Challis R. P. 206, 209).

It has been suggested that seisin in law was only a presumption, which implied that there was no seisin in deed in anybody; and that the presumption was rebutted by the fact that a seisin in deed was whether rightfully or wrongfully in somebody else (Challis R. P. 207). Compare the "seisin" of a squatter where the true owner has been ousted and his former seisin in deed reduced to a right of entry (see *Leach v. Jay*, 9 Ch. D. 45).

Seisin re-
quired for
dower under
old law.

One thing required to give a title of dower before this act was, that the husband should have been seised of the estate during the coverture. A seisin in law was sufficient, without a seisin in deed. Where the heir had a seisin in law and died leaving a widow she was entitled to dower (Litt. s. 681). On conveyances under the Statute of Uses, the bargainee or *cestui que use* was seised immediately on the delivery of the deed, and therefore his wife was dowable, although no entry had been made by him. As if lands were bargained and sold, and a stranger entered, and then the deed was inrolled and the bargainee died, his wife would be endowed (2 And. 161; Gilb. Uses by Sugd. 213; see Cro. Jac. 604), but if the husband had died before inrolment, she would not have been endowed (Gilb. Uses, 213). But wherever an actual entry was necessary to give effect to a conveyance, as in the case of an exchange at common law, the wife was not entitled to dower, unless the husband had entered (Perk. s. 368; Park on Dower, 34).

As to seisin, see further the note to sect. 2 of the Real Property Act, 1845, *post*.

No dower out
of estate
disposed of.

4. No widow shall be entitled to dower out of any land which shall have been absolutely disposed of by her husband in his lifetime, or by his will.

A devise of "all my real estate" to trustees on trust for sale will bar dower under sect. 4 (*Lacey v. Hill*, 19 Eq. 346; see *Rowland v. Cuthbertson*, 8 Eq. 466). 3 & 4 Will. 4, c. 105, s. 4.

5. All partial estates and interests, and all charges created by any disposition or will of a husband, and all debts, incumbrances, contracts and engagements to which his land shall be subject or liable, shall be valid and effectual as against the right of his widow to dower. Priority to partial estates, charges, and specialty debts.

Before this act, after a title of dower had once attached, it was not in the power of the husband alone to defeat it by any act in the nature of alienation or charge (3 Lev. 386; Co. Litt. 32; F. N. B. 147 (E)). The alienation of the husband, whether voluntarily, as by deed or will, or involuntarily, as by bankruptcy, &c., would not defeat the wife's right of dower against the husband's alienee (*Shep. T.* 275; *Stoughton v. Leigh*, 1 Taunt. 410; Co. Litt. 46 a; 7 Rep. 8, 72; Jenk. Cent. p. 36; see Park on Dower, 237, 238). By old law the husband alone could not defeat dower.

In the case of women married before this act, the rule was that a devise of lands liable to dower was *primâ facie* a devise of them subject to the right to dower; and a widow was accordingly entitled to claim both her dower and the benefit given by the will (*Birmingham v. Kirwan*, 2 Sch. & Lef. 444; *Ellis v. Lewis*, 3 Hare, 313; *Gibson v. Gibson*, 1 Drew. 42). But certain provisions were considered as inconsistent with the right to dower, and where a will contained such provisions, the widow was put to her election. Thus she was put to her election where a testator provided that his daughter should have the personal use, occupation and enjoyment of a house (*Miall v. Brain*, 4 Mad. 119; see *Butcher v. Kemp*, 5 Mad. 61; *Roadley v. Dixon*, 3 Russ. 192). Also, where a testator gave to trustees an express power to lease, and also the general power to manage and to cut timber for repairs at their discretion (*Parker v. Sowerby*, 4 D. M. & G. 321; overruling *Warbulton v. W.*, 2 Sm. & G. 163; see *Linley v. Taylor*, 1 Giff. 67). But powers of, or trusts for, sale were held not inconsistent with a widow's right to dower; nor was a direction as to the distribution of the proceeds (*Bending v. B.*, 3 K. & J. 57; see further, 1 Jarm. Wills, 5th ed., 430 *et seq.*; Hawk. Wills, 275). Old rule that a devise of lands liable to dower was *primâ facie* a devise of them subject to the right of dower.

By the above sections all dispositions by the husband are made effectual as against the right of his widow to dower. Thus a mortgage by a husband is a bar *pro tanto* of dower (*Jones v. Jones*, 4 K. & J. 361). Widow put to her election where will contained provisions inconsistent with right to dower.

Notwithstanding the Admon. of Estates Act, 1833, *post*, and the 5th section of this act, the widow's right to dower or freebench has still priority over mere creditors of a deceased husband (*Spyer v. Hyatt*, 20 Beav. 621; *Jones v. J.*, *sup.*; *Northern Bank v. M'Machin*, 1909, 1 I. R. 374; but see *Williams*, R. P. 19th ed. 318, n.). Powers of or trusts for sale. New law.

6. A widow shall not be entitled to dower out of any land of her husband, when in the deed by which such land was conveyed to him, or by any deed executed by him, it shall be declared that his widow shall not be entitled to dower out of such land. Dower may be barred by a declaration in a deed;

A declaration is sufficient under this section, although the deed was not executed by the husband (*Fairley v. Tuck*, 27 L. J. Ch. 28; 6 W. R. 9). A declaration in a conveyance, prior to this act, will not deprive a wife, married after this act, of her dower (*Fry v. Noble*, 20 Beav. 598; 7 D. M. & G. 687; *Clarke v. Franklin*, 4 K. & J. 266). A recital may operate as a declaration (*Re Gibbon*, *Moore v. Gibbon*, 1909, 1 Ch. 367).

7. A widow shall not be entitled to dower out of any land of which her husband shall die wholly or partially intestate, when or by a declaration in the husband's will.

3 & 4 Will. 4, c. 105, s. 7. by the will of her husband duly executed for the devise of freehold estates, he shall declare his intention that she shall not be entitled to dower out of such land, or out of any of his land.

Dower shall be subject to restrictions.

8. A right of a widow to dower shall be subject to any conditions, restrictions, or directions which shall be declared by the will of her husband duly executed as aforesaid.

Devise of real estate to the widow shall bar her dower.

9. Where a husband shall devise any land out of which his widow would be entitled to dower if the same were not so devised, or any estate or interest therein, to or for the benefit of his widow, such widow shall not be entitled to dower out of or in any land of her said husband, unless a contrary intention shall be declared by his will.

Old rule as to when widow was put to election.

According to the law before this act a devise by a husband for the benefit of his wife, who was entitled to dower, did not satisfy such right, unless an intention was expressed, or could be inferred, that the gift was in lieu of dower, in which case the wife could not claim both, but was put to her election (*Thompson v. Burra*, 16 Eq. 601; see *Rop. on Husb. and Wife*, c. 11, s. 3; 1 *Jarman on Wills*, 458 *et seq.*; *Lawrence v. Lawrence*, 2 Vern. 365; *Freem*, 244; 3 Br. P. C. 484; 1 *Swanst.* 398, n.; 1 Br. C. C. 292, n. by *Belt*; *Hall v. Hill*, 1 Dru. and War. 102; *Holdich v. Holdich*, 2 Y. & C. C. C. 18; *Goodfellow v. Goodfellow*, 18 Beav. 356); even where the devise was only for the life of the widow (*Chalmers v. Storil*, 2 Ves. & B. 224; *Dickson v. Robinson*, Jac. R. 503; *Roberts v. Smith*, 1 S. & St. 513). For cases where the gift of an annuity did not put the widow to her election, see *Dowson v. Bell* (1 Keen, 761); *Harrison v. Harrison* (1 Keen, 765); *Wetherell v. Wetherell* (10 W. R. 818).

Effect of receiving provision in lieu of dower.

A widow might be prevented from exercising her election, by receiving a provision given in lieu of dower; see *Parker v. Downing* (2 Jur. 28); *Eland v. Eland* (2 Jur. 852); *Reynard v. Spence* (4 Beav. 103); *Sopwith v. Manghan* (30 Beav. 235). As to the right of election in such a case possessed by the next of kin of a widow who had not elected, see *Fytche v. Fytche* (7 Eq. 494).

New law.

This act has given the husband complete power to defeat the right of dower, either by deed or will (sects. 4 and 5); and where any interest in the land otherwise liable to dower is given to the wife, in order to preserve the right of dower, an intention to that effect must be declared (sect. 9), although no gift to the wife out of personal estate is to defeat the right of dower, unless an intention to do so be declared by the will (sect. 10).

Where a testator devised his real and personal estate to trustees upon trust for sale and conversion and payment of an annuity out of the income of the proceeds to his widow, she was deprived of her right to dower by sect. 9 (*Rowland v. Cuthbertson*, 8 Eq. 466; *Lacey v. Hill*, 19 Eq. 346; *Re Thomas*, *Thomas v. Howell*, 34 Ch. D. 166). A devise by a husband to his wife of his fee simple land will deprive her of dower out of land of which he is tenant in tail (*Cooper v. C.*, 6 Ir. Ch. R. 221).

Intestates' Estates Act, 1890.

Under the Intestates Act, 1890, the estate of an intestate leaving no issue, which does not exceed 500*l.*, belongs to his widow. (See *Re Green*, 17 Times L. R. 242.) If the estate exceeds 500*l.* she has a charge for 500*l.* This right of the widow is in addition to her interest in the rest of the intestate's realty and personalty, *e.g.* her dower (see sect. 4 of the Act); but the amount of the dower will be subject to abatement in respect thereof (*Re Charriere*, *Duret v. Charriere*, 1896, 1 Ch. 912; *Rea v. R.*, 1902, 1 I. R. 451). The right may be barred by a provision in a settlement (*Re Hogan*, *H. v. H.*, 1901, 1 I. R. 168). The act does not apply to a partial intestacy (*Re Twigg*, *Twigg v. Black*, 1892, 1 Ch. 579), but applied where the executor and all the beneficiaries named in a will predeceased a testator (*Re Cuffe*,

Fooks v. Cuffe, 1908, 2 Ch. 500). The value of the estate must be taken as at the death; and if it does not then exceed 500*l.*, the whole belongs to the widow, notwithstanding that by the falling in of a contingent reversionary interest it becomes of greater value (*Re Heath, Heath v. Widgeon*, 1907, 2 Ch. 270). 3 & 4 Will. 4, c. 105, s. 9.

10. No gift or bequest made by any husband to or for the benefit of his widow of or out of his personal estate, or of or out of any of his land not liable to dower, shall defeat or prejudice her right to dower, unless a contrary intention shall be declared by his will. Bequest of personal estate to the widow shall not bar her dower.

A bequest of personalty never operated in bar of dower unless an intention to that effect clearly appeared (*Ayres v. Willis*, 1 Ves. sen. 230).

11. Provided always, and be it further enacted, that nothing in this act contained shall prevent any court of equity from enforcing any covenant or agreement entered into by or on the part of any husband not to bar the right of his widow to dower out of his lands, or any of them. Agreement not to bar dower may be enforced.

In purchasing an estate free from dower by force of this act, it should be ascertained that the vendor has not bound himself by agreement not to bar his wife's dower (Sugd. V. & P. 548, pl. 24, 11th ed.).

12. Nothing in this act contained shall interfere with any rule of equity, or of any ecclesiastical court, by which legacies bequeathed to widows in satisfaction of dower are entitled to priority over other legacies. Legacies in bar of dower still entitled to preference.

When a legacy is given to a wife in satisfaction of dower, she does not, in case assets prove deficient, abate in proportion to other legatees (*Burridge v. Brady*, 1 P. Wms. 127; *Blower v. Morrett*, 2 Ves. sen. 420; *Davenhill v. Fletcher*, Ambl. 244). Preference of legacies in lieu of dower.

But this rule did not apply where the testator at his death was not entitled to any real estate (*Acey v. Simpson*, 5 Beav. 35); or where his only real estate was conveyed to him with a declaration against dower (*Roper v. Roper*, 3 Ch. D. 714), or where he disposed by will of all his real estate (*Re Greenwood, G. v. G.*, 1892, 2 Ch. 295). *Kekewich, J.*, refused to extend the rule to a legacy given in satisfaction of an ascertained debt (*Re Wedmore, W. v. W.*, 1907, 2 Ch. 377; but see *Davies v. Bush*, Younge, 343; Wms. on Exors., 10th ed., 1093; 1 *Roper*, Leg. 372; 1 Fonbl. Eq. 372).

A legacy to a wife in satisfaction of dower carries interest only for one year from the death (*Re Bignold, B. v. B.*, 45 Ch. D. 496).

13. No widow shall hereafter be entitled to dower ad ostium ecclesiae, or dower ex assensu patris. Certain dowers abolished.

An account of this species of dower, which had long become obsolete, will be found in Litt. ss. 38, 39, 40; Co. Litt. 34a; 2 Bl. Comm. 132, 133.

14. This act shall not extend to the dower of any widow who shall have been or shall be married on or before the first day of January, one thousand eight hundred and thirty-four, and shall not give to any will, deed, contract, engagement, or charge Act not to take effect before the 1st January, 1834.

3 & 4 Will. 4, executed, entered into, or created before the said first day of January, one thousand eight hundred and thirty-four, the effect of defeating or prejudicing any right to dower.

See *Fry v. Noble* (20 Beav. 598; 7 D. M. & G. 687); and *Clarke v. Franklin* (4 K. & J. 266).

TENANT BY THE CURTESY.

Tenant by the curtesy of England is where a man marries a woman solely seised of an estate of inheritance, that is, of lands and tenements in fee simple or fee tail, and has by her issue, born alive, and capable of inheriting her estate. In this case the husband shall, on the death of his wife, hold the lands for his life, as tenant by the curtesy of England (Litt. ss. 35, 52; 2 Bl. Comm. 126). And it seems that a husband may have curtesy of an estate which his wife has inherited (Williams, Real Prop., App. E. 572, 14th ed.); and of money which is to be considered as land (*Cunningham v. Moody*, 1 Ves. sen. 174). A husband is still entitled to curtesy in real estate as to which his wife, married since 1882, has died intestate (*Hope v. Hope*, 1892, 2 Ch. 336).

Requisites of
a tenancy by
the curtesy.

Four circumstances are requisite for enabling the husband to be tenant by the curtesy:—1st. A legal marriage; but if the marriage be *voidable* only, the husband will be tenant by the curtesy, unless the marriage be actually avoided during the lives of *both* parties (*Hicks v. Harris*, Carth. 271; 2 Salk. 548; 4 Mod. 182; see 2 Ves. sen. 245; 7 Rep. 43 b).

2nd. The wife must have a seisin in deed of *corporeal* hereditaments (Co. Litt. 29 a), either before or after issue born (*Id.* 30 a). As to the distinction between seisin in deed and seisin in law, see *ante*, p. 374. The receipt of rent reserved on a lease for years, amounts to seisin in deed (*De Grey v. Richardson*, 3 Atk. 469); but the husband cannot acquire such a seisin of an estate let on a lease for life before marriage as will entitle him to curtesy, unless the lease determine during the coverture (Co. Litt. 29 a, 32 a). A husband will not have curtesy of an estate tail of which the wife was not seised during the coverture (Co. Litt. 29 a). Therefore, where a wife by ante-nuptial settlement conveyed land of which she was tenant in tail to her husband during her life, he took no curtesy (*Doe v. Rivers*, 7 T. R. 276). Where a wife's real estate did not fall into possession till after the husband's bankruptcy and discharge, the husband, though there had been issue of the marriage, had not at the time of his bankruptcy any such contingent interest in the estate, as tenant by the curtesy, as would pass to his assignees (*Gibbins v. Eyden*, 7 Eq. 371).

In some cases where it is impossible to obtain seisin in deed, seisin in law is sufficient to give rise to curtesy. Thus, where a wife who hath issue inherits an advowson or rent in fee and dieth before the rent becomes due or the church becomes void, she has but a seisin in law, yet the husband shall be tenant by the curtesy because he could by no industry attain to any other seisin (Co. Litt. 29 a). On the same principle, where a father devised land to a married daughter who predeceased him, her husband took an estate by the curtesy by virtue of sect. 33 of the Wills Act, 1837 (*Eager v. Furnivall*, 17 Ch. D. 115).

Where there is a devise in fee simple, with an executory devise over, the husband's right to curtesy attaches on the first estate, and is not defeated by its determination. As where there was a devise to trustees in fee, in trust for A. and her heirs, with a devise over, in case she died under the age of twenty-one, and without leaving issue. A. had a child which died, and then herself died under twenty-one; when it was held that her husband was entitled to curtesy (*Buckworth v. Thirkel*, 10 Moore, 235, n.; 2 Bing. 447;

3 Bos. & P. 652, n.; 4 Doug. 323; see 2 Sim. 251; 2 Rop. on Husband and Wife, Jac. ed. Addenda, No. 2; Butl. Co. Litt. 241 a, n. (4); *Boothby v. Vernon*, 9 Mod. 147). But where an estate was devised to A. and her heirs, but if she died, leaving issue, then to such issue and their heirs, and A. died, leaving issue, her husband was not entitled to curtesy, because the estate of the wife had determined on her death leaving issue, by which the children took as purchasers by force of the gift, and not by descent from her (*Barker v. Barker*, 2 Sim. 249).

Curtesy must arise out of an estate of inheritance; it cannot arise out of an estate *pur autre vie* (*Stead v. Platt*, 18 Beav. 54). And the wife must have been solely seised of an estate in fee simple or fee tail. There is no curtesy in respect of an estate held in joint tenancy; but it does exist in respect of an estate held under a tenancy in common (*Palmer v. Rich.*, 1897, 1 Ch. 141). Curtesy exists in respect of the estate of a coparcener (Co. Litt. 174 b, 183 a).

As to the effect of the wife's election on the husband's curtesy, see *Griggs v. Gibson* (1 Eq. 685).

3rd. The wife must have issue born alive in her lifetime, and capable of inheriting the estate (Co. Litt. 29 b; 8 Rep. 34 b; Dyer, 25 b; see *Jones v. Ricketts*, 31 L. J. Ch. 753).

4th. The last circumstance required to consummate the right of the husband is the death of the wife (Co. Litt. 20 a).

Copyholds are not subject to curtesy, except by custom (4 Rep. 22 a, 30 b; *Copyholds. Paulter v. Cornhill*, Cro. Eliz. 361), to which resort must be had for determining what portion of the lands of a feme copyholder a husband will take. It is generally an estate for the life of the husband, if there be issue, as at common law; but in gavelkind lands, a moiety only, so long as he continues unmarried, whether there be issue or not (Co. Litt. 30 a, 111 a; 2 Sid. 153; *Robinson on Gav.*, pp. 177—204; *Scriven on Cop.* 74, 7th ed.; *Shelford on Copyholds*, pp. 72—74).

Equity follows the law in the quality of estates, and therefore a husband will become tenant by the curtesy of an equitable estate of inheritance of the wife, and this notwithstanding a direction to pay the rents to her separate use (*Morgan v. Morgan*, 5 Madd. 408; *Hearle v. Greenbank*, 3 Atk. 715; *Pitt v. Jackson*, 2 Br. C. C. 51; *Follett v. Tyrer*, 14 Sim. 125). So where there was a devise of freeholds to trustees upon trust to stand possessed thereof unto and to the use of a married woman, her heirs and assigns for ever, for her separate use (*Appleton v. Rowley*, 8 Eq. 139; *contra, Moore v. Webster*, 3 Eq. 267). But a disposition by a wife of her separate property, either by deed or will prevents an estate by the curtesy (*Cooper v. Macdonald*, 7 Ch. Div. 288).

Where an equitable estate in fee descended on a married woman, the court, by virtue of her equity to a settlement, settled the estate on her during her life, but held that the possible estate, by the curtesy of her husband, could not be interfered with (*Smith v. Matthews*, 3 D. F. & J. 139).

Adverse possession, commenced before the equitable estate of the wife begins, by a party claiming by a title paramount to the trust, who retains possession until after the death of the wife, will prevent any title by the curtesy (*Parker v. Carter*, 4 Hare, 400).

The husband may be excluded in equity by an express declaration, that, upon the death of the wife, the inheritance shall descend to the heir of the wife, and that the husband shall not be a tenant by the curtesy (*Bennett v. Davis*, 2 P. Wms. 316); although a *partial* exclusion from the enjoyment of the property will not have that effect (5 Madd. 412).

By the Fines and Recoveries Act, 1833, s. 22 (*ante*, p. 285), an estate Powers of by the curtesy qualifies a person to be protector of a settlement. As tenant by to the statutory powers of leasing and sale, given to a tenant by the the curtesy. curtesy, see S. E. Act, 1877, sect. 46; S. L. Act, 1882, sect. 58, sub-s. 1 (viii.), *post*.

Tenant by the curtesy.

THE INHERITANCE ACT, 1833.

3 & 4 WILL. IV. C. 106.

An Act for the Amendment of the Law of Inheritance.

[29th August, 1833.]

- § 1. *Interpretation*...380.
- § 2. *Root of Descent*...382.
- § 3. *Effect of Devise to Heir, or Limitation to Grantor*...384.
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- § 9. *Half Blood*...390.
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- § 11. *Commencement of Act*...391.

3 & 4 Will. 4,
c. 106, s. 1.

Meaning of
words in the
act.

"Land."

"The pur-
chaser."

"Descent."

BE it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows (that is to say), the word "land" shall extend to manors, advowsons, messuages, and all other hereditaments, whether corporeal or incorporeal, and whether freehold or copyhold, or of any other tenure, and whether descendible according to the common law, or according to the custom of gavelkind or borough-English, or any other custom, and to money to be laid out in the purchase of land, and to chattels and other personal property transmissible to heirs, and also to any share of the same hereditaments and properties or any of them, and to any estate of inheritance or estate for any life or lives, or other estate transmissible to heirs, and to any possibility, right or title of entry or action, and any other interest capable of being inherited, and whether the same estates, possibilities, rights, titles, and interests, or any of them, shall be in possession, reversion, remainder, or contingency; and the words "the purchaser" shall mean the person who last acquired the land otherwise than by descent or than by any escheat, partition, or inclosure, by the effect of which the land shall have become part of or descendible in the same manner as other land acquired by descent; and the word "descent" shall mean the title to

inherit land by reason of consanguinity, as well where the heir shall be an ancestor or collateral relation, as where he shall be a child or other issue; and the expression "descendants" of any ancestor shall extend to all persons who must trace their descent through such ancestor; and the expression "the person last entitled to land" shall extend to the last person who had a right thereto, whether he did or did not obtain the possession or the receipt of the rents and profits thereof; and the word "assurance" shall mean any deed or instrument (other than a will) by which any land shall be conveyed or transferred at law or in equity; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

3 & 4 Will. 4,
c. 106, s. 1.

"Descendants."

"Persons last entitled."

"Assurance."

Number and gender.

For information on the important subject of the law of descents, the reader is referred to 2 Bl. Comm. 200, 240; Bl. on the Law of Descents; Watkins and H. Chitty on Descents; Bac. Abr. and Com. Dig. Descents; Hale's Hist. C. L. 206—248. But the following extracts from report of the Commissioners of Real Property will explain the general object of the alterations made by this act:

"By the rules which govern the transmission of freehold estates of inheritance at common law on the decease of an absolute proprietor, in the absence of express disposition by him, an estate descends to the eldest son, or his descendants, if he should be dead, leaving issue, and next to the second and other sons according to priority of birth, and their descendants; in default of sons and their descendants, it descends to daughters in equal shares, if more than one, and to the descendants of any deceased daughters, such descendants taking the share which would have gone to the parent if living.

Report of R. P. Commissioners.
State of the law of descents before 3 & 4 W. 4, c. 106.

"When there is no lineal descendant, the estate goes to the eldest or only brother of the whole blood, that is, who was born of the same father and mother as the deceased proprietor, and to his descendants, if he should be dead, leaving issue, and to the other brothers in succession, and their descendants. If there be no brother or descendants of a brother, the sisters of the whole blood succeed in equal shares, and the descendants of deceased sisters, such descendants taking their parent's share as before.

"In case of the failure of brothers and sisters and their descendants, it becomes necessary to inquire whether the deceased proprietor took the estate himself by inheritance, or whether he acquired it immediately by a deed or will, or, in technical language, was a purchaser.

"In the former case, the heir is to be sought in the family from which the estate descended to the deceased proprietor, that is, either on the father's side or on the mother's side, as it happened; in the latter case the law gives the preference to the relations on the paternal side, but if there be none such, then it directs the inheritance to go to the relations on the maternal side.

"Here occurs a rule, drawn from feudal principles, which is at variance with ordinary feelings and notions, and has been long considered unjust; every lineal ancestor of the deceased proprietor, whether near or remote, is excluded from immediately inheriting. An estate may pass to the younger brother of the father, and upon his death it may pass to the father as his heir; but rather than go at once to the father or the mother of the deceased proprietor, the law directs it to escheat, that is, to fall, as for want of an heir, to the lord of whom the land was holden, that is, in most cases, to the crown. [By the 6th section of the Inheritance Act, 1833, *post*, the lineal ancestors are admitted.]

Exclusion of the ascending line.

3 & 4 Will. 4, c. 106, s. 1. "In default, however, of lineal and immediate collateral heirs and their descendants, the inheritance is to be traced through the nearest ancestor, that is, the father, unless it be a maternal inheritance, and if it be a maternal inheritance, the mother, and it will pass to his or her eldest brother of the whole blood or his descendants, and the other brothers in succession and their descendants: and if none such, to sisters of the whole blood and their descendants in equal shares as before. In failure of this line, the next more remote ancestor on the same side is made the stock in the same manner, and then the next more remote, and so on; the rule being still observed, that the paternal line has the preference in ascending from the first purchaser, and that up to the first purchaser the inheritance must be traced back through the line of ancestors by which it descended.

Preference of the paternal line.

"If heirs in the pure male line ascending from the first purchaser should fail, then, in compliance with a rule above stated, a female ancestor, or some ancestor of a female ancestor, is to be made the stock; and first, it is a rule that such female ancestor is to be taken on the paternal side, if any such can be found; and therefore the brother of the paternal grandmother (the father's mother) is preferred to the brother of the mother of the deceased proprietor, he having been the first purchaser.

"Here sometimes, though rarely, occurs a point about which a difference of opinion has existed for a long series of years.

Question with respect to female stocks on the paternal side.

"According to some authorities, when a female stock on the paternal side is to be introduced, proximity of blood is to have the preference, and consequently collateral relations of the paternal grandmother are to be preferred to collateral relations of the paternal great grandmother. According to other authorities (and this is the doctrine maintained by Mr. Justice Blackstone in his Commentaries), the pedigree is still to be traced up as far as possible on the paternal side through males, and the female ancestor of the remotest male ancestor is to be preferred as a stock to the female ancestor of a less remote male ancestor, the paternal great grandmother to the paternal grandmother.

Heirs must be of the blood of the first purchaser.

"On failure of relations on the paternal side of the first purchaser, the maternal line is let in, that is, the mother of the first purchaser is considered as the stock, and her ancestors, first on the paternal and then on the maternal side, as before. It is to be observed, that on failure of heirs of the last proprietor on the side of the first purchaser, the estate does not pass to the heirs of the last proprietor on the other side, but escheats as before, so that an estate descended to the deceased proprietor from his mother can never pass to his collateral relations on the father's side.

Exclusion of the half-blood.

"It has been laid down, in the above statement, that collateral relations, in order to be let in to inherit, must be of the whole blood of the person from or through whom they are to derive their claim.

"Thus a brother of the deceased proprietor by the same father, but a different mother, cannot inherit to the deceased proprietor, whether he took by purchase or descent. The estate will rather escheat, and the same is the case with an uncle, half-brother of the father, and so on. This rule, like that which excludes the lineal ancestor, has long been felt to rest on no sound principle, and to be hard in its operation."

Equitable estates.

Equitable estates are subject to the same rules of descent as *legal* (2 P. Wms. 668; 1 Rep. 121 b; 4 Rep. 22; 2 Eden, 258; 1 Sand. Uses, 217, 3rd ed.; *Trash v. Wood*, 4 M. & C. 324; *Re Hudson, Cassels v. Hudson*, 1908, 1 Ch. 655.

Descent shall always be traced from the purchaser, but the last owner shall be considered to be the

2. In every case descent shall be traced from the purchaser; and to the intent that the pedigree may never be carried further back than the circumstances of the case and the nature of the title shall require, the person last entitled to the land shall, for the purpose of this act, be considered to have been the purchaser thereof, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the

same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner the last person from whom the land shall be proved to have been inherited shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same.

3 & 4 Will. 4,
c. 106, s. 2.

purchaser,
unless the
contrary be
proved.

Where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the land shall descend, and the descent shall thenceforth be traced, from the person last entitled to the land, as if he had been the purchaser thereof (Law of Property Amendment Act, 1859, s. 19).

22 & 23 Vict.
c. 35, s. 19.

The last preceding section shall be read as part of the 3 & 4 Will. 4, c. 106 (*Ib.* s. 20).

The old law before this act depended largely on the question whether the person from whom descent had to be traced had himself obtained seisin in deed, or not. See the explanation by *Romilly, M.R.*, of the old rule *seisina facit stipitem* in *Ingilby v. Amcotts*, 21 Beav. 594. And as to the meaning of seisin deed, see *ante*, p. 374. The old law was as follows:—On the death of A. entitled to a fee simple interest in land which he had acquired by purchase (that is, by conveyance or devise—see for an example of a purchaser acquiring by devise, *Doe v. Thomas*, 3 M. & Gr. 815) descent was traced from him whether he had obtained seisin in deed or not. But where A. had himself acquired the land by descent, the rule was that in the case of corporeal hereditaments in possession, descent was traced from him if he had obtained seisin in deed: otherwise it was traced from the next preceding ancestor who had obtained seisin in deed: if none, from the last purchaser. In the case of corporeal hereditaments held for an estate in remainder or reversion, and also in the case of incorporeal hereditaments, acts of ownership were treated as equivalent to seisin in deed so as to constitute A. the stock of descent (*Tud. L. C. Conv.* 4th ed. 179; 1 R. P. Report, 15; 1 Hayes, *Conv.* 5th ed. 312). See further the note, *ante*, p. 374, as to seisin in deed and seisin in law.

Law before
act.

A vender making title as heir is not bound to produce affirmative evidence in his possession that the ancestor from whom he traces descent took as purchaser, but may rely on the statutory presumption contained in this section until some proof to the contrary is adduced. But he is bound to disclose any matters within his knowledge tending to rebut the presumption that his ancestor took by purchase (*Dorling v. Claydon*, 1 H. & M. 402). Where an action to try the validity of a will was compromised on the terms that the rights of the female plaintiff to certain lands should be the same as if there had been an intestacy, she took that land by descent, not by purchase (*Blake v. Hynes*, 11 L. R. Ir. 284).

Effect of this
section in the
case of pur-
chase from
an heir.

The descent under the present act of an estate in remainder or reversion, or by executory devise, is analogous to the descent of an estate taken by descent from a purchasing ancestor (*Ingilby v. Amcotts*, 21 Beav. 585).

Estates in
remainder or
reversion, or
by executory
devise.

For the purpose of estoppel against a tenant the heir of the landlord may be his privy in blood though the heirship is ascertained under this section by tracing descent from an ancestor of the landlord (*Weeks v. Birch*, 69 L. T. 759).

Where a coparcener dies intestate leaving a son, the whole of her share descends on her son (*Cooper v. France*, 19 L. J. Ch. 315); and the same principle applies in the case of her leaving more remote descendants (*Pater-son v. Mills*, 19 L. J. Ch. 310; *Re Matson, James v. Dickinson*, 1897, 2 Ch. 509). Where land was limited to the "right heirs" of A., who were females, they took as joint tenants and not coparceners, and there was

Whole share
of coparcener
dying intes-
tate, leaving a
son, descends
on the son.

3 & 4 Will. 4. no right of representation (*Berens v. Fellowes*, 56 L. T. 391; 35 W. R. 350; c. 106, s. 2. *Re Baker, Pursey v. Holloway*, 79 L. T. 343). See *Owens v. Gibbons*, 1902, 1 Ch. 636. See the previous discussions of descent among coparceners in 5 Jur. 641, 763; 23 Law Mag. 279; 1 Hayes's Convey. 314, 5th ed.; 1 Jarm. & Byth. Convey. by Sweet, 139, 140; 10 Jur. 71—75, 112, 132, 160, 173.

Customary descents.

The rule as to tracing the descent from the purchaser applies where there is a customary descent (sect. 1, *ante*). If the custom is found applicable by reason of the parties being within the requisite degree of consanguinity, the customary mode of descent is to be applied, and the descent traced according to the directions of the act. If the parties are not within the requisite degree, the directions of the act are to be followed, the descent being traced according to common law (*per Crompton, J.*; *Muggleton v. Barnett*, 2 H. & N. 653; *Re Smart, S. v. S.*, 18 Ch. D. 165; see Williams, Real. Prop. App. A.). An equitable interest in copyholds descended to the customary heirs (*Re Hudson, Cassel v. Hudson*, 1908, 1 Ch. 655). When the custom was that copyholds for the first descent after a surrender descend to the eldest son, and if no surrender to the youngest, the word "descent" was not used in its strict legal sense, but meant "a single step in the scale of genealogy" (*Bickley v. Bickley*, 4 Eq. 216). See Scriven, p. 167 *et seq.*, 7th ed.

Lands of gavelkind tenure, chiefly found in Kent, descend to all sons in equal shares, and in default of sons to all daughters (Robinson on Gavelkind, 5th ed. p. 44). This custom (which in Kent is the common law, *Re Chenoweth, Ward v. Dwelley*, 1902, 2 Ch. 488) extends to collaterals (*Re Chenoweth, Ward v. Dwelley, sup.*; see *Crump v. Norwood*, 7 Taunt. 362). Lands of borough English tenure descend to the youngest son (Robins. Gavelkind, 236). In the case of the descent of lands of gavelkind or borough English tenure, the *jus representationis* attaches to the custom (*Hook v. H.*, 1 H. & M. 43; *Clements v. Scudamore*, 1 P. Wms. 65). In the case of other customary descents, however, where the express terms of the custom are silent, the descent will be in accordance with the common law (*Rider v. Wood*, 1 K. & J. 644; *Re Smart, S. v. S.*, 18 Ch. D. 165; see *Locke v. Colman*, 1 My. & Cr. 423).

Right of posthumous heir.

Although lands have actually descended in the first instance to the person who was heir of the party last seised at the time of his decease, yet, if a nearer heir is afterwards born, property will shift to the nearest heir who subsequently comes into being (see *Rider v. Wood*, 1 K. & J. 644; Cru. Dig. Descent, Ch. III. s. 14). A posthumous heir is entitled to the rents of a descended estate only from the date of his birth, and the qualified heir is entitled to the rents which accrue before the birth of the posthumous heir, whether actually received before that time or not (*Richards v. Richards*, Johns. 754; *Re Mowlen*, 18 Eq. 9; *Re Wilmer, Moore v. Wingfield*, 1903, 1 Ch. 885, 888; see, however, *Goodale v. Gawthorne*, 2 Sm. & Giff. 375).

For the law before Law of Prop. Amdt. Act, 1859, see *Doe v. Blackburn* (1 Mood. & Rob. 547, *Parke, B.*).

Heir entitled under a will shall take as devisee, and a limitation to the grantor or his heirs shall create an estate by purchase.

3. That when any land shall have been devised, by any testator who shall die after the thirty-first day of December, one thousand eight hundred and thirty-three, to the heir or to the person who shall be the heir of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent (*a*); and when any land shall have been limited, by any assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, to the person or to the heirs of the person who shall thereby have conveyed the same land, such person shall be considered to have acquired the same as a purchaser, by virtue of such

assurance, and shall not be considered to be entitled thereto as **3 & 4 Will. 4,** his former estate or part thereof (b). **c. 106, s. 3.**

This section of the act is in direct contravention of two old-established rules of law, and renders it necessary to bear in mind the distinction between *descent* and *purchase*, the two modes of acquiring property. A title by *descent* is vested in a man by the single operation of law, and by *purchase* by his own act or agreement (Co. Litt. 18 b; 2 Bl. Comm. 200, 201). The latter is thus defined by Littleton, s. 12: "Purchase is called the possession of lands or tenements that a man hath by his deed or agreement, unto which possession he cometh not by title of descent from any of his ancestors or cousins, but by his own deed." Lord Coke states that a purchaser is a law term, and imports any estate which is *not* cast upon a man by act of law, (as descent or escheat,) but which he takes or accepts by conveyance for money or other consideration, *vel aliâ quâvis fortunâ*, or freely by gift (Co. Litt. 18 a). The difference between the acquisition of an estate by descent and by purchase consists principally in two points: 1st. That by purchase the estate acquires a new inheritable quality, and is descendible to the owner's blood in general, as a feud of indefinite antiquity. 2nd. An estate taken by purchase will not make the person who acquires it answerable for the acts of his ancestors, as an estate by descent (Cruise's Dig., tit. 30, s. 4).

(a) It was a positive rule of law, that a man could not make his right heirs take by purchase, either by conveyance at common law, or by a limitation to uses, or by devise (*Cownden and Clerk's case*, Hob. 30; *Pybus v. Mitford*, 1 Vent. 372; Co. Litt. 22 b). The same rule applied to equitable as legal estates (Watk. Desc. 169), and to copyholds as to freeholds (*Roe d. Noden v. Griffith*, 4 Burr. 1952; *Thrustout v. Cunningham*, 2 Bl. R. 1048; *Fearne*, 68). Therefore, if a person devised his lands to his heir at law in fee, it was inoperative, and the heir took by descent, as his better title (*Reading v. Royston*, 1 Salk. 242; *S. P.*, 2 Leon. 11; *Dyer*, 124 a; *Plowd.* 545; 2 Ves. & B. 190; *Foxwell v. Van Grutten*, 1897, A. C. 688); and this notwithstanding the will imposed some pecuniary charges on the estate (*Clarke v. Smith*, Com. 72; *Allen v. Heber*, 1 Bl. R. 22; *Emerson v. Inchbird*, 1 Ld. Raym. 728; *Plunkett v. Penson*, 2 Atk. 292; *Hedger v. Rowe*, 3 Lev. 127; see *Wms. Saund.* 8 d.; *Chaplin v. Leroux*, 5 M. & S. 14). So under a devise to one for life, or in tail, with remainder to the right heirs of the testator, immediately upon his death the heir took the reversion by descent, and not under the will (Hob. 30; 10 Rep. 41; *Ventr.* 372; *O'Keefe v. Jones*, 13 Ves. 413). So under a devise to the heir at law in fee, with an executory devise over in case he did not attain the age of twenty-one years, the heir took by descent, and not by purchase (*Doe v. Timins*, 1 B. & Ald. 530; see 1 Jarman on Wills, 5th ed., 74; *Langley v. Sneyd*, 7 Moore, 165; *Manbridge v. Plummer*, 2 M. & K. 93). The rule did not apply in the case of money directed to be laid out in the purchase of land (*Robinson v. Knight*, 2 Eden, 155). And where a different estate was devised than would have descended to the heir, the disposition by will prevailed (*Scott v. Scott*, Amb. 383; *Wood v. Skelton*, 6 Sim. 183; see *Buchanan v. Harrison*, 1 J. & H. 662). As where the estate was devised to the heir in tail (*Plowd.* 545). So where a man having issue two daughters, who were his heirs, devised to them and their heirs, they took under the will, for by law they would have taken as coparceners, but by the will the estate was given to them as joint tenants (*Cro. Eliz.* 431; *Com. R.* 123; 2 Ld. Raym. 829; *Swaine v. Burton*, 15 Ves. 371).

Under this section an heir to whom lands are devised by the ancestor takes them as devisee to all purposes; and therefore the pecuniary legatees are not entitled to have the assets marshalled as against him (*Strickland v. Strickland*, 10 Sim. 374). And as between him and the devisees of other parts of the testator's estates, the estates devised to the former are not to be applied in payment of the debts in priority to the estates devised to the latter (*Biederman v. Seymour*, 3 Beav. 368).

3 & 4 Will. 4, c. 106, s. 3. It does not seem certain whether this section applies to the case of a devise of copyholds to an heir who disclaims all interest under the will, and enters as heir of the testator (*Bickley v. Bickley*, 4 Eq. 216).

Devise to "right heirs." It has been held that the section applies to a devise to "right heirs" (*Owen v. Gibbons*, 1902, 1 Ch. 636). So where a testator devised lands to his own right heirs who were females, they took as joint tenants and not as coparceners (*Re Baker*, *Pursey v. Holloway*, 79 L. T. 343; see *Swaine v. Burton*, 15 Ves. 371; *Berens v. Fellowes*, 56 L. T. 391; *Owen v. Gibbons*, *sup.*).

Construction of devise to "heir." Under a devise of customary lands to the testator's heir, his heir-at-law took, and not his customary heir (*Thorp v. Owen*, 2 Sm. & G. 90; *Polley v. P.*, 31 Beav. 363; *Garland v. Beverley*, 9 Ch. D. 213; see *Sladen v. S.*, 2 J. & H. 369).

A devise of the whole fee simple in the testator's residuary real estate to trustees, in trust to convey to such person as should answer the description of the testator's heir-at-law, broke the descent of real estate which had descended to the testator *ex parte maternâ*, and the trustees were bound to convey to the common law heir (*Davis v. Kirk*, 2 K. & J. 391; compare the grant in *Heywood v. H.*, 34 Beav. 317).

Assurance to heirs.

Law before act.

Reversions and remainders.

(b) In order to understand this section of the act, it is necessary to observe that when a person has an interest in lands and grants a portion of that interest, or, in other terms, a less estate than he has in himself, the possession of these lands will, on the determination of the granted interest or estate, return or revert to the grantor (Com. Dig. Estate (B. 10, 11, 12, 31); 2 Bl. Com. 175; Co. Litt. 22 b; Plowd. 151; Watk. on Conv. 120). An estate in *reversion* is therefore the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted by him (Co. Litt. 22; *Laird v. Briggs*, 19 Ch. Div. 34; *Re Hunter and Hewlett*, 1907, 1 Ch. 46); or the returning of the land to the grantor or his heirs after the grant is over (Co. Litt. 142 b). A reversion is never created by deed or writing, but arises from construction of law. A remainder can only be limited by deed or some other assurance. It is that which is created by the grant after the existing possession (*Laird v. Briggs*, *sup.*). It was a rule before this act that a grantor could not enable his heir general to take a remainder as purchaser, under a limitation to his heirs; but where the limitation is to the right heirs of the grantor, the use so limited was construed to be the old use, and was to be executed in him as the *reversion in fee*, and not as a remainder (1 Rep. 129 b, 130; *Godolphin v. Abingdon*, 2 Atk. 57). As where A. granted land to B. for life with remainder to his own heirs, he remained, under the old law, seised of the reversion as part of his former estate, which descended as if no such grant had been made (*Wills v. Palmer*, Bl. R. 687; 5 Burr. 2615; *Read v. Morpeth*, Cro. Eliz. 321; Moore, 284; *Bingham's case*, 2 Rep. 91; *Cholmondeley v. Clinton*, 2 Mer. 173; 2 B. & Ald. 625; 2 Jac. & W. 1; 4 Bligh, N. S. 1; *Locke v. Southwood*, 1 M. & C. 411).

Effect of section on assurance to heirs.

Under such a grant A. now, by virtue of the present section, takes himself as purchaser. "In fact A. takes under his own assurance as if the estate were to him and his heirs of the gift of a stranger. And where he creates a particular estate, limiting the expectant fee to himself and his heirs, or (without naming himself as an object) to his heirs, he takes the fee, for the purposes of descent at least, not as a reversioner, but as a remainderman" (Hayes, Conv. 5th ed. 317).

Where a lady seised in fee as heir *ex parte maternâ*, by a settlement in 1860 limited the land (ultimately) to the person who would on her decease have become entitled "in case she had died intestate and without having been married," her heir *ex parte maternâ* took, the section not applying (*Heywood v. H.*, 34 Beav. 317).

Cases before the act as to alteration of line of descent.

If, before this act, a man, seised as heir on his mother's side, made a feoffment in fee to the use of himself and his heirs, the use, being a thing in confidence, would have followed the nature of the lands, and would have descended to the heir on the part of the mother (Co. Litt. 13 a; *Godbold v.*

Freestone, 3 Lev. 406; *Nanson v. Barnes*, 7 Eq. 250; *Heywood v. II.*, 34 Beav. 317; and it was the same if the assurance had been by fine and recovery (*Abbot v. Burton*, Salk. 590; see *Stringer v. New*, 9 Mod. 363). But the rule held only where the feoffor or settlor took by descent, and not by purchase (*Martin v. Strachan*, Str. 1179, Nolan's ed.; 1 Wils. 66; 6 Br. P. C. 319; 5 Term Rep. 104). As to copyholds, see *Roe v. Baldwin* (5 Term Rep. 104). A deed of partition between parceners did not break the descent (Com. Dig. Parcener, C. 15); nor a deed of partition between one parcener and a purchaser from another (*Doe v. Dixon*, 5 Ad. & Ell. 834).

If a tenant in tail by purchase, with the reversion in fee *ex parte maternâ*, levied a fine, the land descended to his maternal heirs (*Symonds v. Cudmore*, Salk. 338; 1 Show. 370); for the tenant in tail, by levying a fine, acquired a base fee, which merged in the reversion, of which the tenant was seised *ex parte maternâ*, and descended in the same line. Where a man had an equitable estate *ex parte paternâ* or *ex parte maternâ*, and afterwards, by descent or otherwise, acquired the legal estate, the equitable estate merged in the legal, and the descent was according to the legal title (*Goodright v. Wells*, Dougl. 771, 2nd ed.; *Wade v. Paget*, 1 Br. C. C. 363; *Selby v. Alston*, 3 Ves. 339; *Lyster v. Mahony*, 1 Drury & Warren, 243; *Re Douglas*, Wood v. Douglas, 28 Ch. D. 327; and see *Goodright v. Searle*, 2 Wils. 29; *Goodtitle v. White*, 1 New Rep. 383; 15 East, 174; 3 Prest. Con. 325, 340). But where an infant died seised of an equitable estate which had descended *ex parte maternâ*, the descent was not broken, although a conveyance of the legal estate (which the infant was incapable of calling for) might have broken it (*Langley v. Sneyd*, 1 Sim. & Stu. 45).

Where a settlor entitled *ex parte maternâ* limited lands (by an ultimate limitation in a settlement), to the right heirs of her mother, whose heir-at-law she then was, the estate descended on her intestacy to her own heir *ex parte maternâ* (*Moore v. Simpkin*, 31 Ch. D. 95).

In connection with limitations to heirs reference should be made to the well-known rule, called the rule in *Shelley's case* (1 Rep. 93; see *Parker v. Clarke*, 3 Sm. & G. 161, 165). By this rule it was established, that where the ancestor, by any gift or conveyance, takes an estate for life, and in the same conveyance an estate is limited either immediately or mediately to his heirs in fee or in tail, the word *heirs* is a word of limitation of the estate, and not of purchase. Where the subsequent limitation to the heirs follows immediately the estate for life, it then becomes executed in the ancestor, forming, by its union with the estate for life, one estate of inheritance in possession; but where such limitation is mediate and another estate intervenes, it is then a remainder vested in the ancestor who takes the freehold, not to be executed until after the determination of the preceding lesser estate (1 B. & C. 243). For the decisions on this rule, see Tudor's L. C. Conv. 4th ed. 388; Fearn, Cont. Rem. 10th ed. pp. 28—201; *Foxwell v. Van Grutten*, 1897, A. C. 658; *Re Youman*, 1901, 1 Ch. 720; *Re Buckton*, B. v. B., 1907, 2 Ch. 406.

4. When any person shall have acquired any land by purchase under a limitation to the heirs or to the heirs of the body of any of his ancestors, contained in an assurance executed after the said thirty-first day of December, one thousand eight hundred and thirty-three, or under a limitation to the heirs or to the heirs of the body of any of his ancestors, or under any limitation having the same effect, contained in a will of any testator who shall depart this life after the said thirty-first day of December, one thousand eight hundred and thirty-three, then and in any of such cases such land shall descend, and the descent thereof shall be traced as if the ancestor named in such limitation had been the purchaser of such land.

Where heirs take by purchase under limitations to the heirs of their ancestor, the land shall descend as if the ancestor had been the purchaser.

3 & 4 Will. 4, c. 106, s. 3.

3 & 4 Will. 4,
c. 106, s. 4.

Before this act, under a limitation to special heirs of a person, to whom no estate was given, the descent would have been the same as if the estate had descended from him (see *Fearne, Cont. Rem.* 80). Thus, a limitation to the heirs male of the body of B. (where no estate is in or given to B. himself), not only gives such heir an estate in tail male, but such an estate tail as will, on failure of his issue male, go in succession to the other heirs male of the body of B., in the same course as if the estate tail had descended from B. himself (*Mandeville's case*, Co. Litt. 26; see *Vernon v. Wright*, 2 Drew. 439; *Southcot v. Stowell*, 1 Mod. 226, 237; 2 Mod. 207, 211; *Wills v. Palmer*, 5 Burr. 2615; *Wrightson v. Macauley*, 14 M. & W. 214; *Winter v. Perrott*, 9 Cl. & Fin. 606). But where the limitation was to the heirs general of a person, the rule in *Mandeville's case* did not apply (*Moore v. Simkin*, 31 Ch. D. 95).

The above section lays down a rule of descent applicable as well to limitations to heirs general as to limitations to heirs special.

A gift to the heirs of a person to whom no estate is given is a gift to them as *personæ designatæ*, and they take as joint tenants (*Berens v. Fellowes*, 56 L. T. 391; 35 W. R. 350).

Brothers, &c.,
shall trace
descent
through their
parent.

5. No brother or sister shall be considered to inherit immediately from his or her brother or sister, but every descent from a brother or sister shall be traced through the parent.

Before this act the descent between brothers and sisters was considered as *immediate*; and in making out their title to *each other*, the common father need not have been named, though living, but the descent between them was exactly the same as if he had been dead (*Watk. Desc.* 111, n.; *H. Chitty on Desc.* 64, 354; *Collingwood v. Pace*, 1 Ventr. 413; *Bridge* by Bann. 410). So under the old law, where A. had been attainted of treason, the descendants of one of A.'s children could inherit property from the descendants of another notwithstanding A.'s attainder (*Kynnaird v. Leslie*, L. R. 1 C. P. 389). As to the doctrine of *possessio fratris*, see note to sect. 9, *post*, p. 390.

Lineal ancestor may be
heir in preference to
collateral persons
claiming
through him.

6. Every lineal ancestor shall be capable of being heir to any of his issue; and in every case where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote lineal ancestor to any of his issue, other than a nearer lineal ancestor or his issue.

Old rule
excluding the
ascending
line.

It was an old maxim of law that an inheritance might lineally descend but not ascend (3 Rep. 40a). The parent, therefore, could never take immediately by descent from the child, but the land would rather have escheated (*Cowper v. C.*, 2 P. Wms. 666). Yet a father or mother before this act might have inherited as *cousin* to their child; as where a son died seised in fee of land without issue, brother, or sister, but leaving two cousins his heirs-at-law, one of whom was his own mother (*Eastwood v. Vincke*, 2 P. Wms. 613). So an uncle might have had land as heir though the father was alive (Litt. s. 3); but if in that case the uncle acquired actual seisin and died without issue, the father might have had the land as heir to the uncle (Orig. de Jur. Feud. 234; *Wright's Ten.* 182, n. (z)). So the father might have taken by *purchase* as the nearest of blood to his son, as if a lease were made to the son for life with remainder to his next of blood in fee (Co. Litt. 10 b; 3 Rep. 40 a).

By the present section lineal ancestors are admitted (see Real Property 3 & 4 Will. 4, Report, *ante*, p. 381). c. 106, s. 6.

Where a son, legitimate in Scotland by the subsequent marriage of his parents, died intestate as to lands in England of which he was seised in fee and without issue, the father did not inherit under this section (*Re Don*, 4 Drew. 194). Compare the rule laid down in *Doe v. Vardill*, 7 Cl. & F. 895, that a child born out of wedlock, although legitimated by the subsequent marriage of his parents, cannot inherit land in England. And see *Re Grey*, *Grey v. Stamford*, 1892, 3 Ch. 88; and *Shaw v. Gould*, L. R. 3 H. L. 55.

7. And be it further enacted and declared, that none of the maternal ancestors of the person from whom the descent is to be traced, nor any of their descendants, shall be capable of inheriting until all his paternal ancestors and their descendants shall have failed; and also that no female paternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male paternal ancestors and their descendants shall have failed; and that no female maternal ancestor of such person, nor any of her descendants, shall be capable of inheriting until all his male maternal ancestors and their descendants shall have failed.

The male line to be preferred.

Where, after due and sufficient investigation, there is no reasonable possibility of ascertaining that there are descendants from the paternal ancestors, then under the above section the descendants of the maternal ancestors must be sought for (*Greaves v. Greenwood*, 2 Ex. Div. 297). As to what is sufficient evidence of the extinction of superior lines of descent, see *Ib.*; *Lyell v. Kennedy* (18 Q. B. Div. 811); *Rawlinson v. Miller* (1 Ch. D. 52); *Jeakes v. White* (6 Exch. 880); and the note, *ante*, p. 156.

8. And be it further enacted and declared, that where there shall be a failure of male paternal ancestors of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and where there shall be a failure of male maternal ancestors of such person and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants.

The mother of more remote male ancestor to be preferred to the mother of the less remote male ancestor.

This statute has declared the law to be in accordance with the position laid down by Blackstone (2 Comm. 238; *Davies v. Lowndes*, 5 Bing. N. C. 169). It was decided, that where a person seised of an estate *ex parte maternâ* died without issue, the descendants of his maternal grandfather must all be extinct before any descendant of a remoter maternal ancestor could inherit, however nearly related to the *propositus ex parte maternâ* (*Hawkins v. Shewen*, 1 Sim. & Stu. 257; see Hale's Hist. C. L. by Runn. 2nd vol. 120). As to what is sufficient evidence of the extinction of a superior line of descent, see *Jeakes v. White* (6 Exch. 880), and the cases quoted under sect. 7.

3 & 4 Will. 4,
c. 106, s. 9.

Half blood, if
on the part
of a male
ancestor, to
inherit after
the whole
blood of the
same degree;
if on the part
of a female
ancestor,
after her.

9. Any person related to the person from whom the descent is to be traced by the half blood shall be capable of being his heir; and the place in which any such relation by the half blood shall stand in the order of inheritance, so as to be entitled to inherit, shall be the next after any relation in the same degree of the whole blood, and his issue, where the common ancestor shall be a male, and next after the common ancestor where such common ancestor shall be a female, so that the brother of the half blood on the part of the father shall inherit next after the sisters of the whole blood on the part of the father and their issue, and the brother of the half blood on the part of the mother shall inherit next after the mother.

Exceptions
to the rule
excluding the
half blood.

The old rule of law which excluded the half blood from taking by descent, was subject to some exceptions and qualifications, to which it will be proper to advert. As the descent from the parent to daughters was *immediate*, daughters by different venters might have inherited together as one heir to their common parent, although they could not inherit to each other (Harg. Co. Litt. 14 a, n. (5)). And the daughters by several husbands succeed in the same manner to the inheritance of their mother (see Watk. on Desc. 159, n. (b); H. Chitty on Desc. 78, 79). So, also, in the case of *estates tail*, the half blood coming within the description of the entail might inherit as effectually as the whole blood, for they do not claim as heirs of the person last seised, but of the original donee (Plowd. 57; 3 Rep. 42; *Goodtitle v. Newman*, 3 Wils. 526). In *titles of honour*, also, half blood is no impediment to the descent; but a title can only be transmitted to those who are descended from the first person ennobled, or the person who is made the stock of descent (Co. Litt. 15 b; 3 Rep. 42 a; Cruise's Dig. tit. 26, c. 3, ss. 8—11).

A brother or sister of the half blood is entitled to share the personal estate of an intestate equally with one of the whole blood, inasmuch as they are both equally near of kin to the intestate (1 Jac. 2, c. 17, s. 7; *Jessop v. Watson*, 1 M. & K. 665; *Burnett v. Mann*, 1 Ves. sen. 156).

Seisin of
ancestor.

Before the above act, a man in order to qualify himself to take by descent, must have shown that he was heir of the person last seised in deed of the actual freehold and inheritance (Co. Litt. 11 b, 15 d; 3 Bos. & P. 648; *Jenkins v. Pritchard*, 2 Wils. 45). Thus if A. died leaving a son and daughter by one venter, and a son by another, and the son by the first venter became actually seised in deed and dies, his sister was heir to him; but if he died without having acquired the seisin in deed, the son by the second venter would have taken as immediate heir of his father, to the exclusion of the sister (Co. Litt. 15; Sir W. Jones, 561; Co. Litt. 15 a; 3 Wils. 521; 7 T. R. 398, 399; *Id.* 213; *Bushby v. Dixon*, 3 B. & C. 304; 3 T. R. 211; Jenk. 242; *Goodtitle v. Newman*, 3 Wils. 516; *Doe v. Keen*, 7 T. R. 386; *Cunningham v. Moody*, 1 Ves. sen. 174; *Buchanan v. Harrison*, 1 J. & H. 662; *Doe v. Hutton*, 3 Bos. & P. 643; *Goodtitle v. White*, 15 East, 174; 2 Bos. & P. N. R. 388; Harg. Co. Litt. 14 a, n. 6). See the note on seisin, *ante*, p. 374.

Effect of rule
requiring
seisin of
ancestor upon
descent to
half blood.

Rule of
possessio
fratris.

Descendible
freeholds.

The descent of descendible freeholds to heirs was governed by the same rules as prevailed in cases of estates of inheritance (*Gravenor v. Brooke*, Poph. 32; *Long v. Myles*, Fox & Smith, Ir. Rep. 1; *Pierson v. Shore*, 1 Atk. 480). And the rule of *possessio fratris* was applicable to copyholds (4 Rep. 21).

After the
death of a
person
attainted, his
descendants
may inherit.

10. That when the person from whom the descent of any land is to be traced shall have had any relation who, having been attainted, shall have died before such descent shall have taken place, then such attainder shall not prevent any person from inheriting such land who would have been capable of inheriting

the same, by tracing his descent through such relation, if he had not been attainted, unless such land shall have escheated in consequence of such attainder before the first day of January, one thousand eight hundred and thirty-four.

3 & 4 Will. 4,
c. 106, s. 10.

Persons attainted of high treason or felony were incapable of inheriting lands or of transmitting them by descent to their posterity (Co. Litt. 8 a; Cro. Car. 566). Another consequence of such an attainder was the corruption and extinction of all hereditary blood in the person attainted, by which he was rendered not only incapable of himself inheriting or of transmitting his own property by heirship, but he also obstructed the descent of lands to his posterity, in all cases where they were obliged to derive their title through him from any remote ancestor (11 Rep. 1 b; Co. Litt. 391 b; see Yorke's Law of Forfeiture, 72, 4th ed.; 2 Blac. Com. 251; 4 Ib. 388; Bl. Considerations on the Law of Forfeiture for High Treason; Bac. Abr. Forfeiture; Burn's J. Forfeiture). But as between two sons of an attainted father, there was nothing to hinder one brother from inheriting to the other (1 Ventr. 413; Yorke's Law of Forfeiture, 83, 4th ed.; *Kynniard v. Leslie*, L. R. 1 C. P. 389).

The effect of
attainder.

Freeholds of inheritance, which at the time of the death of a *felo de se* belonged to him, did not escheat to the Crown, but passed to his heir-at-law (*Norris v. Chambers*, 29 Beav. 258; 3 Co. Inst. 55; 2 Bl. Com. 386; 2 Bac. Abr. tit. Felo de se; 4 Vin. Abr. 268, tit. Blood, corrupted, A. pl. 2; *Haley v. Petit*, Plowd. 253, 261; 7 Jur. N. S. 689). In the case of a fee tail, notwithstanding the forfeiture of lands entailed by an attainder, yet the blood of the attainted person was not corrupted so as to affect the issue in tail, for they claimed *per formam doni* (*Doutie's case*, 3 Rep. 9 b; Yorke's Law of Forfeiture, 81, 82; Br. Descent, pl. 1; Bro. Forfeiture, pl. 37; *Mantell v. Mantell*, Cro. Eliz. 28; *Sheffield v. Ratcliffe*, Godb. 305; Hob. 347).

If a copyholder was attainted of treason or felony, his copyhold was immediately forfeited to the lord (Hawk. P. C. b. 2, c. 49, s. 7). But by the custom of some manors, the son might inherit from his father, notwithstanding the attainder of the latter (1 Watk. on Cop. 326; Scriven, 181).

By the Forfeiture Act, 1870, s. 1, it is enacted that, from and after the 4th July, 1870, no confession, verdict, inquest, conviction, or judgment of 4th July, 1870, for any treason or felony or *felo de se* shall cause any attainder or corruption of blood or any forfeiture or escheat. But nothing in the act is to affect the law of forfeiture consequent upon outlawry (see also 54 Geo. 3, c. 145; Hansard, Parl. Debates, vol. 27, pp. 527—538; Trustee Act, 1893, s. 48, *post*). As to a tenant in tail convicted of felony, see *Re Gaskell and Walter*, 1906, 2 Ch. 1; quoted, *ante*, p. 276.

Statutes as to
attainder.

33 & 34 Vict.
c. 23.

11. This act shall not extend to any descent which shall take place on the death of any person who shall die before the said first day of January, one thousand eight hundred and thirty-four.

Act not to
extend to any
descent before
January,
1834.

12. Where any assurance executed before the said first day of January, one thousand eight hundred and thirty-four, or the will of any person who shall die before the same first day of January, one thousand eight hundred and thirty-four, shall contain any limitation or gift to the heir or heirs of any person, under which the person or persons answering the description of heir shall be entitled to an estate by purchase, then the person or persons who would have answered such description of heir if this act had not been made, shall become entitled by virtue of such limitation or gift, whether the person named as ancestor shall or shall not be living on or after the said first day of January, one thousand eight hundred and thirty-four.

Limitations
made before
1st January,
1834, to the
heirs of a
person then
living, shall
take effect as
if this act
had not been
made.

PAYMENT OF DEBTS OUT OF REAL ESTATES.

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I.—THE DEBTS RECOVERY ACT, 1830.

11 GEO. IV. & 1 WILL. IV. c. 47.

11 Geo. 4 & 1 Will. 4, c. 47, s. 1. *An Act for consolidating and amending the Laws for facilitating the Payment of Debts out of Real Estates.* [16th July, 1830.]

3 & 4 Will. & M. c. 14.
6 & 7 Will. 3, c. 14.
4 Anno, c. 5 (I).
47 Geo. 3, c. 74.
Recited acts repealed.

WHEREAS an act was passed in the third and fourth years of King William and Queen Mary, intituled "An Act for the Relief of Creditors against fraudulent Devises," which was made perpetual by an act passed in the sixth and seventh years of King William the Third, intituled "An Act for continuing several Laws therein mentioned:" and whereas an act was passed by the Parliament of Ireland, in the fourth year of Queen Anne, intituled "An Act for Relief of Creditors against fraudulent Devises:" and whereas an act was passed in the forty-seventh year of his late Majesty King George the Third, intituled "An Act for more effectually securing the Payment of Debts of Traders:" and whereas it is expedient that the provisions of the said recited acts should be enlarged, and that the said recited acts should be repealed, in order that all the provisions relating to this matter should be consolidated in one act; be it therefore enacted, that the said several recited acts shall be and the same are hereby repealed, but so as not to affect any of the provisions and remedies of the said acts, or any of them, to the benefit of which any persons are entitled, as against any estate or interest in any lands, tenements, hereditaments or other real estate of any person or persons who died before the passing of this act.

Old rule as to liability of heir were assets for the payment of the ancestor's debts by specialty, as by lands to debts.

bond or covenant in which the heirs were named (1 Str. 665; 4 East, 492). But the ancestor, by disposing of the land by will, could deprive his creditors of that means of payment, as the devisee was neither at law (4 East, 491; 7 East, 135; 2 Atk. 292, 432; 2 Anstr. 515), nor in equity (2 Atk. 432), liable to the payment of the testator's debts in respect of the land devised. The heir-at-law also to whom the land descended might have defeated the creditor of his ancestor by aliening the land before suit by the creditors (1 P. Wms. 777), although in equity he appears to have been responsible for the value of the land sold (*Id.* 777, 431; see 1 Fonbl. Eq. 283). To obviate those mischiefs 3 & 4 Will. & Mary, c. 14 (made perpetual by 6 & 7 Will. 3, c. 14, and extended to Ireland by 4 Anne, c. 5), was passed. And after that statute the course was to sue the heir, as being the person bound by the specialty, and the devisee, because he had the land (*Re Hyatt, Bowles v. Hyatt*, 38 Ch. D. 619). 3 & 4 W. & M., c. 14, was repealed and re-enacted by the present act with additional provisions. For the old law as to proceedings against the heir upon the bond of his ancestor, as to alienation of assets by the heir, and the statute of fraudulent devises, see further the notes to *Jeffreson v. Morton* (2 Wms. Saund. 12, ed. 1871).

11 Geo. 4 &
1 Will. 4,
c. 47, s. 1.

It was not necessary under 3 & 4 W. & M., c. 14, as it is under the act 13 Eliz. c. 5, against fraudulent conveyances, that the devise should have been made with the intent to delay, hinder, or defraud creditors (*Coope v. Cresswell*, 2 Eq. 106). Under 13 Eliz. c. 5, fraudulent conveyances may be set aside by creditors after the death of the debtor (*Lush v. Wilkinson*, 5 Ves. 384). The action should be brought by the plaintiff on behalf of himself and all other unsatisfied creditors of the deceased (*French v. French*, 6 D. M. & G. 95; *Richardson v. Smallwood*, Jac. 552). And it seems that the plaintiff need not have obtained judgment for his debt (*Reese River Co. v. Atwell*, 7 Eq. 347). See the forms of order, Seton, 6th ed., 2345).

Fraudulent
conveyances.

2. And whereas it is not reasonable or just that by the practice or contrivance of any debtors their creditors should be defrauded of their just debts and nevertheless it hath often so happened, that where several persons having by bonds, covenants or other specialties, bound themselves and their heirs, and have afterwards died seised in fee simple of and in manors, messuages, lands, tenements and hereditaments, or had power or authority to dispose of or charge the same by their wills or testaments, have, to the defrauding of such their creditors, by their last wills or testaments, devised the same or disposed thereof in such manner as such creditors have lost their said debts; for remedying of which, and for the maintenance of just and upright dealing, be it therefore further enacted, that all wills and testamentary limitations, dispositions or appointments, already made by persons now in being, or hereafter to be made by any person or persons whomsoever, of or concerning any manors, messuages, lands, tenements or hereditaments, or any rent, profit, term or charge out of the same, whereof any person or persons, at the time of his, her, or their decease, shall be seised in fee simple, in possession, reversion or remainder, or have power to dispose of (a) the same by his, her or their last wills or testaments, shall be deemed or taken (only as against such person or persons, bodies politic or corporate, and his and their heirs, successors, executors, administrators and assigns, and every of them with whom the person or persons making any such wills

For remedy-
ing frauds
committed on
creditors by
wills.

11 Geo. 4 &
1 Will. 4.
c. 47, s. 2.

or testaments, limitations, dispositions or appointments, shall have entered into any bond, covenant or other specialty, binding his, her, or their heirs) to be fraudulent and clearly, absolutely and utterly void, frustrate, and of none effect; any pretence, colour, feigned or presumed consideration, or any other matter or thing to the contrary notwithstanding.

(a) The words "power to dispose of" included leasehold estates *pur autre vie*, therefore a devise of them was void against creditors (*Westfaling v. W.*, 3 Atk. 460, 465). Sect. 2 of 3 & 4 W. & M., c. 14, applied to devises of every description of estate legal or equitable. And by sect. 3, the devisee of an equitable estate seems to be made liable to an action of debt by the creditors of the devisor (*Coope v. Cresswell*, 2 Ch. 121; *Re Atkinson, Proctor v. Atkinson*, 1908, 2 Ch. 307).

Under sect. 59 of Conv. Act, 1881 (*post*), obligations under seal executed since 31st December, 1881, operate in the absence of a contrary intention to bind heirs and real estate, although not so expressed.

Enabling
creditors to
recover upon
bonds, &c.

3. And, for the means that such creditors may be enabled to recover upon such bonds, covenants and other specialties, be it further enacted, that in the cases before mentioned every such creditor shall and may have and maintain his, her, and their action and actions of debt or covenant (*b*) upon the said bonds, covenants and specialties against the heir and heirs at law of such obligor or obligors, covenantor or covenantors, and such devisee and devisees, or the devisee or devisees of such first-mentioned devisee or devisees jointly (*c*), by virtue of this act; and such devisee and devisees shall be liable and chargeable for a false plea by him or them pleaded, in the same manner as any heir should have been for any false plea by him pleaded, or for not confessing the lands or tenements to him descended (*e*).

3 & 4 W. &
M. c. 14,
confined to
actions of
debt.

Debts within
3 & 4 W. &
M. c. 14.

(*b*) By 3 & 4 W. & M. c. 14, s. 3, the remedy was confined to actions of debt; an action of covenant would not lie against a devisee (*Wilson v. Knubley*, 7 East, 128). Damages, however, recovered in an action of covenant, brought in respect of breaches after death of the testator, were a debt payable out of his real estate under a charge of debts in his will (*Morse v. Tucker*, 5 Hare, 79). The statute 3 & 4 W. & M. c. 14, only applied where debt in the ordinary sense of the word existed between the parties in the life-time of both (*Farley v. Briant*, 3 Ad. & El. 839). Liquidated damages for breach of covenant occurring after the covenantor's death, where the liability during his life was contingent, were not such a debt (*Ib.*; see *Morse v. Tucker*, 5 Hare, 83). But money due under covenant for payment of sums certain, was such a debt even though not accruing until after the covenantor's death (*Jenkins v. Briant*, 6 Sim. 603). So, where a testator had covenanted for payment of 3,000*l.* during his life, or three months after his decease (*Coope v. Cresswell*, 2 Ch. 112).

(*c*) The above liability of the heir and the devisees is a joint liability at law (*Re Lacey, Howard v. Lightfoot*, 1907, 1 Ch. 347). As to the effect of this on payments under the Stat. Lim., see *ante*, pp. 216, 242. The extent of the liability is discussed in the note to sect. 7, *post*.

In a bill by a specialty creditor against a devisee under the 3 & 4 W. & M. c. 14, the heir at law (if any) of the testator was a necessary party (*Gawler v. Wade*, 1 P. Wms. 99; *Warren v. Stawell*, 2 Atk. 125). As to the order in which, as between heir and devisee, amounts are applied in payment of debts, see *Chaplin v. Chaplin*, 3 P. Wms. 367; *Powis v. Corbet*, 3 Atk. 556; the note to the Admon. of Estates Act, 1833, *post*.

(e) As to the effect of a false plea by the heir, see *Price v. Evans*, 4 Sim. 514.

11 Geo. 4 &
1 Will. 4,
c. 47, s. 3.

The right of action under the above section was not taken away by the Administration of Estates Act, 1833 (*Re Illidge, Davidson v. Illidge*, 27 Ch. D. 482). Consider now the effect of the Land Transfer Act, 1897 (*post*).

4. If in any case there shall not be any heir at law against whom, jointly with the devisee or devisees, a remedy is hereby given, in every such case every creditor to whom by this act relief is so given shall and may have and maintain his, her and their action and actions of debt or covenant, as the case may be, against such devisee or devisees solely; and such devisee or devisees shall be liable for false plea as aforesaid.

If there is no heir at law, actions may be maintained against the devisee.

Formerly a devisee could not be sued without the heir (*Hunting v. Shelldrake*, 9 M. & W. 256. See *Gawler v. Wade*, 1 P. Wms. 100).

5. Provided always, and be it further enacted, that where there hath been or shall be any limitation or appointment, devise or disposition, of or concerning any manors, messuages, lands, tenements or hereditaments, for the raising or payment of any real and just debt or debts, or any portion or portions, sum or sums of money, for any child or children of any person, according to or in pursuance of any marriage contract or agreement in writing, *bonâ fide* made before such marriage, the same and every of them shall be in full force, and the same manors, messuages, lands, tenements and hereditaments shall and may be holden and enjoyed by every such person or persons, his, her and their heirs, executors, administrators and assigns, for whom the said limitation, appointment, devise or disposition was made, and by his, her and their trustee or trustees, his, her and their heirs, executors, administrators and assigns, for such estate or interest as shall be so limited or appointed, devised or disposed, until such debt or debts, portion or portions, shall be raised, paid and satisfied, anything in this act contained to the contrary notwithstanding.

Not to affect limitations for just debts or portions for children.

The uniform rule is, that an effectual provision by will for payment of creditors is not fraudulent within the statute; and it makes no difference whether the land be devised to trustees to sell, or descend to the heir charged with debts (*Matthews v. Jones*, 2 Anstr. 515; *Bailey v. Ekins*, 7 Ves. 323; *Bath v. Bradford*, 2 Ves. sen. 590; *Plunket v. Penon*, 2 Atk. 292; *Shiphard v. Lutwidge*, 8 Ves. 26; *Kidney v. Coussmaker*, 12 Ves. 154). But if the devise for payment of debts does not provide for it in a practicable manner, the case will not be taken out of the statute (*Hughes v. Doulsen*, 2 Cox, 170; 2 Br. C. C. 614). A devise of all the devisor's lands in trust to sell and pay all the testator's debts could not be sued under the stat. 3 & 4 W. & M. c. 14 (*Gott v. Atkinson*, Willes, 521; *Soames v. Robinson*, 1 M. & K. 500; see *Barker v. May*, 9 B. & C. 489). As to the effect of a devise for payment of debts by rents and profits, see *Bootle v. Blundell*, 19 Ves. 528. A direction in a will to pay simple contract before specialty creditors was not void, as it was within the exception in 3 & 4 W. & M. c. 14 (*Millar v. Horton*, Coop. C. C. 45). A devise which was not for the payment of debts generally would not be within the exception (3 Barnard, 304). A devise for payment of debts generally might let in creditors by simple contract to the

Provisions for payment of debts within this section.

11 Geo. 4 &
1 Will. 4,
c. 47, s. 5.

prejudice of creditors by specialty (*Kidney v. Coussmaker*, 12 Ves. 154; 2 Atk. 104).

Heir-at-law
to be answer-
able for debts,
although he
may sell
estate before
action
brought.

6. In all cases where any heir-at-law shall be liable to pay the debts or perform the covenants of his ancestors, in regard to any lands, tenements, or hereditaments descended to him, and shall sell, alien, or make over the same, before any action brought or process sued out against him, such heir-at-law shall be answerable for such debt or debts, or covenants, in an action or actions of debt or covenant, to the value of the said lands so by him sold, aliened, or made over, in which cases all creditors shall be preferred as in actions against executors and administrators; and such execution shall be taken out upon any judgment or judgments so obtained against such heir, to the value of the said lands, as if the same were his own proper debt or debts; saving that the lands, tenements, and hereditaments, *bonâ fide* aliened before the action brought, shall not be liable to such execution.

Under the L. T. Act, 1897, the real estate of a person dying after 1897 is made available for payment of his debts without the necessity for proceedings; such real estate vesting in the personal representative (see *post*). The following note relates to the law independent of that act.

By sect. 8 (*post*) devisees are liable in the same manner as heirs, notwithstanding alienation. "Devisees" include persons taking equitable interests under a devise (*Re Atkinson, Proctor v. Atkinson*, 1908, 2 Ch. 307).

Specialty
debts no
charge on the
land.

Debts by specialty in which the heirs are bound constitute no lien or charge upon the land, either in the hands of a debtor or of his heir (*Richardson v. Horton*, 7 Beav. 112; *Morley v. Morley*, 5 D. M. & G. 610). By taking proper proceedings the specialty creditors may obtain payment out of the descended or devised estates in the hands of the heir or devisee; but if such proceedings are not taken, the heir or devisee may alienate, and in the hands of the alienee the land is not liable, though the heir or devisee remains personally liable, to the extent of the value of the land alienated (*Richardson v. Horton*, 7 Beav. 123; *Re Moon, Holmes v. Holmes*, 1907, 2 Ch. 310; *Re Hedgeley, Small v. Hedgeley*, 34 Ch. D. 384, where the devisee aliened by her marriage settlement, and her separate estate was subsequently made liable).

Bonâ fide
alienation.

Bankruptcy is not such an alienation as will under this section prevent creditors from taking in execution the land itself (*Ex p. Morton*, 5 Ves. 449). The alienation must be one which carries the beneficial interest, and accordingly, when the devisee was a trustee, a conveyance to new trustees was not within this section (*Coope v. Cresswell*, 2 Ch. 112); nor was a covenant in marriage articles to settle descended lands (*Pimm v. Insall*, 1 M. & G. 449; compare *Re Mouat*, 1899, 1 Ch. 834). But an actual settlement by the devisee on marriage is such an alienation (*Spackman v. Timbrell*, 8 Sim. 253; *Re Hedgeley, Small v. Hedgeley*, 34 Ch. D. 379); so is a mortgage by deposit with memorandum made by an equitable remainderman (*British Mutual Co. v. Smart*, 10 Ch. 567); or an assignment by an equitable tenant for life (*Re Atkinson, Proctor v. Atkinson*, 1908, 2 Ch. 307).

Where an
action of debt
is brought
against the
heir, he may
plead riens
per descent.

7. Provided always, and be it further enacted, that where any action of debt or covenant upon any specialty is brought against the heir, he may plead riens per descent at the time of the original writ brought or the bill filed against him, anything herein contained to the contrary notwithstanding; and the plaintiff in such action may reply that he had lands, tenements,

or hereditaments from his ancestor before the original writ brought or bill filed; and if, upon the issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, tenements, or hereditaments so descended, and thereupon judgment shall be given and execution shall be awarded as aforesaid; but if judgment be given against such heir by confession of the action, without confessing the assets descended, or upon demurrer or nihil dicit, it shall be for the debt and damage, without any writ to inquire of the lands, tenements, or hereditaments so descended.

11 Geo. 4 &
1 Will. 4,
c. 47, s. 7.

An heir or devisee is liable for his ancestor's or testator's debts no further than the value of the land taken by descent or devise (*Re Moon*, *Holmes v. H.*, 1907, 2 Ch. 310); therefore if the heir pay his ancestor's debts to the value of the land descended, he may hold the land discharged from the other debts of the ancestor (*Buckley v. Nightingale*, 1 Str. 655; *Horn v. Horn*, 2 Sim. & S. 448; *Spackman v. Timbrell*, 8 Sim. 259). But a plea by an heir to an action on his ancestor's bond, that he claims to retain a certain sum for money laid out in repairing the premises descended, cannot be supported (*Shetelworth v. Neville*, 1 T. R. 454), although it may be otherwise if the repairs were necessary (*Ib.*; see *Hill v. Maurice*, 1 De G. & Sm. 214). The heir-at-law is entitled to the rents until judgment is given against him (1 T. R. 457). In this respect the effect of the Administration of Estates Act, 1833 (*post*), is different.

In an action against an heir or devisee (see Com. Dig. Pleader (2 E)), the defendant may not only plead any matter which might have been pleaded by the ancestor or devisor, but may also plead that he has *nothing by descent* or by *devise*, either generally (*Ib.*) or specially; viz., that he has nothing but a reversion after an estate for life or years (Com. Dig. Pleader (2 E 3)), or that he has paid debts of an equal or superior degree, to the amount of the assets descended or devised; or that he *retains* the assets to satisfy his own debt of equal or superior degree, or debts of a superior degree due to a third person (*Ib.*; Chitty on Pleading, 7th ed., vol. 1, pp. 61, 517; vol. 2, p. 333; Selw. N. P. Debt, s. 6; 2 Saund. 7, n. 4). To debt against heirs on the bond of their ancestors, the defendants pleaded *riens per descent*; and the plaintiff replied, that after the death and before the commencement of the suit, the defendant had lands by descent; this was a replication under 3 & 4 W. & M., c. 14, and the jury, having found that lands descended, were bound to assess the value (*Brown v. Shuker*, 1 Cr. & Jer. 583).

For forms of statement of claim, defence, and replication in proceedings under this statute, see Bullen & Leake, 6th ed. 182, 678, 679.

8. Provided always, and be it further enacted, that all and every the devisee and devisees, made liable by this act, shall be liable and chargeable in the same manner as the heir-at-law by force of this act, notwithstanding the lands, tenements or hereditaments to him or them devised shall be aliened before the action brought.

Devisees to be
liable the
same as heirs-
at-law.

See the note to sect. 6, *ante*, p. 396.

9. From and after the passing of this act, where any person being, at the time of his death, a trader within the true intent and meaning of the laws relating to bankrupts, shall die seised of or entitled to any estate or interest in lands, tenements or hereditaments, or other real estate, which he shall not by his

Traders' estates shall be assets to be administered in courts of equity.

11 Geo. 4 &
1 Will. 4,
c. 47, s. 9.

last will have charged with or devised subject to or for the payment of his debts, and which would be assets for the payment of his debts due on any specialty in which the heirs were bound, the same shall be assets to be administered in courts of equity for the payment of all the just debts of such person, as well debts due on simple contract as on specialty; and that the heir or heirs-at-law, devisee or devisees of such debtor, and the devisee or devisees of such first-mentioned devisee or devisees, shall be liable to all the same suits in equity, at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as they are liable to at the suit of creditors by specialty, in which the heirs were bound: provided always, that in the administration of assets by courts of equity, under and by virtue of this provision, all creditors by specialty, in which the heirs are bound, shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty, in which the heirs are not bound, shall be paid any part of their demands.

This section of the act corresponds *verbatim* with the statute 47 Geo. 3, sess. 2, c. 74. In the construction of that act it was held, that a party to come within it must have been a trader at his death (*Keene v. Riley*, 3 Mer. 436; *Hitchon v. Bennett*, 4 Mad. 180). See further as to this section, the note to Administration of Estates Act, 1833, *post*, p. 403.

In actions by
or against
infant, the
parol shall
not demur.

10. From and after the passing of this act, where any action, suit, or other proceeding for the payment of debts, or any other purpose, shall be commenced or prosecuted by or against any infant under the age of twenty-one years, either alone or together with any other person or persons, the parol shall not demur, but such action, suit, or other proceeding shall be prosecuted and carried on in the same manner and as effectually as any action or suit could before the passing of this act be carried on or prosecuted by or against any infant, where according to law, the parol did not demur.

Demurrer of
parol.

Where an infant heir was sued by the specialty creditor of his ancestor, he might as a dilatory plea plead his non-age in stay of the creditor's action and claim to make the parol demur, that is, that the proceedings might be stayed, until he was of full age (see Gilbert's Hist. Com. Pl. 54, 56; 2 Bl. Com. 300; 2 Inst. 257, 291). The plea might be pleaded in equity as well as at law (*Chaplin v. Chaplin*, 3 P. W. 368; *Lechmere v. Brasier*, 2 Jac. & W. 290; *Scarth v. Cotton*, Jac. 635, n.). In equity the privilege seems to have been extended to an infant devisee (*Powell v. Robins*, 7 Ves. 211), but not at law (*Plaskett v. Beeby*, 4 East, 485; see *Price v. Carver*, 3 M. & Cr. 162). By the above section the demurrer of the parol has been abolished in all cases, both at law and in equity.

Day to show
cause.

In addition to and distinct from the demurrer of the parol (see *Price v. Carver*, 3 M. & C. 162), courts of equity adopted a further rule by which the infant was entitled, after attaining his majority, to a day to show cause against the decree. This was adopted in foreclosure and partition and in all cases in which a conveyance was required from an infant, except those cases in which the parol would demur at law (*Price v. Carver*, 3 M. & C. 162; *Walsh v. Trevanion*, 16 Sim. 178). This rule was not affected by the above section (*Ib.*), but in consequence of sect. 11, the provision giving an infant a day to show cause was omitted in decrees in equity by which, for payment

of debts, estates were directed to be sold (*Scholefield v. Heafield*, 7 Sim. 669; *Mahon v. Dawson*, 2 Dr. & W. 286) or mortgaged (*Holme v. Williams*, 8 Sim. 557). Now in all cases where there is a judgment against an infant for an immediate conveyance, the Trustee Act, 1893, s. 31 (*post*), applies, and it is not necessary to insert in the decree the direction giving the infant a day to show cause after he shall have attained twenty-one (*Mellor v. Porter*, 25 Ch. D. 161; see *Bowra v. Wright*, 4 D. J. & S. 265).

11 Geo. 4 &
1 Will. 4,
c. 47, s. 10.

In the case, however, of foreclosure of an equitable mortgage when there is no decree for sale, the decree must still be for the infant to convey at twenty-one, with a direction giving him a day to show cause (*Price v. Carver*, 3 M. & C. 163; *Scholefield v. Heafield*, 7 Sim. 669; *Mellor v. Porter*, 25 Ch. D. 158); but not where the infant is entitled only as trustee (*Foster v. Parker*, 8 Ch. D. 147). See the forms of foreclosure judgments, Seton, 6th ed., 980. Where there is a decree for sale no day will be given (*Scholefield v. Heafield*, *sup.*; *Clinton v. Bernard*, Dru. 287). And the court may order a sale when it is for the benefit of the infant (*Davis v. Dowding*, 2 Keen, 245).

Besides cases where a conveyance was required from an infant, a day to show cause was given in cases of foreclosure of a legal mortgage (*Williamson v. Gordon*, 19 Ves. 114); and this is still the rule (*Newbury v. Marten*, 15 Jur. 166; *Gray v. Bell*, 46 L. T. 521; see *Mellor v. Porter*, 25 Ch. D. 161). But where the value of the property was less than the amount due to the mortgagee, and it was for the benefit of the infant, on the plaintiff paying the infant's costs a decree absolute was made, no day to show cause being given (*Crozon v. Lever*, 12 W. R. 237; *Bennett v. Harfoot*, 19 W. R. 428; *Wolverhampton v. George*, 24 Ch. D. 707).

Where in a foreclosure action a day to show cause has been given, the infant on attaining twenty-one cannot travel into the account, or redeem, but only show error in the decree (*Mallack v. Galton*, 3 P. Wms. 352; *Williamson v. Gordon*, 19 Ves. 114; *Kelsall v. Kelsall*, 2 M. & K. 409).

11. Where any suit hath been or shall be instituted in any court of equity, for the payment of any debts of any person or persons deceased, to which their heir or heirs, devisee or devisees, may be subject or liable, and such court of equity shall decree the estates liable to such debts, or any of them, to be sold for satisfaction of such debt or debts, and by reason of the infancy of any such heir or heirs, devisee or devisees, an immediate conveyance thereof cannot, as the law at present stands, be compelled, in every such case such court shall direct, and, if necessary, compel such infant or infants to convey such estates so to be sold (by all proper assurances in the law) to the purchaser or purchasers thereof, and in such manner as the said court shall think proper and direct; and every such infant shall make such conveyance accordingly; and every such conveyance shall be as valid and effectual to all intents and purposes as if such person or persons, being an infant or infants, was or were at the time of executing the same of the full age of twenty-one years.

Infants to
make convey-
ances under
order of the
court.

The personal representative of a person dying after 1897 can deal with his real estate for payment of his debts (L. T. Act, 1897, *post*). Before that act, sects. 11 and 12 of the present had been superseded by Trustee Act, 1893, s. 30 (*post*). See *Wood v. Beeston* (1 K. & J. 213). The usual practice was for the order directing the sale or mortgage to declare that the infant was a trustee within the meaning of the Trustee Act; see *Thomas v. Gwynne*, 9 Beav. 275, and then to obtain a vesting order (*Daniell*, Ch. Pr.

11 Geo. 4 & 7th ed. 867, n. (r)). See the notes to the Trustee Act, 1893, s. 30 (*post*).
 1 Will. 4, Under Jud. Act, 1884, s. 14, the court has power to nominate a person to
 c. 47, s. 11. execute an instrument in place of a refusing party. As to sales by the court,
 see generally R. S. C. Ord. 51, r. 1.

By the Debts Recovery Act, 1839 (*post*), sects. 11 and 12 were extended so as to include a mortgage. See *Holme v. Williams*, 8 Sim. 557; *Smethurst v. Longworth*, 7 L. J. Ch. 18). Under sect. 11 an infant devisee in tail may be ordered to convey (*Penny v. Pretor*, 9 Sim. 135); and the conveyance must be made by the proper assurance which by law is now required for a tenant in tail (*Radcliffe v. Eccles*, 1 Keen, 130; see *Re Hambrough, H. v. H.*, 1909, 2 Ch. 620). In a creditor's suit, after a decree for sale of the estate, an infant heir was ordered to join in the conveyance to the purchaser under sect. 11 (*Brook v. Smith*, 2 R. & M. 73). A conveyance by an infant under this section passes only such interest as the infant, if of full age, might pass (*Heming v. Archer*, 8 Beav. 294).

Persons having a life interest may convey the fee, if the estate is ordered to be sold.

12. Where any lands, tenements, or hereditaments, hath been or shall be devised in settlement by any person or persons, whose estate under this act, or by law, or by his or their will or wills, shall be liable to the payment of any of his or their debts, and by such devise shall be vested in any person or persons for life or other limited interest, with any remainder, limitation, or gift over, which may not be vested, or may be vested in some person or persons from whom a conveyance or other assurance of the same cannot be obtained, or by way of executory devise, and a decree shall be made for the sale thereof for the payment of such debts or any of them, it shall be lawful for the court by whom such decree shall be made, to direct any such tenant for life, or other person having a limited interest, or the first executory devisee thereof, to convey, release, assign, surrender, or otherwise assure the fee simple, or other the whole interest or interests so to be sold, to the purchaser or purchasers, or in such manner as the said court shall think proper; and every such conveyance, release, surrender, assignment, or other assurance, shall be as effectual as if the person who shall make and execute the same were seised or possessed of the fee simple or other whole estate so to be sold.

Section applies to copyholds. Conveyances under this section.

The personal representative of a person dying since 1897 can deal with his real estate for payment of his debts. Before that act it was held that the present section applied to copyholds (*Branch v. Browne*, 2 De G. & Sm. 299). Where a testator devised land to trustees to pay debts, and subject to such debts to convey to his son in strict settlement, and the trustees conveyed to the son for life, with remainder over, the son could convey the legal estate under this section (*Cheese v. Cheese*, 15 L. J. Ch. 28; see *Walker v. Aston*, 14 Sim. 87). This section did not apply to a case where an estate was devised to a trustee during the life of the *cestui que trust*, with remainder over, and by the disclaimer of the trustee the legal estate descended on the heir (*Heming v. Archer*, 7 Beav. 515; 8 Beav. 294). See *Heming v. Archer*, 9 Beav. 366. The present section was extended by the Debts Recovery Act, 1839, *post*; and the Debts Recovery Act, 1848 (*post*). The lunatic tenant for life of estates, decreed in a creditor's suit to be sold for payment of debts, was a trustee for the purchaser (*Re Milfield*, 2 Phill. 254).

Not to repeal act 33 Geo. 2 (I.) relating to debts due

13. Nothing in this act shall extend or be deemed or construed to extend to repeal or alter an act made by the parliament of Ireland, in the thirty-third year of the reign of King

George (o) the First, intituled "An Act for the better securing the Payment of Bankers' Notes, and for providing a more effectual Remedy for the Security and Payment of the Debts due by Bankers" (p).

11 Geo. 4 &
1 Will. 4,
c. 47, s. 13.

to bankers.

(o) The following words are here omitted by mistake: "the Second, intituled 'An Act for repealing an Act passed in this Kingdom in the eighth Year of the Reign of King George.'"

(p) By the third section of the Irish act, 33 Geo. 2, c. 14, all dispositions after 10th May, 1760, by bankers of real or leasehold estates, or any interest therein, to or for any children or grandchildren of any banker, are void against creditors, though for valuable consideration, and though not creditors at the time. As to the act 33 Geo. 2, c. 14, see *Copland v. Davies* (L. R. 5 H. L. 358).

II.—THE DEBTS RECOVERY ACT, 1839.

2 & 3 VICT. c. 60.

The Debts Recovery Act, 1839, after reciting the 11th and 12th sections of the Debts Recovery Act, 1830 (*ante*, pp. 399, 400), and that doubts were entertained whether the above sections authorized courts of equity to direct mortgages as well as sales to be made of the estates of such infant heirs or devisees, or of lands, tenements or hereditaments so devised in settlement as aforesaid, and also to authorize such sales and mortgages to be made in cases where such tenant for life, or other person having a limited interest, or such first executory devisee as aforesaid, is an infant, enacts, "that the said hereinbefore recited provisions of the said act shall extend and the same are hereby extended to authorize courts of equity to direct mortgages as well as sales to be made of the estates of such infant heirs or devisees, and also of lands, tenements or hereditaments so devised in settlement as aforesaid, and to authorize such sales and mortgages to be made in cases where such tenant for life, or other person having a limited interest, or such first executory devisee as aforesaid, is an infant."

2 & 3 Vict.
c. 60.

Recited provisions of
11 Geo. 4 & 1
Will. 4, c. 47,
extended to
authorize
mortgages as
well as sales
of estates.

A mortgage under this section was directed in *National Bank v. Gourley* (17 L. R. Ir. 357). But the court has no jurisdiction under these statutes to order the cost of repairs to be raised by way of mortgage (*Hill v. Maurice*, 1 De G. & S. 214; see *Garmstone v. Gaunt*, 1 Coll. 577). For forms of orders under the act, see Seton, 3rd ed. 826.

2. When any sale or mortgage shall be made in pursuance of the said recited act or this act, the surplus (if any) of the money raised by such sale or mortgage which shall remain after answering the purposes for which the same shall have been raised, and defraying all reasonable costs and expenses, shall be considered in all respects of the same nature and descend or devolve in the same manner as the estate, or the lands, tenements or hereditaments so sold or mortgaged, and shall belong to the same persons, be subject to the same limitations and provisions,

Surplus of
money arising
from such
sale or mort-
gage to de-
scend in the
same manner
as the estates
so sold or
mortgaged

2 & 3 Vict.
c. 60.
would have
done.

and be applicable to the same purposes as such estate or such lands, tenements or hereditaments would have belonged and been subject and applicable to in case no such sale or mortgage had been made.

III.—THE DEBTS RECOVERY ACT, 1848.

11 & 12 VICT. c. 87.

11 & 12 Vict.
c. 87.

The Debts Recovery Act, 1848, after reciting the 12th section of the Debts Recovery Act, 1830, "And that such provision did not extend to the case of lands, tenements or hereditaments of a deceased debtor which are by descent or otherwise than by devise vested in the heir or co-heirs of such debtor, subject to an executory devise over in favour of a person or persons not existing or not ascertained, and that it was expedient that the said provision of the said act should be extended to such case:"

enacted, that in cases in other respects falling within the said thereinbefore recited provisions of the said act the same act shall extend and is hereby extended to any case in which any lands, tenements or hereditaments of any deceased person shall by descent or otherwise than by devise be vested in the heir or co-heirs of such person, subject to an executory devise over in favour of a person or persons not existing or not ascertained; and in any such case it shall be lawful for the court mentioned in the said recited provision to direct such heir or co-heirs, notwithstanding such heir or such co-heirs, or any of them, may be an infant or infants, to convey, release, assign, surrender or otherwise assure the fee simple or other the whole interest or interests so to be sold, to the purchaser or purchasers, or in such manner as the said court shall think proper; and every such conveyance, release, surrender, assignment or other assurance shall be as effectual as if the heir or co-heirs who shall make and execute the same was or were seised or possessed of the fee simple or other whole estate so to be sold, and, if an infant or infants, was or were of full age.

Recited provision to extend to lands, &c. of a deceased debtor, in certain cases.

IV.—THE ADMINISTRATION OF ESTATES ACT, 1833.

3 & 4 WILL. IV. c. 104.

*An Act to render Freehold and Copyhold Estates Assets for the Payment of Simple and * Contract Debts. [29th August, 1833.]*

* Sic.

3 & 4 Will 4,
c. 104.

Freehold and
copyhold

Whereas it is expedient that the payment of the debts of all persons should be secured more effectually than is done by the laws now in force: be it therefore enacted, that from and after the passing of this act, when any person shall die seised of or

entitled to any estate or interest in lands, tenements or hereditaments, corporeal or incorporeal, or other real estate, whether freehold, customaryhold, or copyhold, which he shall not by his last will have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in courts of equity for the payment of the just debts of such persons, as well debts due on simple contract as on specialty; and that the heir or heirs-at-law, customary heir or heirs, devisee or devisees of such debtor shall be liable to all the same suits in equity at the suit of any of the creditors of such debtor, whether creditors by simple contract or by specialty, as the heir or heirs-at-law, devisee or devisees of any person or persons who died seised of freehold estates was or were before the passing of this act liable to in respect of such freehold estates at the suit of creditors by specialty in which the heirs were bound; provided always, that in the administration of assets by courts of equity under and by virtue of this act all creditors by specialty in which the heirs are bound shall be paid the full amount of the debts due to them before any of the creditors by simple contract or by specialty in which the heirs are not bound shall be paid any part of their demands.

3 & 4 Will. 4
c. 104.

estates in all cases to be assets for the payment of simple contract or specialty debts.

1. *Operation of the Act*...403.
2. *Actions to Administer Real Assets*...405.
3. *Legal and Equitable Assets*...406.
4. *Order in which Assets applied in Payment of Debts*...407.
5. *Marshalling between Legatees*...408.
6. *Marshalling between Creditors*...408.
7. *Debts of a Deceased Person, and Costs of Administration, &c.*...408.
8. *Order in which Debts are Paid*...410.
9. *Retainer by Executor or Administrator*...412.
10. *Administration in one Country of Assets belonging to Owner Domiciled in Another*...414.
11. *Copyholds*...415.

In the case of a person dying after 1897, his "real estate" vests in his personal representative, by whom the same is applicable in payment of his debts (see Land Transfer Act, 1897, sects. 1 and 2, and the notes thereto, p. 421, *post*). "Real estate" includes real estate appointed under a general testamentary power, but not copyholds (sect. 1). The L. T. Act, 1897, however, does not apply to the administration of the estates of persons dying before 1898; or in the case of a person dying after 1897, to the payment of his debts out of copyholds.

The Admon. of Estates Act, 1833, applies where the testator has not charged his land with, or devised it subject to, the payment of his debts. The case where he has created such a charge is dealt with by 22 & 23 Vict. c. 38, s. 14, *post*, p. 415. As to what constitutes such a charge, see *post*, p. 416.

At the time of the passing of the Administration of Estates Act, 1833, lands devised or charged for payment of debts were equitable assets, but lands not so charged were not available at all for payment of debts, except that freehold lands were liable to debts by specialty where the heirs were bound, and were also liable to debts of all descriptions owing from traders (Debts Recovery Act, 1830, s. 9 (*ante*, p. 397); see *Re Illidge, Davidson v. Illidge*, 27 Ch. Div. 480, 483). The Administration of Estates Act, 1833,

(1)

Operation of Administration of Estates Act, 1833.

3 & 4 Will. 4, c. 104. extended to the freeholds of all persons the provisions of the Debts Recovery Act, 1830, as to the freeholds of traders, and also subjected copyholds to a similar liability (see as to copyholds the note, *post*, p. 415). To enforce this statutory liability it is necessary to apply to a court of equity (*Ball v. Harris*, 4 M. & C. 268). It should also be remembered that specialties executed after 1881 bind heirs, though not so expressed (Conv. Act, 1881, s. 59, *post*); and seem accordingly to bring the holders within the words of the Debts Recovery Act, 1830, s. 3 (*ante*, p. 394); the right of action under which section was not taken away by the Admon. of Estates Act, 1833 (*Re Illidge*, 27 Ch. Div. 482). Consider now the effect of the Land Transfer Act, 1897 (*post*, p. 421).

Lands applicable as assets under this act. The substance of the Administration of Estates Act, 1833, is that the land itself was made assets (*Re Hyatt, Bowles v. Hyatt*, 38 Ch. D. 619); and the remedies given against the heir and devisee did not control the larger effect of the previous words, which made the land assets generally (*Doune v. Morris*, 3 Hare, 399). Accordingly, where a person died without heirs, it was held that as against the lord claiming by escheat the lands of the deceased were assets for payment of his debts (*Evans v. Brown*, 5 Beav. 114; *Hughes v. Wells*, 9 Hare, 749). Under this act freehold estates over which a testator had a general power of appointment, and which he appointed by will, were assets for payment of his debts (*Fleming v. Buchanan*, 3 D. M. & G. 976). So all rents arising from the real estate of a deceased person after his death were assets by accretion, whether received by his heir

Rents.

Equity of redemption.

Dower.

Limitation of actions.

Proviso in act.

Effect of act in making debts a general charge.

(*Re Illidge, Davidson v. Illidge*, 27 Ch. Div. 478; see *Re Moon, Holmes v. H.*, 1907, 2 Ch. 311), or by a person appointed a trustee of his will after his death (*Re Hyatt, Bowles v. Hyatt*, 38 Ch. D. 621), the creditor being entitled to an account (*Ib.*; see Seton, 1429, 6th ed.). So an equity of redemption of freeholds was assets (*Foster v. Handley*, 1 Sim. N. S. 200; *Beale v. Symonds*, 16 Beav. 406), or copyholds (*Burrell v. Smith*, 9 Eq. 443), and consequently a mortgagee might tack his simple contract debt as against the heir or devisee (*Rolfe v. Chester*, 20 Beav. 610; *Thomas v. T.*, 22 Beav. 341). The act did not affect a widow's right to dower or freebench, which still had priority over mere creditors of the deceased (*Spyer v. Hyatt*, 20 Beav. 621; *Jones v. J.*, 4 K. & J. 361; *Northern Bank v. M'Machin*, 1909, 1 I. R. 374; but see Williams' R. P. 19th ed. 318, n.). Although the effect of the act (subject to the proviso) was to place simple contract and specialty creditors on the same footing, it did not confer on simple contract creditors the benefit of the same Statute of Limitations as related to specialties (*Hollingshead v. Webster*, 37 Ch. D. 656).

Under the proviso (which was said to be anomalous (*Bain v. Sadler*, 12 Eq. 573)), creditors by bond, in which the heirs were named, took priority over creditors by specialty in which the heirs were not named (*Richardson v. Jenkins*, 1 Drew. 477). Also over simple contract creditors in the case of an equity of redemption of freeholds (*Foster v. Handley*, 1 Sim. N. S. 200; 15 Jur. 73) or of copyholds (*Burrell v. Smith*, 9 Eq. 443). In the case, however, of debtors dying after 1869, specialty and simple contract creditors stood in equal degree and were paid accordingly (Administration of Estates Act, 1869, *post*, p. 411). In the case of persons dying insolvent on or after the 1st November, 1875, the bankruptcy rules as to the respective rights of secured and unsecured creditors apply (Jud. Act, 1875, s. 10).

Until a judgment has been obtained the Act gives to a creditor no lien or charge on the real estate of his deceased debtor (*Re Moon, Holmes v. H.*, 1907, 2 Ch. 304); and a devisee will not be restrained from receiving rents (*Ib.*). Debts were made rather an inchoate than an actual charge (*Price v. P.*, 35 Ch. D. 305). They were constituted a general charge, but so that a *bond fide* purchaser from the heir or devisee was not bound to see to the application of the purchase money as he would have been in the case of a specific mortgage (*Kinderley v. Jervis*, 22 Beav. 1; compare sect. 6 of the Debts Recovery Act, 1830, *ante*, p. 396). This was so even where the purchaser had notice of the debt (*Jones v. Noyes*, 7 W. R. 21). Where a devisee, before creditor's bill filed, effected an equitable

charge, such charge had priority over the statutory charge in favour of the creditors (*British Mutual Co. v. Smart*, 10 Ch. 567; compare *Ex p. Baine*, 1 Mont. D. & G. 492, under Debts Recovery Act, 1830, s. 9). But where a creditor commenced an action against the devisee, sufficiently indicating the real estate sought to be charged, and registered the action as a *lis pendens*, the plaintiff after registration had priority over a mortgagee from the devisee (*Price v. P.*, 35 Ch. D. 305). Judgments against the heir for his personal debts did not defeat the right of simple contract creditors of the ancestor against descended land (*Kinderley v. Jervis*, 22 Beav. 1).

3 & 4 Will. 4,
c. 104.

To enforce the liability created by the statute a creditor had to take proceedings in equity (*Ball v. Harris*, 4 M. & C. 268), which took the form of an action to administer real assets. Before the Land Transfer Act, 1897, the following rules were laid down as to parties to these actions. Incumbrancers on freeholds and copyholds of which a trader, who died intestate, was seised at the time of his death, were not, under 47 Geo. 3, c. 74, proper parties to a bill for payment of his debts out of his real estates (*Parker v. Fuller*, 1 R. & M. 656). The legal personal representative was a necessary party to an action for the administration of real and personal estate (*Rowse v. Morris*, 17 Eq. 20); an executor *de son tort* and the trustees of the real estate were not sufficient (*Ib.*), nor an administrator *ad litem* (*Dowdeswell v. D.*, 9 Ch. Div. 294). But the charge of debts arising under Admon. of Estates Act, 1833, did not render an executor a necessary party to an action by beneficiaries for the sale of a testator's realty and distribution of the proceeds (*Curtis v. Fulbrook*, 8 Hare, 25). In an action by a creditor to obtain payment out of his debtor's real estate (not devised on trust for sale), the devisee or heir, as well as the executor, was a necessary party (*Dan. Ch. Pr.* 209, 7th ed.; see *Willson v. Leonard*, 3 Beav. 373; *Morse v. Tucker*, 5 Hare, 79; *Harvey v. Wilde*, 14 Eq. 438). After 3 & 4 Will. & M. c. 14, the course was to sue the heir as being the person bound by and named in the specialty, and the devisee because he had the land (*Re Hyatt, Bowles v. Hyatt*, 38 Ch. D. 619). Under Admon. of Estates Act, 1833, the heir-at-law was not a necessary party as well as the devisee (*Bridges v. Hinman*, 16 Sim. 71; *Weeks v. Evans*, 7 Sim. 546). Nor was the heir a necessary party in respect of Indian realty (*Story v. Fry*, 1 Y. & C. C. 603). And it was not necessary to establish the will against the testator's heir (*Goodchild v. Terrett*, 5 Beav. 398). In a creditor's suit, seeking the application of real estate in payment of debts, both the heir-at-law and devisees of the debtors being parties, and the will not being admitted by the heir, the court would neither dismiss the bill against the heir, nor direct an issue *devisavit vel non* at his request, as the creditors had a title paramount to that of the heir or devisees (*Spickernell v. Hotham*, 9 Hare, 73). Proceedings under the Admon. of Estates Act, 1833, could, if necessary, be brought against the lord claiming by escheat (*Evans v. Brown*, 5 Beav. 114), or against a person appointed as trustee of the deceased's will after his death (*Re Hyatt, Bowles v. Hyatt*, 38 Ch. D. 619). It was not necessary that the plaintiff should be a creditor (*Dinning v. Henderson*, 2 Coll. 330). The heir and the next of kin might sue (*Price v. P.*, 15 Sim. 484; *Rodney v. R.*, 16 Sim. 307). Before the Judicature Acts a legal personal representative could not alone commence the suit (*Catley v. Sampson*, 33 Beav. 551; *Tubby v. T.*, 2 Coll. 136). A creditor could not have a decree for the administration of real estate not devised on trust for sale, unless he sued on behalf of all creditors (*Ponsford v. Hartley*, 2 J. & H. 736; *Worraker v. Pryer*, 2 Ch. D. 109; *Re Royle, Fryer v. Royle*, 5 Ch. D. 540; *Re Vincent, Parham v. Vincent*, 1877, W. N. 249). It was necessary to express this either in the writ or in the title of the statement of claim (*Re Tottenham*, 1896, 1 Ch. 628; see R. S. C. Ord. 55, rr. 3, 4).

The old rule as to the devisee or heir being (as well as the personal representative) a necessary party to an action to administer real assets was given effect to in the forms of indorsements on writs contained in the Appendices to the R. S. C. (see Ord. 3, r. 3, Appendix A. Part 3, Sect. 1).

(2)
Action to
administer
real assets.
Parties.

Effect of
Land Trans-
fer Act, 1897.

3 & 4 Will. 4, c. 104. These forms have not been altered. It would seem, however, that since the Land Transfer Act, 1897, it is not necessary that the heir or devisee should be a party to a creditor's action to administer freehold assets in England (see *Re Harrouby & Paine*, 1902, W. N. 137). But the old rule remains as regards copyhold assets (Land Transfer Act, 1897, s. 1, sub-s. 4, *post*, p. 422). Where the personalty had been completely administered, and a grant of administration was refused, a creditor sustained against the heir's executors an action to apply the realty in payment of debts (*Re Dawson, Clarke v. Dawson*, 1906, W. N. 20).

Contribu-
tories. Where a deceased owner of real estate in England held shares in a company which is being wound up, his personal representatives should be placed on the list of contributors, but not it seems his heirs or devisees (Comp. Consol. Act, 1908, sect. 126 (2); see sect. 168 (2)).

Orders for
sale. Under R. S. C. Ord. 51, r. 1, the court has power in any cause or matter relating to real estate to order a sale; that is, a sale for the purposes of the action (*Re Robinson, Pickard v. Wheeler*, 31 Ch. D. 247; compare the similar power in 15 & 16 Vict. c. 86, s. 55, now repealed, which was intended to apply to administration suits; *London & County Co. v. Dover*, 11 Ch. D. 204). And the ordinary form of creditor's decree for the administration of realty and personalty directs sale of the realty, "in case the personal estate shall be insufficient for payment of debts and funeral expenses" (Seton, 6th ed. 1391; see further Seton, 1426 *et seq.*).

(3)
Legal and
equitable
assets.

In connection with the Administration of Estates Act, 1833, mention should be made of the distinction between legal and equitable assets. After that act all the debts of the deceased were payable out of all his assets, whether legal or equitable. Legal assets were described as the assets with which a court of law would charge an executor in an action brought against him by a creditor; and included all assets which, *virtute officii*, he could recover, whether in a court of law or of equity (*Cook v. Gregson*, 3 Drew. 549; *A.-G. v. Brunning*, 8 H. L. C. 258). Equitable assets were described as the assets which could only be made available for payment of debts through a court of equity (*Cook v. Gregson, sup.*). Independently of the Land Transfer Act, 1897, equitable assets include (1) land charged or devised for payment of debts (*Silk v. Prime*, 1 Bro. C. C. 138), including the proceeds of sale thereof (*Bain v. Sadler*, 12 Eq. 570; see *Newton v. Bennet*, 1 Bro. C. C. 135); (2) land which can only be reached by the Administration of Estates Act, 1833; and (3) separate estate to which, before the M. W. P. Act, 1870, a married woman was entitled (*Anon.*, 18 Ves. 258), and also earnings which, by that act, were made separate estate (*Re Poole, Thompson v. Bennett*, 6 Ch. D. 739). Under the M. W. P. Act, 1882, the separate estate of a married woman, including property appointed by her will under a general power (sect. 4), appears to have been made legal assets (see sect. 1, sub-sect. 2, and sect. 23, *ante*, pp. 346, 364). Personal estate appointed by the will of a *feme sole* under a general power has been held by the C. A. to be legal assets (*Re Hadley, Johnson v. Hadley*, 1909, 1 Ch. 30; see *contra* the words of Lord Lindley, *Commrs. of Stamps v. Stephen*, 1904, A. C. 140; of Lord Romilly, *Pardo v. Bingham*, 6 Eq. 487; of Eady, J., *Re Peacock, Kelcey v. Harrison*, 1902, 1 Ch. 555; and of Warrington, J., *Re Guedalla, Lee v. Guedalla*, 1905, 2 Ch. 339). Under the Land Transfer Act, 1897, the real estate of a person dying after 1897 (including real estate appointed under a general testamentary power, but not including copyholds) vests in his personal representative (L. T. Act, 1897, s. 1, *post*, p. 421), and seems also to be legal assets. The principal distinctions between these two classes of assets are: (1) out of legal assets an executor has a right of retainer for his own debt (see *post*, p. 412), but not out of equitable assets; (2) debts are payable in the order of priority given *post*, p. 410, out of legal assets, but *pari passu* out of equitable assets (Seton, 6th ed. 1423).

Lands are
equitable
assets under
this act.

As mentioned above, real estate which could only be reached by the Administration of Estates Act, 1833, was equitable assets (*Re Illidge, Davidson v. Illidge*, 27 Ch. Div. 484; *Walters v. W.*, 18 Ch. D. 182).

Thus, in the administration of assets under that act, creditors by specialty, in which the heirs were not bound, had no priority over simple contract creditors (*Cummins v. Cl.*, 3 J. & Lat. 64); and an executor had no right of retainer (*Walters v. W.*, *sup.*; *Dring v. Greetham*, 23 L. J. Ch. 156).

The Land Transfer Act, 1897 (see sect. 2 (3), *post*, p. 426), has not altered the old rule as to the order in which assets are applicable to the payment of debts. The order is as follows:—

- (1.) The general personal estate not disposed of in the way of specific bequests, unless it be exempted from its primary liability by express words or necessary implication (*Re Banks*, *Banks v. Burbridge*, 1905, 1 Ch. 547; see *Ancaster v. Mayer*, 1 L. C. Eq. It has been held that such general personal estate includes personal estate subject to a general power exercised by virtue of sect. 27 (*post*) of the Wills Act, 1837 (*Re Hartley*, *Williams v. Jones*, 1900, 1 Ch. 152; but see *Fleming v. Buchanan*, 3 D. M. G. 979). As to personal estate disposed in the way of general pecuniary legacies, see No. 5 *infra*. A lapsed share of residuary personally contributes rateably with the other shares (*Trethewy v. Helyar*, 4 Ch. D. 53; *Fenton v. Wills*, 7 Ch. D. 33). As to a specific part of the residue affected by a secret trust, see *Re Maddock*, *Llewellyn v. Washington*, 1902, 2 Ch. 220.
- (2.) Real estate devised or ordered to be sold for payment of debts, not simply charged (*Harmood v. Oglander*, 8 Ves. 124; *Philips v. Parry*, 22 Beav. 279; *Re Balls*, *Trewby v. Balls*, 1909, 1 Ch. 794).
- (3.) Real estate descended (*Milnes v. Slater*, 8 Ves. 295; see *Stead v. Hardaker*, 15 Eq. 175; *Hurst v. Hurst*, 28 Ch. D. 159); and as to real estate escheated, see *Evans v. Brown*, 5 Beav. 114; *Downe v. Morris*, 3 Hare, 398; *Re Ball*, 1902, W. N. 226.
- (4.) Real estate simply charged with debts (*Irvin v. Ironmonger*, 2 R. & M. 531; see *Re Banks*, *supra*; *Re Balls*, *supra*; and No. 6 *infra*. A lapsed share contributes as if the devisee had survived (*Ryves v. R.*, 11 Eq. 539).
- (5.) Personal estate disposed of in the way of general pecuniary legacies (*Re Roberts*; *R. v. R.*, 1902, 2 Ch. 834, and cases there mentioned; *Re Kempster*, *K. v. K.*, 1906, 1 Ch. 446). Pecuniary legacies charged on residuary real estate do not contribute to debts till after No. 6 (*Re Bawden*, *National Provincial Bank v. Cresswell*, 1894, 1 Ch. 693). As to priority between devisees and pecuniary legatees as regards the payment of mortgage debts where the Real Estate Charges Acts (*post*) are excluded, see *Re Smith*, *S. v. S.*, 1899, 1 Ch. 365.
- (6.) Real estate specifically devised, or comprised in a residuary devise, and not charged with debts, and personal estate specifically bequeathed, each contributing rateably (*Eddels v. Johnson*, 1 Giff. 22; *Hensman v. Fryer*, 3 Ch. 420; *Lancefield v. Iggulden*, 10 Ch. 136). The rule was applied in paying costs of administration (*Jackson v. Pease*, 19 Eq. 96). Real estate charged with legacies contributes according to its full value as if not so charged (*Re Saunders-Davies*, *S. v. S.*, 34 Ch. D. 482; *Re Bawden*, *sup.*).
- (7.) Real or personal estate expressly appointed under a general power vested in testator (*Fleming v. Buchanan*, 3 D. M. & G. 976; *Re Peacock*, *Kelsey v. Harrison*, 1902, 1 Ch. 555; *Commrs. of Stamps v. Stephen*, 1904, A. C. 140; see *Re Hartley Williams v. Jones*, 1900, 1 Ch. 152; and compare the case of bankruptcy, *Re Guedalla*, *Lee v. Guedalla*, 1905, 2 Ch. 331). Where funds were appointed by will in pursuance of a covenant entered into on borrowing money by the donee of a general testamentary power that he would by testamentary appointment give the lender a first charge on the funds, the lender had no priority over other creditors (*Beyfus v. Lawley*, 1903, A. C. 411).

The liability of property appointed by a married woman's will is dealt with in the note to sect. 4 of the M. W. P. Act, 1882, *ante*, p. 353.

(4)

Order in which assets are applied in payment of debts.

3 & 4 Will. 4, c. 104.

3 & 4 Will. 4, c. 104. See further, as to the order of application of assets, 2 Jarm. Wills, 5th ed., 1430; Seton, 6th ed. 1672. As to mortgage debts, which are now primarily payable out of the mortgaged lands, unless a contrary intention appears by will or deed, see the Real Estate Charges Act, 1854, *post*, p. 433; and as to incumbered personalty, see *post*, p. 434.

As to the application in payment of debts of real estate in a foreign country, see *Harrison v. Harrison*, 8 Ch. 342; *Re Hewit*, *Lawson v. Duncan*, 1891, 3 Ch. 568.

(5)
Marshalling
assets
between
legatees.

If the above-mentioned order has been disturbed by any creditor, equity will marshal the assets so as to set right the disturbance. Thus, if the general personal estate out of which pecuniary legacies are to be paid has been exhausted by creditors the legatee will be repaid out of lands devised for payment of debts, and out of lands descended (*Richard v. Barrett*, 3 K. & J. 289; *Foster v. Cook*, 3 Br. C. C. 347); and out of lands charged with debts (*Re Roberts*, R. v. R., 1902, 2 Ch. 834; *Re Kempster*, K. v. K., 1906, 1 Ch. 446). But (inasmuch as a residuary devise remains specific notwithstanding the Wills Act (*Hensman v. Fryer*, 3 Ch. 420)) a pecuniary legatee cannot call upon a residuary devisee to contribute to the payment of debts (*Collins v. Lewis*, 8 Eq. 708; *Dugdale v. Dugdale*, 14 Eq. 234); unless the legacy is charged on the residuary real estate (*Re Bawden*, *sup.*). Where a debt is charged by way of mortgage on specifically devised real estate and the testator excludes the Real Estate Charges Acts (*post*), and the mortgagee obtains payment out of the personal estate, a pecuniary legatee can stand in the shoes of the mortgagee as against the real estate and has priority over the devisee (*Re Smith*, S. v. S., 1899, 1 Ch. 371). When a testator agreed to purchase land and devised it, and after his death the purchase-money was paid out of his general personal estate, a pecuniary legatee stood in the place of the vendor against the land (*Lilford v. Powys Keck*, 1 Eq. 347). Generally speaking, if specific or residuary devisees or specific legatees are called on to pay debts, they have a right to throw the debts on the other property which is primarily liable. And on failure of other assets, any one of such devisees or legatees who may have paid the whole of the debts, will have a right to contribution from the others (Wms. Real Assets, 113; *Hensman v. Fryer*, 3 Ch. 430; followed on the question of the specific character of a residuary devise in *Lancefield v. Iggulden*, 10 Ch. 136; but not followed on the question of the right of pecuniary legatees to contribution, *Dugdale v. Dugdale*, 14 Eq. 234; *Farquharson v. Floyer*, 3 Ch. D. 109).

(6)
Marshalling
assets
between
creditors.

The principle of marshalling was, that a person who had two funds to which he might resort for the payment of a debt, should not by his choice disappoint another who had only one, but the latter should stand in the place of the former (*Trimmer v. Bayne*, 9 Ves. 209; see *Aldrich v. Cooper*, 8 Ves. 391). Thus where, before the Admon. of Estates Act, 1833, creditors holding specialties binding the heir exhausted the personal estate, equity allowed simple contract creditors to stand in their place against the real estate (*Cradock v. Piper*, 15 Sim. 301; see *Kidney v. Coussmaker*, 12 Ves. 154, and the notes to *Aldrich v. Cooper*, 1 L. C. Eq.). There does not appear to be any authority for holding that the right to marshal assets will be exercised in favour of a simple contract creditor, whose immediate right against the real estate is barred by the Stat. Lim. (*Fordham v. Wallis*, 10 Hare, 230; see *Busby v. Seymour*, 1 J. & Lat. 527).

(7)
Debts of a
deceased
erson.
Simple con-
tract debts.

In view of the distinction (as regards payment out of real estate) between the specialty and simple contract debts before the Administration of Estates Act, 1833, that act expressly referred to each of these classes of debts. Debts by simple contract are, where the contract is neither ascertained by matter of record, nor yet by deed, but by oral evidence, or by notes unsealed (2 Bl. Comm. 465). A foreign judgment constitutes but a simple contract debt (*Wilson v. Dunsany*, 18 Beav. 293). So the right to indemnity of a surety for a specialty debt, who has not paid (*Ferguson v. Gibson*, 14 Eq. 379; *Re Illidge*, *Davidson v. Illidge*, 27 Ch. Div. 482). So damages awarded in an

arbitration for breach of an agreement to lease a mine (*Talbot v. Shrewsbury*, 16 Eq. 26). 3 & 4 Will. 4, c. 104.

In the case of necessities supplied to a lunatic, the law implies an obligation on the part of the lunatic, under which the amount of such necessities may become payable as a simple contract debt out of his real or personal assets (*Re Rhodes, R. v. R.*, 44 Ch. Div. 94; *Wentworth v. Tubb*, 1 Y. & Coll. C. C. 171; see the cases quoted, *ante*, p. 221; Pope on Lunacy, 257, 2nd ed.). And a trustee will be allowed such payments in account (*Nelson v. Duncombe*, 9 Beav. 211). Necessaries include costs of proceedings in lunacy (*Stedman v. Hart*, Kay, 607; *Jones v. Noyes*, 7 W. R. 21; *Williams v. Wentworth*, 5 Beav. 325). Payments on behalf of lunatics.

A trustee, who has committed a breach of trust by misapplying the trust fund, is considered only as a simple contract debtor to his *cestui que trust* nection with (*Vernon v. Vawdry*, 2 Atk. 119; *Cox v. Bateman*, 2 Ves. sen. 19; see trusts. *Perry v. Phelps*, 4 Ves. 116). But an acknowledgment by a trustee under his hand and seal, that he alone had received the whole trust money for the purposes of the trust (*Gifford v. Manley*, Cas. temp. Talbot, 109; see Kay, 725), or any general words amounting to a covenant on his part, will make him a debtor by specialty (*Montford v. Cadogan*, 19 Ves. 638; *Wood v. Hardisty*, 2 Coll. 542). And the words "covenant or agree," are not necessary in a trust deed to constitute a specialty contract: a declaration by the trustee that he will stand possessed on certain trusts, &c., is sufficient (*Richardson v. Jenkins*, 1 Drew. 477). A trustee, however, under a deed, the terms of which would amount to the creation of a contract, is not a specialty debtor if he has not executed the deed, although he has acted under it (*Richardson v. Jenkins*, 1 Drew. 477). And even where the trustee has executed the deed, the court will not raise a covenant without necessity (*Adey v. Arnold*, 2 D. M. & G. 437). In every case the question is: Was it intended that the trustee should give a covenant for payment of the money? (*Isaacson v. Harwood*, 3 Ch. 228). The mere assignment of the trust property will not create a specialty debt (*Adey v. Arnold*, 2 D. M. & G. 432; *Wynch v. Grant*, 2 Drew. 312); nor a recital of an agreement to become trustee (*Wynch v. Grant*, *ubi sup*); nor a declaration by the trustee that he accepts the office (*Holland v. Holland*, 4 Ch. 449).

As to specialty debts, see generally the note to sect. 3 of the Civil Procedure Act, 1833, *ante*, p. 211. To make a debt a specialty it must be enforceable at law. There is no specialty in equity (*Holland v. Holland*, 4 Ch. 455). Specialty debts have been held to have been created by a covenant in a marriage settlement to settle money (*Eyre v. Monro*, 3 K. & J. 305); by a covenant to execute a lease (*Kidd v. Boone*, 12 Eq. 89); and by a covenant for further assurance (*Re Dickson*, *ib.* 154). In general, an acknowledgment of a debt by an instrument under seal will amount to a covenant to pay and creates a specialty (*Saunders v. Milsome*, 2 Eq. 573), but not where the acknowledgment is made for a collateral purpose (*Jackson v. N. E. R.*, 7 Ch. D. 573, 583; *Isaacson v. Harwood*, 3 Ch. 225; *Marryat v. Marryat*, 28 Beav. 224). All moneys payable in pursuance of the regulations of a company formed under Companies Act, 1862, by a member to the company were specialty debts (Cos. Act, 1862, s. 16); and where a company was being wound up, the liability of a contributory to pay calls was a specialty (sect. 75; *Buck v. Robson*, 10 Eq. 629), even where the company was not registered under that act (*Re Muggeridge*, *Muggeridge v. Sharp*, 10 Eq. 443). See now Companies Consolidation Act, 1908, sects. 14 and 125.

The Admon. of Estates Act, 1833, charged the real estate not only with Calls en-debts actually due, but also with all liabilities resulting out of obligations forced against entered into during life (*Hamers' Devises' Case*, 2 D. M. & G. 366). Calls real estate. in respect of shares made after the death of a shareholder were enforced against his real estate in the hands of his devisees (*ib.*; *Turquand v. Kirby*, 4 Eq. 123). It is now provided that on the death of a contributory his personal representatives and also his heirs and devisees shall be liable to contribute (Companies Consolidation Act, 1908, sect. 126, subsect. 1). As to settling on the list, see sect. 126, subsect. 2, sect. 168, subsect. 2.

3 & 4 Will. 4, c. 104. The costs of probate litigation could not, before the Land Transfer Act, 1897 (*post*, p. 421), be paid out of real estate (*Charter v. Charter*, 3 Ch. D. 218; *Re Price*, *Williams v. Jenkins*, 31 Ch. D. 485; *Re Shaw*, *Bridges v. Shaw*, 1894, 3 Ch. 615). But the Land Transfer Act, 1897, has altered the rule (*Re Prince*, *Godwin v. Prince*, 1898, 2 Ch. 228; see *Brisco v. Baillie Hamilton*, 1902, P. 238; *Re Vickerstaff*, *Vickerstaff v. Chadwick*, 1906, W. N. 67). The costs of a creditor's administration action were, according to the old rule, paid out of the same funds and in the same order as debts (see *Wilson v. Heaton*, 11 Beav. 492). According, however, to the modern rule (laid down by the C. A. in a legatee's administration action), the general costs of an action to administer real and personal estate are borne by the personal estate; but the costs exclusively occasioned by the administration of the real estate are thrown upon the real estate (*Patching v. Barnett*, 1907, 2 Ch. 154; *Re Middleton*, *Thompson v. Harris*, 19 Ch. Div. 552). This has not been altered by the L. T. Act, 1897 (*Re Jones*, *Elgood v. Kinderley*, 1902, 1 Ch. 92; *Re Betty*, *Doughty v. Walker*, 1907, 2 Ch. 149).

(8)
Order in
which debts
are paid.

In the administration of equitable assets all creditors are paid *pari passu* without regard to legal priority (Wms. Exors., 10th ed. 1299; see *Pardo v. Bingham*, 6 Eq. 485; *Re Poole*, *Thompson v. Bennett*, 6 Ch. D. 739).

In the administration of legal assets the debts of persons dying since 1869 are paid in the following order:—

- (1.) Debts due to the Crown on record or specialty. See as to the priority of the Crown in winding up proceedings, *Re Henley* (9 Ch. Div. 469); *Re Oriental Bank* (28 Ch. D. 643); *Fox v. Newfoundland*, 1898, A. C. 667; *New South Wales v. Palmer*, 1907, A. C. 179. A surety to the Crown who has paid the debt is entitled to the Crown's priority (*Re Churchill*, *Manisty v. Churchill*, 39 Ch. D. 174). As to who are Crown debtors, see *Re West London Bank*, 38 Ch. D. 367.
- (2.) Debts to which particular statutes give priority, such as debts for poor rates due from overseers (Poor Relief Act, 1743, s. 3; *Fisher v. Shirley*, 1879, W. N. p. 108); debts due from their officers to an unincorporated building society (*Moors v. Marriott*, 7 Ch. D. 543), or to a friendly society (Friendly Societies Act, 1896, s. 35; see *Ex parte Edmonds*, 46 L. T. 240); or to a savings-bank (Trustee Savings Banks Act, 1863, s. 14; *Jones v. Williams*, 36 Ch. D. 573); certain debts from officers or soldiers dying while subject to military law (Regimental Debts Act, 1893, s. 2). When an insolvent estate is being administered in the Chancery Division, the priority as to rates and wages given by the Preferential Payments in Bankruptcy Act, 1888, applies (*Re Heywood*, *Parkington v. Heywood*, 1897, 2 Ch. 593).
- (3.) Judgments in courts of record, and decrees in courts of equity against the deceased *pari passu* (*M'Causland v. O'Callaghan*, 1904, 1 I. R. 376). After the Law of Property Amendment Act, 1860, it was held that to enjoy this priority the judgment must be registered (*Re Turner*, *Turner v. Waller*, 12 W. R. 337; 33 L. J. Ch. 232; *Kemp v. Waddingham*, L. R. 1 Q. B. 355; *Van Gheluwe v. Nerinckx*, 21 Ch. D. 189). *Quære* whether since the Land Charges Act, 1900, s. 2 (3) and s. 5, registration is now necessary, those sections having altered the law as to the registration of judgments (see note to sect. 2 of that Act, *post*; see also *Fuller v. Redman* (No. 1, 26 Beav. 600). A foreign judgment is only a simple contract debt (*Wilson v. Dunsany*, 18 Beav. 293). As to a surety for the deceased who has paid off a judgment recovered during his life for the debt, see *Re M'Myn*, *Lightbown v. M'Myn* (33 Ch. D. 575).
- (4.) Judgments against legal personal representatives for debts of deceased whether specialty or simple contract (*Williams v. W.*, 15 Eq. 270; see however as to judgments for simple contract debt, *Re Bentinck*, *B. v. B.*, 1897, 1 Ch. 673), and whether the judgment be registered

or not. The rule before Administration of Estates Act, 1869, that registration was unnecessary (*Jennings v. Rigby*, 33 Beav. 198), was not altered by that act (*Williams v. W.*, 15 Eq. 270). A balance order for payment of a call is not such a judgment (*Re Hubback, International Co. v. Hawes*, 29 Ch. D. 934). Where a general decree for administration was made on the same day as the judgment, the judgment creditor had no priority (*Parker v. Ringham*, 33 Beav. 535). So where a like decree was made after order *nisi* to sign judgment, but before judgment actually signed (*Hanson v. Stubbs*, 8 Ch. D. 154). Judgments against representatives are payable according to their dates (*Dolland v. Johnson*, 2 Sm. & G. 301; see *M'Causland v. O'Callaghan*, 1904, 1 I. R. 376).

- (5.) Recognizances and statutes.
 - (6.) Specialty and simple contract debts, which now stand in equal degree (Administration of Estates Act, 1869, *infra*), including arrears of rent (*Re Hastings, Sherriff v. Hastings*, 6 Ch. D. 610). Simple contract debts due to the Crown have priority over simple contract debts due to a subject (Wms. Exors., 10th ed., 756). In a case of insolvency which occurred since the last-mentioned act, the assets were apportioned rateably between the simple contract creditors (one of whom was the Crown) and the specialty creditor, and the Crown's debt was paid in priority out of the assets apportioned to the former class (*Re Bentinck, B. v. B.*, 1897, 1 Ch. 673).
- As regards debts due from an incumbent's estate for dilapidations; where an order has been made under the Ecc. Dilapidations Act, 1871, these are under sect. 36 of that Act payable out of the assets of the deceased incumbent *pari passu* with his other debts (*Re Monk, Wayman v. Monk*, 35 Ch. D. 583). As to the law before that act, see *Bryan v. Clay*, 1 E. & B. 38; *Bissett v. Burgess*, 23 Beav. 278.
- (7.) Voluntary bonds (*Markwell v. Markwell*, 34 Beav. 18; see as to voluntary notes *Re Whitaker*, 42 Ch. Div. 119). If assigned for value these bonds are specialties (*Payne v. Mortimer*, 4 De G. & J. 447). As to the payment of voluntary creditors in the administration of insolvent estates, see *Re Whitaker, Whitaker v. Palmer*, 1901, 1 Ch. 9, quoted p. 412.

In the case of persons dying after 1869, no debt or liability of such person entitled to any priority or preference by reason merely that the same is secured by or arises under a bond, deed, or other instrument under seal, or is otherwise made or constituted a specialty debt; but all the creditors of such person, as well specialty as simple contract, are treated as standing in equal degree, and paid accordingly out of the assets of such deceased person, whether such assets are legal or equitable. But this does not prejudice or affect any lien, charge, or other security held by any creditor (Administration of Estates Act, 1869, s. 1).

The last-mentioned act gave simple contract creditors who obtained judgment against the debtor's executor a right to be paid in priority to specialty creditors (*Re Williams, W. v. W.*, 15 Eq. 270). It did not deprive an executor of the power to prefer a simple contract to a specialty creditor (*Re Samson, Robbins v. Alexander*, 1906, 2 Ch. 584). But it did not give an executor the right to retain a simple contract debt as against specialty creditors (*Wilson v. Coxwell*, 23 Ch. D. 764; *Re Jones, Calver v. Laxton*, 31 Ch. D. 440; *Re Briggs, Earp v. Briggs*, 1894, W. N. 162). Nor does the act (which does not affect the Crown) give a simple contract Crown debt priority over specialty debts due to subjects (*Re Bentinck, B. v. B.*, 1897, 1 Ch. 673).

In the administration by the court of the assets of any person whose estate may prove to be insufficient for the payment in full of his debts and liabilities, the same rules are to be observed as to the respective rights of secured and unsecured creditors, and as to the debts and liabilities provable, and as to the valuation of annuities and future and contingent liabilities respectively as are in force for the time being under the law of bankruptcy with respect

3 & 4 Will. 4,
c. 104.

Jud. Act,
1875, s. 10.

3 & 4 Will. 4, c. 104. to the estates of persons adjudged bankrupt (Jud. Act, 1875, s. 10). Insufficiency of assets to pay the interest on debts brings the case within the section (*Re Whitaker, Whitaker v. Palmer*, 1904, 1 Ch. 299).

This section does not render applicable to the administration in Chancery of the assets of a deceased person the rules in Bankruptcy which increase a bankrupt's assets, e.g., the reputed ownership clause, the fraudulent preference clause, and the sections which defeat certain settlements and executions. Those assets must be ascertained by applying the general laws of property and not the special rules applicable only to cases of bankruptcy (*Re Leng, Tarn v. Emerson*, 1895, 1 Ch. 655). But the section imports the Bankruptcy Rules "as to debts and liabilities provable;" including the general rule as to the payment of debts *pari passu* (*Re Leng, Tarn v. Emerson*, 1895, 1 Ch. 656), e.g., voluntary creditors and creditors for value (*Re Whitaker, Whitaker v. Palmer*, 1901, 1 Ch. 9); and including the rules prescribed by the Preferential Payments in Bankruptcy Act, 1888 (*Re Heywood, Partington v. Heywood*, 1897, 2 Ch. 593); and the rule postponing a widow's claim for money lent to the deceased for the purposes of his trade (*Re Leng, Tarn v. Emerson, sup.*). The section does not interfere with an executor's right of retainer (*Lee v. Nuttall*, 12 Ch. D. 61; *Re May, Crawford v. May*, 45 Ch. D. 499; *Re Ambler, Woodhead v. Ambler*, 1905, 1 Ch. 697). See further as to this section the notes thereto in the Annual Practice.

Bankruptcy Act, 1883, s. 125.

The Bankruptcy Act, 1883, s. 125, gives power to transfer the administration of an insolvent estate to bankruptcy, see Bankruptcy Act, 1890, ss. 21, 29. As to the general effect of the section, see *Re Williams, Jones v. Williams* (36 Ch. D. 573); *Watkins v. Barnard* (1897, 2 Q. B. 521); *Hasluck v. Clark* (1899, 1 Q. B. 699).

The power to make an order is discretionary (*Higgs v. Weaver*, 29 Ch. D. 236). As to an executor's right of retainer being exercisable after such an order, see *Re Rhoades* (1899, 2 Q. B. 347).

Executor may prefer creditors.

Before judgment in an administration action an executor or administrator may prefer one creditor to another (*Vane v. Rigden*, 5 Ch. 669; *Maltby v. Russell*, 2 Sim. & Stu. 227); even a simple contract to a specialty creditor (*Re Samson, Robbins v. Alexander*, 1906, 2 Ch. 584); and even though the preferred creditor be barred by statute (*Stahlschmidt v. Lett*, 1 Sm. & G. 415); and even though the representative have notice of the commencement of an administration action (*European Society v. Radcliffe*, 7 Ch. D. 733). Nor will a receiver be appointed against an executor except where a case is shown of assets being wasted (*Harris v. H.*, 56 L. T. 507; *Re Wells, Moloney v. Brooke*, 45 Ch. D. 575).

(9)
Retainer by executor.

Origin of doctrine.

An executor's right of retaining out of a testator's assets a debt owing to himself by the testator is the exercise by the executor in his own favour of the right of preference (*Tulbot v. Frere*, 9 Ch. D. 571). It is a "privilege" of the executor personally (*Re Benett, Ward v. Benett*, 1906, 1 Ch. 227); a common law right exercisable against legal assets (*Re Baker, Nicholls v. Baker*, 44 Ch. Div. 270), "given for this reason. When the creditor was also executor he could not sue himself. Any other creditor by suing the executor might get priority by judgment obtained; and the executor not being able to sue himself was allowed, as against other creditors, to retain" (*Re Illidge, Davidson v. Illidge*, 27 Ch. Div. 481).

By whom right exercisable.

The right might be exercised by the executor of an executor if the right was claimed during the lifetime of the latter (*Wilson v. Coarwell*, 23 Ch. D. 764; see *Re Owen, Poe v. Shortt*, 23 L. R. Ir. 328); but only out of assets which came to the hands of the latter or were paid into court in his lifetime (*Re Compton, Norton v. Compton*, 30 Ch. D. 15). The right might also formerly be exercised by an administrator (*Re May, Crawford v. May*, 45 Ch. D. 499). But see now the form of administration bond (Practice Note, 1899, W. N. 262; see *Davies v. Parry*, 1899, 1 Ch. 602; *Re Belham, Richardes v. Yates*, 1901, 2 Ch. 52).

Against whom.

An executor's retainer is not affected by Administration of Estates Act, 1869, s. 1 (*Crowder v. Stewart*, 16 Ch. D. 368); but can be exercised only

as against creditors in equal degree (*Wilson v. Coxwell*, 23 Ch. D. 764; *Re Jones, Calver v. Laxton*, 31 Ch. D. 440; *Re Briggs, Earp v. Briggs*, 1894, W. N. 162; see *Re Samson, Robbins v. Alexander*, 1906, 2 Ch. 584; *Talbot v. Frere*, 9 Ch. D. 568; *Re Allen, Adcock v. Evans*, 1896, 2 Ch. 345; *Laver v. Botham*, 1895, 1 Q. B. 59). But a retainer made without notice of a debt of higher degree will be good (*Re Fludyer, Wingfield v. Erskine*, 1898, 2 Ch. 562).

3 & 4 Will. 4,
c. 104.

The right of retainer can be exercised out of legal assets (*Re Baker*, Out of what *Nicholls v. Baker*, 44 Ch. Div. 270), but not out of equitable assets (*Ib.*; *Re Poole, Thompson v. Bennett*, 6 Ch. D. 739; *Walters v. W.*, 18 Ch. D. 182). As to a fund appointed under a general testamentary power, the right of retainer has been doubted (*Re Guedalla, Lee v. Guedalla*, 1905, 2 Ch. 339). Such a fund, however, has been held to be legal assets (*Re Hadley*, 1909, 1 Ch. 30). Real estate made assets under Administration of Estates Act, 1833, being equitable assets, an executor had no right of retainer out of it (*Walters v. W.*, 18 Ch. D. 182; *Davidson v. Illidge*, 27 Ch. Div. 478). The real estate of persons dying after 1897 has been made legal assets by the L. T. Act, 1897; but it has been held that sub-sect. 3 of sect. 2 of that act prevents the right of retainer from applying (*Re Williams, Holder v. Williams*, 1904, 1 Ch. 52). An executor cannot retain out of assets got in by a receiver (*Re Jones, Calver v. Laxton*, 31 Ch. D. 440); but where the executor had paid a debt out of assets in his hands under an order of court made "without prejudice to any question of retainer," he was allowed to retain out of assets subsequently got in by the receiver (*Re Lance, Sharp v. Rebbeck*, 1900, W. N. 29); and he may retain out of assets got in by himself and handed over to a receiver (*Re Harrison, Latimer v. Harrison*, 32 Ch. D. 395; *Re Giles, Jones v. Pennefather*, 1896, 1 Ch. 956); and also (where the estate is being administered in bankruptcy) out of assets got in by himself and paid over to the trustee in ignorance of the right (*Re Rhoades*, 1899, 2 Q. B. 347). He can also retain out of assets paid into court by him either actually or in substance (*Richmond v. White*, 12 Ch. Div. 361; *Re Giles, sup.*; *Re Langley, Johnson v. Langley*, 68 L. J. Ch. 361); but he cannot retain out of a fund transferred from the credit of another suit to the credit of the administration action (*Pulman v. Meadows*, 1901, 1 Ch. 233). The court has refused to pay funds out of court to an executor to enable him to retain his debt (*Trevor v. Hutchins*, 1896, 1 Ch. 844). When the executor's debt exceeds the value of the assets he may retain the assets in specie (*Re Gilbert*, 1898, 1 Q. B. 282).

An executor can retain in respect of debts whether legal or equitable (*Re Morris, M. v. M.*, 10 Ch. 68), even where an account must be taken (*Ib.*). In respect of what debts. He can retain in respect of a debt due to himself jointly with others (*Crowder v. Stewart*, 16 Ch. D. 368; *Re Hubback, International Co. v. Hawes*, 29 Ch. Div. 935; *Re Bolton*, 1892, W. N. 114), or due to himself as trustee (*Re Hubback, sup.*). The representative of a sole trustee who has committed a breach of trust may, if he has himself elected to act as trustee, be compelled to exercise the right of retainer for the benefit of the *c. g. trusts* (*Davies v. Parry*, 1899, 1 Ch. 607; *Re Benett, Ward v. Benett*, 1906, 1 Ch. 233; see *Sander v. Heathfield*, 19 Eq. 21; *Re Faithfull*, 57 L. T. 14); *secus* if he has not accepted the position of trustee, at least where the debt is an equitable one (*Re Benett, Ward v. Benett*, 1906, 1 Ch. 229, 230). Where the debt was a legal one and the estates of the debtor and creditor were both being administered by the court, the administrator was ordered to retain (*Fox v. Garrett*, 28 Beav. 16; *Re Owen, Poe v. Shortt*, 23 L. R. Ir. 328; but see *Re Benett, sup.*). An executor, however, cannot retain a debt to which he is entitled as *c. g. t.*, the right to sue for which is vested in trustees (*Re Dunning*, 54 L. J. Ch. 900; *Re Hayward, Tweedie v. Hayward*, 1901, 1 Ch. 221). A person to whom administration is granted *durante minoritate*, or to the use of a lunatic, may retain for their benefit (*Franks v. Cooper*, 4 Ves. 763); but where the grant was made to the manager of a bank who were creditors (but not expressed to be made for the use of the bank), he could not retain the bank's debt (*Re Richards, Lawson v. Hervey*, 1901, 2

3 & 4 Will. 4, Ch. 399). The right may be exercised in respect of the right of indemnity as surety for the testator (*Re Giles, Jones v. Pennefather*, 1896, 1 Ch. 956), or in respect of claims for damages for breach of pecuniary contracts (*Re Compton, Norton v. Compton*, 30 Ch. D. 15; see *Re Allen, Adcock v. Evans*, 1896, 2 Ch. 345). In the case of a debt payable in the form of an annuity where the estate was insolvent, an administratrix was allowed to retain arrears, but not the value of her future annuity (*Re Beeman, Fowler v. James*, 1896, 1 Ch. 48). An executor may retain a debt notwithstanding that the amount has not been ascertained (*Morris v. M.*, 10 Ch. 68); and in respect of a debt barred by the Statute of Limitations (*Beswick v. Orpen*, 16 Ch. Div. 207; see *Re Rownson, Field v. White*, 29 Ch. Div. 359), but not one barred by the Statute of Frauds (*Re Rownson, sup.*). The right can be exercised by an administratrix in respect of moneys advanced out of her separate estate to her deceased husband for his business (*Re May, Crawford v. May*, 45 Ch. D. 499; *Re Ambler, Woodhead v. Ambler*, 1905, 1 Ch. 697). A husband, as his wife's executor, could retain her funeral expenses out of assets appointed by her will (*Re M'Myn, Lightbown v. M'Myn*, 33 Ch. D. 575).

Effect of proceedings on right.

The right need not be asserted before occasion arises (*Re Rhoades*, 1899, 2 Q. B. 347). It may be exercised after an administration judgment (*Re Barrett, Whitaker v. Barrett*, 43 Ch. D. 70; *Davies v. Parry*, 1899, 1 Ch. 602), even after certificate (*Re Giles, Jones v. Pennefather*, 1896, 1 Ch. 956). But it could not be exercised as against a simple contract creditor who had previously obtained judgment *de bonis testatoris* against the executrix in an action where the right of retainer had not been set up (*Re Marvin, Crawler v. Marvin*, 1905, 2 Ch. 490). The right is not waived by the executor commencing an administration action on behalf of himself and all other creditors, and submitting to account (*Ex p. Campbell, C. v. C.*, 16 Ch. D. 198). The court will not interfere with the retainer by appointing a receiver (*Re Wells, Molony v. Brooke*, 45 Ch. D. 569). The right of retainer is not affected by the Jud. Act, 1875, s. 10 (*ante*, p. 411); nor (so far as regards assets got in by the executor) by the transfer of the administration to bankruptcy under sect. 125 of the Bankruptcy Act, 1883 (*Re Rhoades*, 1899, 2 Q. B. 347).

By heir-at-law.

It was said before the Land Transfer Act, 1897, that an heir-at-law or devisee, where the estate was not charged with debts, might retain a debt to which he was entitled by specialty in which the heirs were bound, but not a simple contract debt (*Re Illidge, Davidson v. Illidge*, 27 Ch. Div. 478). Consider now the effect of the L. T. Act, 1897 (*post*, p. 421).

(10)

Administration of assets in one country where owner domiciled in another.

As regards the application in payment of the debts of a person domiciled in one country of assets belonging to him situate in another, it has been laid down that the proper order and priority of distribution of assets is always a matter for the *lex fori*; and the country where the distribution takes place always claims to itself the right to regulate the course of distribution (*Thurburn v. Steward*, L. R. 3 P. C. 513; see *Re Doetsch, Matheson v. Ludwig*, 1896, 2 Ch. 836). Personal assets for the purpose of administration as distinguished from distribution among successors are governed by the law, not of their owner's domicile, but of their locality (*Blackwood v. Reg.*, 8 App. Cas. 93; *Commissioners of Stamps v. Hope*, 1891, A. C. 476; *Henty v. Reg.*, 1896, App. Cas. 567, overruling on this point *Wilson v. Dunsany*, 18 Beav. 293). Compare in the case of real assets *Harrison v. Harrison*, 8 Ch. 342; *Re Hewit, Lawson v. Duncan*, 1891, 3 Ch. 568. In the case of a debt contracted abroad by a domiciled Englishman, the *lex loci contractus* does not entitle the creditor to prior payment out of equitable assets administered here (*Pardo v. Bingham*, 6 Eq. 485). An executor who has taken out probate in one country must not remit assets situate there to another country, in order to give a priority which would not exist in the first country (*Cook v. Gregson*, 2 Drew. 286; see *Re Klæbe, Kannreuther v. Geiselbrecht*, 28 Ch. D. 179). In the administration of the English estate of a deceased domiciled abroad, foreign creditors are entitled to dividends *pari passu* with English creditors (*Re Klæbe, Kannreuther v. Geiselbrecht*, 28 Ch. D. 175).

Before this act, copyholds (which were not within the statute 3 & 4 W. & M. c. 14, nor the 47 Geo. 3, sess. 2, c. 74, nor the Debts Recovery Act, 1830) were not liable, either at law or in equity, to the debts of a testator any further than he charged them (*Aldrich v. Cooper*, 8 Ves. 393). Where a testator having both freeholds and copyholds, charged all his *real estates* with the payment of his debts, if he had surrendered the copyhold to the use of his will, the freehold and copyhold would have been applied rateably; if he had not surrendered, the copyhold would have been applied after the freehold was exhausted (*Growcock v. Smith*, 2 Cox, 397; *Coombes v. Gibson*, 1 Br. C. C. 273; *Kentish v. Kentish*, 2 Br. C. C. 257). Equity would, before the statute 55 Geo. 3, c. 192, supply a surrender to the use of a will where a manifest intent to charge copyholds with debts appeared in the will (*Drake v. Robinson*, 1 P. Wms. 443; *Bateman v. Bateman*, 1 Atk. 421). As to copyholds being charged by a will, see *Noel v. Weston* (2 Ves. & Bea. 269); *Godolphin v. Penneck* (2 Ves. Sen. 271); *Doe v. Ludlam* (7 Bing. 275); *Ronalds v. Feltham* (T. & R. 418). Where one party had a charge on freeholds and copyholds, and another party on the freeholds only, the latter was entitled to require that the former should first have recourse to the copyholds (*Tidd v. Lister*, 10 Hare, 157).

Formerly copyholds were not liable to an extent (Park. R. 195; *Drury v. Man*, 1 Atk. 96); and neither the Crown nor the subject was allowed to take copyhold tenements held in fee or for lives in execution (*Aldrich v. Cooper*, 8 Ves. 394); but leases for years of copyholds, granted by virtue of a licence from the lord, might be taken in execution, that being a common law interest (3 Prest. Abstr. 351). Before sect. 11 of the Judgments Act, 1838 (*post*), copyholds could not be taken in execution upon a judgment (*Cannon v. Pack*, Vin. Abr. Copyhold (O. e), pl. 6; 2 Eq. Cas. Abr. 226, pl. 6); nor be seized upon an outlawry, because it would have been prejudicial to the lord of the manor (*R. v. Budd*, Park. R. 190). But it seems that they might be sequestered (*Dunkley v. Scribner*, 2 Madd. 443; *Carmarthen v. Hawson*, 3 Swanst. 294); although the sequestration would not be revived against the heir of the party who was sequestered (*Whitehead v. Harrison*, 1 Barn. K. B. 431); and they were within the rules as to marshalling assets (*Aldrich v. Cooper*, 8 Ves. 388). But a trust of copyholds, which descended according to the rules of the common law, was assets in the hands of the heir of the *c. q. t.*, as the customary descent is in that case broken (*Kelly v. Kelly*, 2 Eq. Cas. Abr. 509, pl. 4).

The legal estate in copyholds does not on the death of the copyholder vest in his personal representative, either under sect. 30 of the Conv. Act, 1881 (Copyhold Act, 1894, sect. 88), or under sect. 1 of the L. T. Act, 1897 (see sub-s. 4). But the last-mentioned section includes an equitable interest in copyholds (*Re Somerville and Turner*, 1903, 2 Ch. 583).

3 & 4 Will. 4,
c. 104.

(11)
Copyholds.

V.—THE LAW OF PROPERTY AMENDMENT ACT, 1859.

22 & 23 VICT. c. 35, ss. 14—18, AND 23.

[13th August, 1859.]

14. Where by any will which shall come into operation after the passing of this act the testator shall have charged his real estate or any specific portion thereof with the payment of his debts, or with the payment of any legacy or other specific sum of money, and shall have devised the estate so charged to any trustee or trustees for the whole of his estate or interest therein,

22 & 23 Vict.
c. 35, s. 14.

Devisee in
trust may
raise money
by sale, not-
withstanding

22 & 23 Vict.
c. 35, s. 14.

want of ex-
press power
in the will.

and shall not have made any express provision for the raising of such debt, legacy or sum of money out of such estate, it shall be lawful for the said devisee or devisees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy or money as aforesaid, by a sale and absolute disposition by public auction or private contract of the said hereditaments or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other, and any deed or deeds of mortgage so executed may reserve such rate of interest and fix such period or periods of repayment as the person or persons executing the same shall think proper.

The other sections of this act will be found under different heads in this work (see *ante*, p. 383, and *post*).

Having regard to the L. T. Act, 1897 (*post*), it will not be necessary in the case of persons dying after 1897 to have recourse to these sections, except as regards copyholds (see L. T. Act, 1897, s. 1 (4), *post*, p. 422). As regards copyholds and the freeholds of a person dying before 1898, these sections will apply where there is a charge of debts. Where there is no charge, recourse can if necessary be had to the Administration of Estates Act, 1833 (*ante*, p. 402).

- (1) *What amounts to a Charge of Debts or Legacies on Real Estate* ...416.
- (2) *Effect of Charge of Debts before the Act*...417.
- (3) *Cases under the Act*...418.
- (4) *Effect of Lapse of Time on Executor's Power*...419.
- (5) *Power to Mortgage*...419.

(1)
Charge of
debts on real
estate.

On the question, what amounts to a charge of debts upon real estate, a mere authority to trustees to pay claims on the estate is not such a charge (*Re Head's Trustees*, 45 Ch. D. 310). A general direction, however, in a will to pay debts, charges them ordinarily on all the testator's real estate (*Graves v. G.*, 8 Sim. 55; *Cook v. Dawson*, 29 B. 126; *Corser v. Cartwright*, L. R. 7 H. L. 735; *Re Adams and Perry*, 1899, 1 Ch. 554); unless a contrary intention appears in the will (*Thomas v. Britnell*, 2 Ves. Sen. 313; see *Re Butler, Le Bas v. Herbert*, 1894, 3 Ch. 258). Such contrary intention may appear (1) by reason of there being a specific charge of debts on part of the real estate (*Palmer v. Graves*, 1 Keen, 545; *Corser v. Cartwright, sup.*), in which case the words must be clear (*Taylor v. T.*, 6 Sim. 246; *Jones v. Williams*, 1 Coll. 156; see *Wrigley v. Sykes*, 21 Beav. 337; *Marshall v. Gingell*, 21 Ch. D. 790); or (2) by reason of the direction being a direction to executors to pay, in which case the presumed intention is that the debts are to be paid only out of the property which passes to the executors as such (*Wasse v. Heslington*, 3 M. & K. 495; *Re Bailey, B. v. B.*, 12 Ch. D. 272). Where, however, in addition to the direction to the executors to pay debts the will contains a devise of real estate to them, such real estate may be charged, whether under the devise they take beneficially for life or otherwise (*Henvell v. Whitaker*, 3 Russ. 343; *Finch v. Hattersley, ib.* 345), or merely on trust (*Hartland v. Murrell*, 27 Beav. 204; *Re Tanqueray-Willlaume*, 20 Ch. Div. 465; *Re Brooke, B. v. B.*, 1894, 1 Ch. 43; *Re Stokes, Parsons v. Miller*, 67 L. T. 223; see *De Burgh Lawson v. De Burgh Lawson*, 41 Ch. D. 568, the will of a married woman in exercise of a power). But it is a question of intention (*Re Bailey, B. v. B.*, 12 Ch. D. 272; *Wasse v. Heslington*, 3 M. & K. 495). And such real estate will not be charged, either where the executors take unequal benefits (*Harris v. Watkins*, Kay, 438; see *Re Tanqueray-Willlaume*, 20 Ch. Div. 465), or where the devise is to one executor only (*Warren v. Davis*, 2 M. & K. 49; see *Marshall v. Gingell*, 21

Ch. D. 790). Real estates made assets by means of such a charge are equitable assets (*Silke v. Prime*, 1 Br. C. C. 138; *Shiphard v. Lutwidge*, 8 Ves. 26); as to equitable assets, see *ante*, p. 406.

With regard to legacies, where there is only a general gift of them, they are not charged on the testator's real estate (*Kightley v. K.*, 2 Ves. Jun. 328). To charge them a clear intention must be shown (*Bench v. Biles*, 4 Mad. 188); clearer, it would seem, than in the case of debts (*Kightley v. K.*, *sup.*). Where there is a direction that the real estate be sold, the proceeds to form part of the personal estate, the realty is charged (*Bright v. Larcher*, 3 De G. & J. 148; *Field v. Peckett*, 29 B. 568). A direction to the executor to pay legacies would seem to charge real estate devised to him (*Alcock v. Sparhawk*, 2 Vern. 228; *Elliot v. Handcock*, *ib.* 143; *Cross v. Kennington*, 9 Beav. 150); but a direction to executors to realise for the payment of legacies such part of the testator's estate as they thought right, did not charge the real estate (*Re Cameron, Nixon v. Cameron*, 26 Ch. D. 19). A general charge of legacies on the real estate did not charge specifically devised realty (*Spong v. S.*, 3 Bli. N. S. 84; *Conron v. C.*, 7 H. L. C. 168); except where the legacies were coupled with debts (*Maskell v. Farrington*, 3 D. J. & S. 338; see *Mannox v. Greener*, 14 Eq. 456); or where the specific devises comprised the whole of the testator's real estate (*Bank of Ireland v. McCarthy*, 1898, A. C. 181). Where legacies are charged on the real estate if the personal estate be deficient, see as to the time when the deficiency is to be ascertained, *Richardson v. Horton*, 13 Eq. 121, and cases there referred to; *McCarthy v. McCartie*, 1897, 1 I. R. 86; 1898, A. C. 181.

Where a will gives legacies generally, and also gives the residue of the real and personal estate in one mass, the result is to charge the legacies upon the residuary real estate (*Greville v. Browne*, 7 H. L. C. 689; *Re Bellis*, 5 Ch. D. 504; *Re Dyson and Fowke*, 1896, 2 Ch. 720; *Re Adams and Perry*, 1899, 1 Ch. 554). The rule applies where the gift is of all real and personal estate "not otherwise disposed of" (*Re Bawden, National Bank v. Cresswell*, 1894, 1 Ch. 693; see *Re Smith, S. v. S.*, 1899, 1 Ch. 369); and whether the legacies are given before or after the gift of residue (*Elliott v. Dearsley*, 16 Ch. D. 327; *Re Balls, Treuby v. Balls*, 1909, 1 Ch. 791); and is not affected by a direction that debts and legacies are to be paid by the executors (*Re Brooke, B. v. Rooke*, 3 Ch. D. 630). As to its application in the case of property subject to a special power of appointment, see *Gainsford v. Dunn* (17 Eq. 405). The rule applies even where the will contains a specific devise of real estate by means of which the word "residue" might have been explained (*Francois v. Clemow, Kay*, 435); but in such case the specifically devised estate is not charged (see *Bray v. Stephens*, 12 Ch. D. 169). Where, after bequeathing legacies, a testator devised his real estate in B. and the residue of his real and personal estate, the legacies were charged on the real estate in B. as well as the testator's other real estate (*Bray v. Stephens*, 12 Ch. D. 162). But where, after bequeathing legacies, a testator devised all his real estate and bequeathed the residue of his personal estate, the rule in *Greville v. Browne* did not apply (*Wells v. Rowe*, 48 L. J. Ch. 476). When the rule applies the legacies are payable primarily out of the personalty, unless the testator directs payment out of a mixed fund arising from the conversion of the real and personal estates; in which case they are payable rateably out of the realty and personalty (*Re Boards, Knight v. Knight*, 1895, 1 Ch. 499; *Re Spencer Cooper, Poe v. Spencer Cooper*, 1908, 1 Ch. 130). The rule was not applied to legacies expressly directed to be paid out of personal estate (*Gyett v. Williams*, 2 J. & H. 429).

Notwithstanding a charge of legacies on real estate, the general personal estate remains the primary fund for their payment (*Davies v. Ashford*, 15 Sim. 46; *Paget v. Huish*, 1 H. & M. 668); unless the words of the charge exonerate the personal estate (*Re Needham, Robinson v. Needham*, 54 L. J. Ch. 78; *Ion v. Ashton*, 28 Beav. 379).

In the case of wills coming into operation before 13th August, 1859, the law is doubtful as to the legal operation of a will creating merely a charge of

Charge of legacies on real estate.

(2)
Wills before 1859 containing charge of

22 & 23 Vict.
c. 35, s. 14.

debts; who
took power
of sale.

Executor, &c.

Devise on
trust.

Devise bene-
ficially.

Devise for
life with
remainders
over.

Heir-at-law.

Disclaimer.

Executor's
power of sale,
equitable.

(3)

Wills after
1859. Cases
under this
act.

debts, where no machinery is provided for giving effect to the charge. With regard to such cases, it was laid down that a charge of debts was equivalent to a trust for sale for the payment of them (*Ball v. Harris*, 4 M. & C. 267). And that a general charge of debts enabled an executor to sell land and make a good title (*Greetham v. Colton*, 34 Beav. 619; see *Gosling v. Carter*, 1 Coll. 650; *Storv v. Walsh*, 18 Beav. 568; *Wrigley v. Sykes*, 21 Beav. 337; *Hodkinson v. Quin*, 1 J. & H. 309; *Cook v. Dawson*, 29 Beav. 126; *Hamilton v. Buckmaster*, 3 Eq. 323; *Colyer v. Finch*, 5 H. L. C. 922). No power of sale, however, was ever implied in an administrator with the will annexed (*Re Clay and Tetley*, 16 Ch. Div. 7). A testator having charged his real estate with a sum of money, must be taken to have given an implied power to some one to raise the sum required, and the donee of the power must in each case be ascertained from the whole will (*Eidsforth v. Armstead*, 2 K. & J. 333; see *Robinson v. Lowater*, 5 D. M. & G. 272; *Gosling v. Carter*, 1 Coll. 650). Where the land was devised to trustees, they could sell or mortgage (*Hodkinson v. Quin*, 1 J. & H. 303; *Eidsforth v. Armstead*, 2 K. & J. 333; *Ball v. Harris*, 4 M. & C. 264); certainly with the consent of the executors (*Shaw v. Borrer*, 1 Keen, 559); or where the trustee was also executor (*Sabin v. Heape*, 27 Beav. 553). But it seems that the executors might also have had a concurrent power of sale (*Hodkinson v. Quin*, 1 J. & H. 303). Where the estate was devised beneficially to a person other than the executor, charged with certain payments of debts or legacies, then the money was to be raised through the instrumentality of a sale by the devisee, and that devisee was the person, and the only person, who could make a legal title (*Colyer v. Finch*, 5 H. L. C. 922; see *Corser v. Cartwright*, 8 Ch. 971). A devisee subject to a general charge of debts, who was also one of the executors, was the only person to sell or mortgage (*Corser v. Cartwright*, L. R. 7 H. L. 731). A devisee subject to a general charge of debts and annuities (who was also an executor) could make a good title without the annuitants (*Page v. Adams*, 4 Beav. 269; *Elliot v. Merryman*, 2 L. C. Eq. 904, 7th ed.; see *Re Tanqueray-Willauve*, 20 Ch. D. 465). For the case where the charge was of a particular legacy, see *Re Rebbeck*, *Bennett v. Bebeck* (63 L. J. Ch. 596; 71 L. T. 74). Where a testator devised lands for life with contingent remainders over, and charged them with his debts generally, but gave no express power of sale, the executor could sell (*Robinson v. Lowater*, 5 D. M. & G. 272; see *Bolton v. Stannard*, 6 W. R. 570). Where a testator charged his real estate with the payment of his debts, and the real estate descended to the heir, it seems that the heir could not sell (*Gosling v. Carter*, 1 Coll. 650). In a similar case it was held, at law, that the executor had no legal power of sale (*Doe v. Hughes*, 6 Exch. 223); but probably he had an equitable power (*Colyer v. Finch*, 5 H. L. C. 922). Where a sole executor, who was devisee of real estate in trust to sell and pay debts, renounced and disclaimed, it was held that the heir who had taken out administration could sell (*Austin v. Martin*, 29 Beav. 523). But the decision seems inconsistent with *Robson v. Flight*, 4 D. G., Jo. & S. 613. Where real estate was being sold for payment of debts, and the legal estate was in the heir, who was out of the jurisdiction, and the charge of debts was not clear, the court declared the heir to be a trustee, and made a vesting order (*Hooper v. Strutton*, 12 W. R. 367).

In the case of wills before this act, it seems that the implied power of sale which executors took under a charge of debts, was merely an equitable power; and the concurrence of the heir or devisee was necessary to pass the legal estate (Dart, V. & P. 694, 6th ed.).

In the case of wills coming into operation after the 13th of August, 1859, sect. 14 of this act gives to trustees taking by devise the whole of the testator's interest in real estate charged with debts or legacies, an absolute power to sell or mortgage the same to raise such debts or legacies. Where by the will the legal estate was vested in the widow during her life, the section did not apply (*Re Adams and Perry*, 1899, 1 Ch. 554). By sect. 18, the case of a beneficial devise in fee is excepted from the operation of the

act. In such a case it would seem that, having regard to the then state of the law (see last words of section 18), the beneficial devisee, and not the executor, is the person in whom all power to sell is vested (*Colyer v. Finch*, 5 H. L. C. 922; see *Re Wilson, Pennington v. Payne*, 54 L. T. 600). Where a testator appointed A. and B. executors and gave to them in trust a particular legacy, and subject thereto devised land to A. beneficially in fee, sect. 18 applied, and the devisee could sell, but the concurrence of the particular legatee was required (*Re Rebbeck, Bennett v. Rebbeck*, 63 L. J. Ch. 596; 71 L. T. 74). By sect. 16, it was apparently intended to give the executor an absolute legal power to sell or mortgage in all cases not falling within sects. 14 and 18 (see *Pennington v. Payne*, 54 L. T. 600; *Re Sankey, Sankey v. Clarke*, 1889, W. N. 79). Executors could sell or mortgage where, subject to debts and legacies, land was devised to A. for life with remainder over (*Re Wilson, Pennington v. Payne*, 54 L. T. 600), or was devised in fee to the first son of the testator who should attain 25 (*Re Barrow-in-Furness*, 1903, 1 Ch. 339). It is at present doubtful how far (if at all) the provisions of the S. L. A., 1882, as to the consent of the tenant for life are applicable to sales for the payment of debts (see Lewin on Trusts, 547, 11th ed.; Wolstenholme, S. L. Acts, 387, 8th ed.).

The power implied under a charge of debts in wills before this act has been held to exist notwithstanding the lapse of a considerable time. Thus, in *Greetham v. Colton* (34 Beav. 615), thirteen years; in *Forbes v. Peacock* (Phill. 717), twenty-five years; in *Sabin v. Heape* (27 Beav. 353), twenty-seven years; and in *Wrigley v. Sykes* (21 Beav. 337), thirty-three years, had elapsed between the testator's death and the sale. In a case before the L. T. Act, 1897, the rule was laid down that after twenty years there was a presumption that the debts had been paid, and that in such case a purchaser of freeholds from the executor was bound to inquire as to this; but that within that period the purchaser was not entitled to make any inquiry (*Re Tanqueray-Willlaume*, 20 Ch. Div. 480). Before the L. T. Act, 1897, the last-mentioned rule did not apply to an executor selling leaseholds (*Re Venn and Furze*, 1894, 2 Ch. 101; *Re Whistler*, 35 Ch. D. 561; see *Re Molyneux and White*, 15 L. R. Ir. 383; *Re Verrell*, 1903, 1 Ch. 65). Since the L. T. Act, 1897 (*post*, p. 421), it may be a question whether as regards freeholds affected by that act the rule continues to apply. Compare the rule that after ten years from the death money will not be paid out of court to an executor without notice to beneficiaries (Practice Note, 1904, W. N. 135).

A power of sale out and out does not authorize a mortgage (*Stroughill v. Anstey*, 1 D. M. & G. 645; *Page v. Cooper*, 16 Beav. 400); but a power of sale for raising a particular charge does (*ib.*; see *Walker v. Southall*, 56 L. T. 882): so a power of sale to pay debts implies power to mortgage (*Ball v. Harris*, 4 M. & C. 267; see *Colyer v. Finch*, 5 H. L. C. 905; *Corser v. Cartwright*, L. R. 7 H. L. 731). A trust for sale was held not to authorize a mortgage, even where some of the trusts required the raising of money (*Walker v. Southall*, 56 L. T. 882; see *Haldenby v. Spofforth*, 1 Beav. 390). But the trustees could mortgage where they had power to employ capital in carrying on a business (*Re Dimmock, De v. D.*, 52 L. T. 494); or power to make any outlay out of the income or capital of the testator's real and personal estate (*Re Bellinger, Durell v. Bellinger*, 1898, 2 Ch. 534). A power to mortgage does not give a power to sell (*Cook v. Dawson*, 29 Beav. 128); but a power to mortgage authorizes a mortgage with a power of sale (*Bridges v. Longman*, 24 Beav. 29; *Cook v. Dawson*, 29 Beav. 128; *Re Chawner's Will*, 8 Eq. 569; *contra, Clarke v. Royal Panopticon*, 4 Drew. 26).

15. The powers conferred by the last section shall extend to all and every person or persons in whom the estate devised shall for the time being be vested by survivorship, descent or devise, or to any person or persons who may be appointed under any

Powers given by last section extended to survivors, devisees, &c.

22 & 23 Vict.
c. 35, s. 15.

power in the will, or by the Court of Chancery, to succeed to the trusteeship vested in such devisee or devisees in trust as aforesaid.

See the questions which have been raised as to how far the devisee of a trust estate can execute the trust (*Braybrooke v. Inskip*, Tudor's L. C., Conv.). See also sect. 22 of the Trustee Act, 1893 (*post*).

Executors to have power of raising money, &c. where there is no sufficient devise.

16. If any testator who shall have created such a charge as is described in the fourteenth section shall not have devised the hereditaments charged as aforesaid in such terms as that his whole estate and interest therein shall become vested in any trustee or trustees, the executor or executors for the time being named in such will (if any), shall have the same or the like power of raising the said moneys as is hereinbefore vested in the devisee or devisees in trust of the said hereditaments, and such power shall from time to time devolve to and become vested in the person or persons (if any) in whom the executorship shall for the time being be vested; but any sale or mortgage under this act shall operate only on the estate and interest, whether legal or equitable, of the testator, and shall not render it unnecessary to get in any outstanding subsisting legal estate.

See note to sect. 14, *ante*. The section was excluded by a beneficial devise in fee which fell within sect. 18 (*Re Rebbeck*, 63 L. J. Ch. 596). In other cases executors took a legal power of sale under this section (*Re Wilson, Pennington v. Payne*, 54 L. T. 600; *Re Sankey, Sankey v. Clark*, 1889, W. N. 79; *Re Barrow-in-Furness*, 1903, 1 Ch. 339); but it confers no power on an administrator with the will annexed (*Re Clay and Tetley*, 16 Ch. Div. 3).

Purchasers, &c. not bound to inquire as to powers.

17. Purchasers or mortgagees shall not be bound to inquire whether the powers conferred by sections fourteen, fifteen and sixteen of this act, or either of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof.

Sections 14, 15 and 16 not to affect certain sales, &c. nor to extend to devises in fee or in tail.

18. The provisions contained in sections fourteen, fifteen and sixteen shall not in any way prejudice or affect any sale or mortgage already made or hereafter to be made, under or in pursuance of any will coming into operation before the passing of this act, but the validity of any such sale or mortgage shall be ascertained and determined in all respects as if this act had not passed; and the said several sections shall not extend to a devise to any person or persons in fee or in tail, or for the testator's whole estate and interest charged with debts or legacies, nor shall they affect the power of any such devisee or devisees to sell or mortgage as he or they may by law now do.

See note to sect. 14, *ante*. This section applied in the case of a beneficial devise subject to a particular legacy, the concurrence in the sale of the legatee being required. *Re Rebbeck, Bennett v. Rebbeck* (63 L. J. Ch. 596; 71 L. T. 74). But the section did not apply in the case of a devise in fee to the first son of the testator who should attain 25 (*Re Barrow-in-Furness*, 1903, 1 Ch. 339).

23. The *bonâ fide* payment to and the receipt of any person to whom any purchase or mortgage money shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application or being answerable for the misapplication thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security.

22 & 23 Vict.
c. 35, s. 23.

Not to be bound to see to the application of purchase-money.

See also Trustee Act, 1893, s. 20, *post*, as to the present law.

Before these statutes, where a will contained no express trust or charge for payment of debts, and before proceedings were taken by a creditor the land was sold by devisee or heir, the purchaser was not bound to see to the application of the purchase-money, where the land was made assets, either by the Debts Recovery Act, 1830 (see *ante*, p. 396), or by the Administration of Estates Act, 1833 (see *ante*, p. 404).

Previous law as to purchaser's obligation in case of sale for payment of debts or legacies:

Where a will contained an express trust or charge for payment of debts generally, a purchaser was not bound to see to the application of the purchase-money (*Johnson v. Kennett*, 3 M. & K. 630); even where a testator charged the land with a specified debt, and also with his other debts generally (*Robinson v. Lowater*, 5 D. M. & G. 272). And the rule had reference to the time of the testator's death, and did not cease to be applicable, though the debts were subsequently paid (*Forbes v. Peacock*, 1 Phill. 717; see *Stroughill v. Anstey*, 1 D. M. & G. 653). So where a testator charged debts upon his real estate in case of the insufficiency of his personal estate (*Greetham v. Colton*, 34 Beav. 615; see *Carlyon v. Truscott*, 20 Eq. 348).

Where express trust or charge for payment of debts generally;

Where debts and legacies were charged generally, a purchaser was not bound to see to the application of the purchase-money (*Johnson v. Kennett*, 3 M. & K. 630; *Corser v. Cartwright*, 7 H. L. 736; *Re Henson*, *Chester v. Henson*, 1908, 2 Ch. 356); even where the personalty was sufficient to pay the debts, and they had all been paid (*Page v. Adam*, 4 Beav. 269; *Dowling v. Hudson*, 17 Beav. 248; *Jones v. Price*, 11 Sim. 557). But the rule did not apply where the circumstances afforded intrinsic evidence that the purchase-money was not to be applied for payment of the debts and legacies (*Watkins v. Cheek*, 2 Sim. & Stu. 199; *Eland v. Eland*, 4 M. & C. 420; *Forbes v. Peacock*, 1 Phill. 721).

of debts and legacies generally;

Where legacies alone were charged generally a purchaser was bound to see to the application of the purchase money (*Johnson v. Kennett*, 3 M. & K. 630; *Horne v. H.*, 2 S. & S. 448).

of legacies generally.

A purchaser was similarly bound where the trust was for payment of specified debts (*Binks v. Rokeby*, 2 Mad. 238), or of a specified legacy (*Re Rebbeck*, *Bennett v. Rebbeck*, 63 L. J. Ch. 596).

For payment of particular debts or legacies.

See further *Elliot v. Merryman*, 1 L. C. Eq.

VI.—THE LAND TRANSFER ACT, 1897, SS. 1—5, 24—26.

60 & 61 VICT. c. 65.

An Act to establish a Real Representative and to Amend the Land Transfer Act, 1875. [6th August, 1897.]

PART I.

Establishment of a Real Representative.

1.—(1.) Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his

60 & 61 Vict.
c. 65, s. 1.

60 & 61 Vict.
c. 65, s. 1.

Devolution of
legal interest
in real estate
on death.

death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him.

(2.) This section shall apply to any real estate over which a person executes by will a general power of appointment, as if it were real estate vested in him.

(3.) Probate and letters of administration may be granted in respect of real estate only, although there is no personal estate.

(4.) The expression "real estate," in this part of this act, shall not be deemed to include land of copyhold tenure or customary freehold in any case in which an admission or any act by the lord of the manor is necessary to perfect the title of a purchaser from the customary tenant.

(5.) This section applies only in cases of death after the commencement of this act.

Law as to
persons dying
before 1898.

Sect. 25 of the L. T. Act, 1897 (*post*, p. 433), fixed 1st January, 1898, as the date on which the act was to come into operation. In the case of a person dying before that date and who had by his will charged his debts on his real estate, the Law of Property Amendment Act, 1859, contained provisions for raising the money, either by trustees to whom the real estate had been devised for the testator's whole interest (sect. 14, *ante*, p. 415), or by the executors (sect. 16, *ante*, p. 420). As to a devisee in fee or tail raising the money in such a case, see sect. 18, *ante*, p. 420. Where such a person's will did not contain a charge, or where he died intestate, the real estate could be made available for payment of debts under the Administration of Estates Act, 1833 (*ante*, p. 402); the proceedings used for the purpose being a creditor's administration action in the Chancery Division, to which the devisee or heir, as well as the executor, was a necessary party (see *ante*, p. 405, and see the forms of indorsement on a creditor's writ, App. A., R. S. C. 1883, Pt. III., s. 1). Such an action might be commenced by originating summons (see R. S. C., Ord. 55, rr. 3, 4, 10 and 10a).

Persons dying
after 1897.

Under the present act, the real estate of a person dying after 1897 is made available in all cases for the payment of his debts without the necessity for any proceedings. Sect. 1, sub-sect. 1, vests such real estate (including real estate appointed by will under a general power—sub-sect. 2; but not including copyholds—sub-sect. 4) in the personal representatives. And this real estate is to be administered in the same manner for the payment of debts, &c. as if it were personal estate (sect. 2, sub-sect. 3). For the purpose of such administration the powers, rights, duties, and liabilities of the personal representatives in respect of the personal estate are to apply to the real estate as if the same were a chattel real (see sect. 2, sub-sect. 2). And, subject to such powers, rights, duties, and liabilities, the representatives hold the real estate as trustees for the beneficiaries (sect. 2, sub-sect. 1). To these beneficiaries a transfer may be made by the representatives, either by means of an assent to a devise or by a conveyance, and either subject to a charge or not (sect. 3, sub-sect. 1); and may be ordered after the expiration of one year from the death (sect. 3, sub-sect. 2). The act further contains provisions as to probate and letters of administration (sect. 1, sub-sect. 3, and sect. 2, sub-sect. 4), and also a special power for the representatives to appropriate parts of the residuary estate (sect. 4).

Parties to ad-
ministration
actions.

If it becomes necessary to administer in an action the freehold estate of a person dying since 1897, it seems that (contrary to the rule before this act) the heir or devisee is not a necessary party; see *Re Harrowby and Paine*, 1902, W. N. 137.

Where the owner of real estate in England who has died since 1897 held shares in a company which is being wound up, his personal representatives

and also his heirs and devisees are liable to contribute (Comp. Consol. Act, 1908, sect. 126, sub-sect. 1). The representatives should be placed on the list of contributories, but not it seems the heirs or devisees (sect. 126, sub-sect. 2; see sect. 168, sub-sect. 2).

The real estate referred to in sect. 1 appears to be thereby made "legal assets"—i.e., assets which the representative could *virtute officii* recover in a court of law or equity (*Cook v. Gregson*, 3 Drew. 549, *ante*, p. 406).

The trust and mortgage estates vested in a deceased person at the time of his death are dealt with by sect. 30, sub-sect. 1, of the Conv. Act, 1881 (*post*), which appears to be still in operation. As regards his beneficial interests the words of the present sub-section include every interest of the deceased (whether legal or equitable) in real estate (*Re Somerville and Turner*, 1903, 2 Ch. 587). Such real estate is to vest in the personal representatives as if it were a "chattel real;" as to the meaning of which, see *ante*, p. 117. At the commencement of this act all interests of the deceased (whether legal or equitable) in chattels real passed to the executor as such (Wms. Exors., 10th ed., 516; *Re Culverhouse*, 1896, 2 Ch. 253).

According to sect. 26 of the L. T. Act, 1897 (*post*, p. 433), the act is to be construed as one with the L. T. Act, 1875. Sect. 2 of the last-mentioned act provides that such act shall not apply to Scotland or Ireland. It seems, accordingly, that the provisions as to a real representative do not apply to real estate situate in Scotland or Ireland.

The real estate made available for debts by the Admon. of Estates Act, 1833 (which only applied where there was no testamentary charge of debts), included, in the words of that act, every estate or interest in real estate of or to which a person died seised or entitled (*ante*, p. 403). In the case of a man who died intestate leaving a widow, it was said that what was claimed by or came to the widow as dower was no part of what the intestate was seised of at his death, and that accordingly the dower had priority over the creditors (*Spyer v. Hyatt*, 20 Beav. 623; *Northern Bank v. M'Machin*, 1909, 1 I. R. 374). Under the present act the widow's dower seems to have the same priority.

As regards real estate appointed by the will of the deceased under a general power, this now, under sect. 1, sub-sect. 2, of this act, vests in the representative. Previously such property had been held to fall within the words of the Admon. of Estates Act, 1833, above referred to, and to be applicable in payment of debts under that act (*Fleming v. Buchanan*, 3 D. M. & G. 980). Under the joint operation of sects. 24 and 27 of the Wills Act, 1837, all general powers vested in a testator immediately before his death are (in the absence of a contrary intention) executed by a general devise (see *post*, p. 473). In the case of a married woman such appointed property was made liable for her debts by M. W. P. Act, 1882, s. 4, *ante*, p. 353. Sect. 27 always applied to the will of a married woman (*Bernard v. Minshull*, John. 276); and in the case of a married woman dying since 5th December, 1893, sect. 24 has been rendered applicable by sect. 3 of the M. W. P. Act, 1893, *ante*, p. 367. The case of a testator who has exercised a general testamentary power becoming bankrupt and dying undischarged is dealt with in *Re Guedalla*, *Lee v. Guedalla*, 1905, 2 Ch. 331, quoted, *ante*, p. 323.

Copyholds where the interest is legal and an admission is necessary are not included in the real estate which vests in the representative (sect. 1, sub-sect. 4); and to these the old law still applies. But an equitable interest in copyholds passes to the representative (*Re Somerville and Turner*, 1903, 2 Ch. 583).

The expression "personal representative" in sub-sect. 1 means an executor or administrator (sect. 24, sub-sect. 2, *post*, p. 433). It has been held that this section vests a testator's real estate in all the executors appointed by his will, whether they have or have not proved; unless those who have not proved have, by renunciation or otherwise, made it impossible for them to obtain probate; in which last case (*semble*) the real estate may vest exclusively in the executors who have proved (*Re Pawley and London Bank*, 1900, 1 Ch. 64; see *Re Boucherett*, *Barne v. Erskine*, 1908, 1 Ch. 180; *quære* as

Contribu-
tories.

Real estate
made legal
assets.

What real
estate vests
under the
section.

Scotland and
Ireland.

Dower.

Real estate
appointed.

Copyholds.

Representa-
tive.

60 & 61 Vict. c. 65, s. 1. to the effect of a retractation of renunciation, see *Re Stiles*, 1898, P. 12; *Re Morant*, 3 P. & M. 151). It was said by North, J., that, until some executor proved, the legal estate remained in the heir (*John v. John*, 1898, 2 Ch. 576). But upon probate or grant of administration there is a relation back to the death of the title of the representative (*Re Pryse*, 1904, P. 301; see *ante*, p. 142). As to the vesting of personal estate between the death and grant of administration, see 21 & 22 Vict. c. 95, s. 19.

Where a testator appointed general executors, and also special executors for his property in Australia, the general executors could under this section make a good title to property in England without the concurrence of the special executors (*Re Cohen's Executors*, 1902, 1 Ch. 187; compare *Re Clark, M'Kecknie v. Clark*, 1904, 1 Ch. 294).

Married woman representative. Where a married woman holds real or personal property solely or jointly with any other person as personal representative she can, without her husband, dispose of the same as if she were a *feme sole* (M. W. P. Act, 1907, sect. 1).

Estate duty. As regards the incidence of estate duty, it has been held that, notwithstanding this section, real estate does not "pass to the executor as such" within the meaning of sect. 9, sub-sect. 1, of the Finance Act, 1894, and must bear a rateable part of the duty (*Re Palmer, Palmer v. Rose-Innes*, 1900, W. N. 9; *Re Sharman, Wright v. Sharman*, 1901, 2 Ch. 280).

Escheat. As regards escheated land (as to which see *ante*, p. 122), this act does not bind the Crown, which is not named therein (see cases quoted *ante*, p. 123); and accordingly does not affect the legal estate in such land (*Re Hartley*, 1899, P. 40; *Re Ball*, 1902, W. N. 226).

Probate, &c. As to probate and letters of administration in the case of real estate, see note to sect. 2, sub-sect. 4, *post*.

In the case of applications under part I. of this act, the Senior Judge of the Chancery Division has no exclusive jurisdiction (*Re Walbeck*, 1904, W. N. 204).

Provisions as to administration. 2.—(1.) Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate.

In the case of personal estate it was held before this act that an executor was not, strictly speaking, a trustee for legatees (see *Re Barker, Buxton v. Campbell*, 1892, 2 Ch. 491; *Re Davis, Evans v. Moore*, 1891, 3 Ch. 124; see *Re Lacy, Royal Association v. Kydd*, 1899, 2 Ch. 149; *Re Hyatt, Bowles v. Hyatt*, 38 Ch. D. 617); but an executor might become a trustee by his conduct (see cases quoted *ante*, p. 191). Under this section the representative (subject as therein mentioned) is made a trustee of the real estate for the beneficiaries (see *Re Peel, Woodcock v. Holdroyd*, 1899, W. N. 208). But as regards costs, where a conflict arose on the construction of a devise between devisees and the heir, and the executors brought them both before the court, the unsuccessful party was ordered to pay costs (*Ib.*). Where land descended to an infant, and the representative disclaimed the trusteeship arising under this section, the Court appointed trustees under sect. 42 (*post*) of the Conv. Act, 1881 (*Re Cowley*, 1901, 1 Ch. 38).

As regards personal estate, it was held before this act that, subject to paramount claims of creditors, the next of kin of an intestate had a right to require the specific property forming his personal estate to be transferred to them by the administrator (*Cooper v. C.*, L. R. 7 H. L. 65, 72).

(2.) All enactments and rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or

administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the court, to sell or transfer real estate.

60 & 61 Vict.
c. 65, s. 2.

As to the rules of law relating to the effect of probate or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, see the note to the R. P. Lim. Act, 1833, sect. 6, *ante*, p. 142.

As regards the costs of administration, the rule of law which obtained at the passing of this act is stated in the note to sub-sect. 3 of present section; see the words of the proviso in that sub-section.

The "powers and rights" of representatives in dealing with the chattels real of a deceased person include power for executors (for the purpose of administration and before assenting to a bequest thereof) to sell the chattels real (*Simpson v. Gutteridge*, 1 Madd. 609; *Cole v. Miles*, 10 Hare, 179), and to mortgage them (*Thorne v. Thorne*, 1893, 3 Ch. 196; *Re Morgan, Pillgrem v. Pillgrem*, 18 Ch. D. 98). And unless the contrary be shown, executors dealing with purchasers or mortgagees, even more than twenty years after the testator's death, are to be presumed to be acting in discharge of their duties as such (*Re Venn and Furze*, 1894, 2 Ch. 114; *Corser v. Cartwright*, L. R. 7 H. L. 736; *Re Henson, Chester v. Henson*, 1908, 2 Ch. 356; see *Re Verrell*, 1903, 1 Ch. 65, where the rule did not apply). It would seem that in future dealings with freeholds under the powers of the present act this rule would apply rather than the rule in *Re Tanqueray Willaume* (20 Ch. Div. 480; *ante*, p. 419). Executors cannot give an option of purchase at a future time of leaseholds (*Oceanic Co. v. Sutherberry*, 16 Ch. Div. 236); but, if necessary for the due administration of the property, can grant an underlease (*Ib.*; see *Re Judd and Poland*, 1906, 1 Ch. 684). Administrators after a grant have equal power with executors (Wms. Exors. 10th ed., 694). The rights and liabilities, under sub-sect. 2, of the administratrix of an equitable mortgagor of freeholds were said to include the right to redeem, and the liability to be sued in a foreclosure action; to which action the mortgagor's heir was held not to be a necessary party (*Re Harrowby & Paine*, 1902, W. N. 137).

Powers,
rights and
duties of
representa-
tives.

One only of several executors could sell chattels real (*Simpson v. Gutteridge*; *Cole v. Miles*, *supra*). And it seems that one administrator stands on the same ground with one executor (*Jacomb v. Harwood*, 2 Ves. sen. 267). This power of a single representative was expressly made applicable in the case of trust and mortgage estates by sect. 30 of the Conv. Act, 1881 (*post*). But the proviso in this sub-section prevents it from applying in the case of real estate vesting in representatives under the present act.

One of several
representa-
tives.

As regards estate duty, the power and duty of the personal representatives is to discharge out of the general personal estate the estate duty payable in respect of the chattels real of the deceased, even where they are specifically bequeathed (*Re Culverhouse, Cook v. Culverhouse*, 1896, 2 Ch. 251; see Finance Act, 1894, s. 6, sub-s. 2; *Re Webber, Gribble v. Webber*, 1896, 1 Ch. 914). Having regard, however, to sect. 9, sub-sect. 1, of the Finance Act, 1894, the estate duty payable in respect of the freeholds of the deceased is charged on such freeholds (*Re Palmer, Palmer v. Rose Innes*, 1900, W. N. 9; see *Re Shorman, Wright v. Shorman*, 1901, 2 Ch. 280).

Estate duty.

As to the liability of personal representatives in respect of the chattels real of the deceased, see the note to sect. 27 of the Law of Property Amendment Act, 1859, *post*. Their liability in respect of the acts of the deceased generally is dealt with in Wms. Exors. 10th ed., 1346. The representatives

Liabilities of
representa-
tives.

60 & 61 Vict.
c. 65, s. 2.

may also be liable in respect of their own acts, *e.g.* devastavit. The rule of limitation applicable in such a case is stated *ante*, pp. 221, 253. See also, in connection with representative's acts, sects. 24 and 50 of the Trustee Act, 1893, *post*. The last-mentioned liability is dealt with generally in Wms. Exors. 10th ed., 1412.

(3.) In the administration of the assets of a person dying after the commencement of this act, his real estate shall be administered in the same manner, subject to the same liabilities for debt, costs, and expenses, and with the same incidents, as if it were personal estate; provided that nothing herein contained shall alter or affect the order in which real and personal assets respectively are now applicable in or towards the payment of funeral and testamentary expenses, debts, or legacies, or the liability of real estate to be charged with the payment of legacies.

Persons dying
before 1898,
liability of
their person-
alty to pay—
debts,
costs and
expenses.

In the case of a person dying before the commencement of this act, his general personal estate was the primary fund for payment of his debts other than debts being at the time of the death charged on land (see *ante*, p. 407); which last-mentioned debts were by the Real Estate Charges Acts (*post*, p. 433 *et seq.*) payable primarily out of the land charged. Similarly costs and expenses, including the costs of an administration action, were payable primarily out of general personalty (*Trethewy v. Helyar*, 4 Ch. D. 53). But where real estate was included in the action, any additional costs were borne by the real estate (*Patching v. Barnett*, 1907, 2 Ch. 154; *Re Middleton, Thompson v. Harris*, 19 Ch. Div. 552). Where real and personal estate were given on trust for conversion, the proceeds formed one fund for this purpose (*Re Price, Williams v. Jenkins*, 31 Ch. D. 493). The rule in *Patching v. Barnett* has not been altered by the present act (*Re Jones, Elgood v. Kinderley*, 1902, 1 Ch. 92); even where the will contains a direction to pay "testamentary expenses" out of personalty (*Re Betts, Doughty v. Walker*, 1907, 2 Ch. 149). Before this act the costs of probate litigation were not payable out of real estate (*Re Shaw, Bridges v. Shaw*, 1894, 3 Ch. 615). But this act has altered the rule (*Re Prince, Godwin v. Prince*, 1898, 2 Ch. 228; see *Briscoe v. Baillie Hamilton*, 1902, P. 238; *Re Vickerstaff, Vickerstaff v. Chadwick*, 1906, W. N. 67).

Proviso.

The order in which, at the date of the passing of this act, real and personal assets were applicable in payment of debts is stated *ante*, p. 407. The words "testamentary expenses" in wills have been held to include the costs of an administration action (*Penny v. Penny*, 11 Ch. D. 440; *Sharp v. Lush*, 10 Ch. D. 468; see *Re Betts, sup.*; as to administration under an intestacy, see *Re Clemow, Yeo v. Clemow*, 1900, 2 Ch. 182). They have also been held to include estate duty payable in respect of a bequest of personalty (*Re Trenchard, T. v. T.*, 1905, 1 Ch. 82; as to personalty appointed under a general power, see *Re Hadley, Johnson v. Hadley*, 1909, 1 Ch. 24, 20); but not settlement estate duty on personalty (*Re King, Travers v. Kelly*, 1904, 1 Ch. 363; see as to this *Re Pimm, Sharpe v. Hodgson*, 1904, 2 Ch. 345; *Re Cayley, Awdry v. Cayley, Ib.* 781; *Re Turnbull, Skipper v. Wade*, 1905, 1 Ch. 726); or estate duty payable in respect of specifically devised real estate (*Re Sharman, Wright v. Sharman*, 1901, 2 Ch. 280; *Re Jolley*, 17 T. L. R. 244). As regards the incidence of estate duty payable in respect of real estate, it has been held that, under sect. 9, sub-sect. 1, of the Finance Act, 1894, such duty is charged on and payable out of the real estate itself (*Re Palmer, Palmer v. Rose Innes*, 1900, W. N. 9; see also sect. 5, *post*). The cases relating to the liability of real estate to be charged with legacies are collected, *ante*, p. 417.

The proviso has preserved the doctrine of marshalling (*ante*, p. 408), under which, where the general personalty has been exhausted by a creditor, a pecuniary legatee is entitled to be repaid out of land charged with debts (*Re Kempster, K. v. K.*, 1906, 1 Ch. 446; see *Re Balls, Trevby v. Balls*, 1909,

1 Ch. 795). The words of the proviso were held to prevent an administratrix from successfully claiming a right to retain out of real assets a debt due to her from the intestate (*Re Williams, Holder v. Williams*, 1904, 1 Ch. 52).

60 & 61 Vict.
c. 65, s. 2.

(4.) Where a person dies possessed of real estate, the court shall, in granting letters of administration, have regard to the rights and interests of persons interested in his real estate, and his heir-at-law, if not one of the next of kin, shall be equally entitled to the grant with the next of kin, and provision shall be made by rules of court for adapting the procedure and practice in the grant of letters of administration to the case of real estate.

Before this act a will disposing of realty only, but not appointing an executor, could not be proved (*Re Drummond*, 2 Sw. & Tr. 8). Where it was appointed an executor, it could (*Re Hornbuckle*, 15 P. D. 151; *Re Jordan*, L. R. 1 P. & M. 555). But the last rule did not apply to the will of a married woman appointing under a power (*Re Tomlinson*, 6 P. D. 209; *Re Barden*, L. R. 1 P. & M. 325), except where by equitable conversion the real estate was personality (*Re Gunn*, 9 P. D. 242).

In the case of a will dealing with realty and personality, the court could, under the Court of Probate Act, 1857, grant probate without citing the heir (sect. 63). He was not bound unless cited (*Id.*); but he was bound if cited even as one of the next of kin (*Beardsley v. Beardsley*, 1899, 1 Q. B. 746). Probate was conclusive evidence of a will proved in solemn form (Court of Probate Act, 1857, s. 62). Where not so proved, see sect. 64.

Under the present act, probate and letters of administration may be granted in respect of real estate only (sect. 1, sub-sect. 3); even, it seems, in the case of the will of a married woman exercising a power (sub-sect. 2).

Sect. 2, sub-sect. 4, deals with letters of administration in the case of real estate. The position of the heir under the act has been said to be practically that of the next of kin (*Twist v. Tye*, 1902, P. 98). By an additional rule and order of the Probate Division dated the 20th of November, 1897, all rules, orders and instructions and the existing practice of the court with respect to non-contentious business shall, so far as the circumstances of each case will allow, be applicable to grants of probate and administration made under the authority of the Land Transfer Act, 1897 (L. R. Current Index, 1897, p. lxxxii.). Under this rule grants *ad colligendum* may be made applicable to real estate (*Re Roberts*, 1898, P. 152). Where an heir with a clear title applies for administration and there is no personality, a grant may be made without notice to the next of kin; otherwise they should have notice (*Re Barnett*, 1898, P. 145). Administration was granted to one of the next of kin without citing the heir, who was abroad (*Re Blenkinsop*, 49 W. R. 336). Sub-sect. 4 does not expressly refer to a husband, whose right to administration of his wife's estate is well established; under special circumstances this right was disregarded, and administration was granted to the guardian *ad litem* of the wife's heir (*Re Ardern*, 1898, P. 147; see *Re Roberts*, *sup.*). The universal devisee and legatee in a will which names no executor is entitled to administration with the will annexed (*Re Pryse*, 1904, P. 301). As to the form of grant where land has escheated, see *Re Ball*, 1902, W. N. 226.

3.—(1.) At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable

Provision for
transfer to
heir or
devisee.

60 & 61 Vict.
c. 65, s. 3.

to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance.

(2.) At any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives.

(3.) Where the personal representatives of a deceased person are registered as proprietors of land on his death, a fee shall not be chargeable on any transfer of the land by them unless the transfer is for valuable consideration.

(4.) The production of an assent in the prescribed form by the personal representatives of a deceased proprietor of registered land shall authorise the registrar to register the person named in the assent as proprietor of the land.

Cases under
the section.

Where executors conveyed freeholds to devisees in trust, "subject to a charge of any money which the personal representatives were liable to pay," and on a subsequent sale by such devisees the purchaser insisted on an indemnity in respect of any claims against the testator's estate of which at the date of the conveyance the executors had no notice; it was held that, having regard to sect. 2, sub-sect. 3, of the L. T. Act, 1897, and sect. 29 of the Law of Prop. Amt. Act, 1859 (*post*), the purchaser was not entitled to the indemnity (*Re Cary and Lott*, 1901, 2 Ch. 463).

The personal representative is entitled to assent to the devise in preference to executing a conveyance (*Re Pix, Plomley v. Stileman*, 1901, W. N. 165; where see as to form of assent. See also the instrument of assent, Form 51, Rule 185, Land Transfer Rules, 1903). A written assent, not under seal, is not liable to stamp duty as a conveyance (*Kemp v. Commrs. of Revenue*, 1905, 1 K. B. 581).

Assent by
representa-
tives.

This section, providing for the transfer of freeholds to the devisee by means of an assent or conveyance on the part of the representative, has rendered important the doctrines previously laid down in relation to the assent of the representative to dispositions of personal estate.

Thus it was settled that, upon the assent of the executor, the title to leaseholds specifically bequeathed vested absolutely in the legatee without any deed of assignment (*Re Culverhouse, Cook v. Culverhouse*, 1896, 2 Ch. 251). It was not essential to the efficacy of an assent to a bequest that it should confer a legal interest or affect the mere legal title (*Trail v. Bull*, 1 Coll. 359; see *Doe v. Tatchell*, 3 B. & Ad. 675). The question whether there had been an assent or not might involve a matter of law, but was generally a question of fact (*Elliott v. E.*, 9 M. & W. 27; *Austin v. Beddoe*, 41 W. R. 619). An assent might result either from words or from acts; but it was necessary that the words or acts relied on should be unambiguous (*Doe v. Harris*, 16 M. & W. 517; *Thorne v. T.*, 1893, 3 Ch. 187). Thus words were held to amount to an assent (*Camden v. Turner*, Cowp. 293; *Garrett v. Lister*, 1 Lev. 225; *Barnard v. Pumfrett*,

By words.

5 My. & Cr. 70; *Lampet's case*, 10 Rep. 47A, 52B; see also Comyns, Dig. Administration, c. 6; Bac. Abr. Legacies (L.); Shep. Touchstone, 456). 60 & 61 Vict.
c. 65, s. 3.

Acts might also amount to an assent. Thus, in the case of bequests of leaseholds, where the representative let the legatee into possession or receipt of the rents (*Austin v. Beddoe*, 41 W. R. 619; *Cole v. Miles*, 10 Ha. 179; *Spackman v. Timbrell*, 8 Sim. 261); and where the representative on behalf of the legatee paid a quit-rent charged on the property (*Doe v. Maberley*, 6 C. & P. 126; see *Young v. Holmes*, 1 Str. 70). As to payments by the representative to the legatee on account of the rents, see *Re Charik*, *Abrahams v. Charik*, 1889, W. N. 91; *Thorne v. T.*, 1893, 3 Ch. 196. Assent resulted from the executrix occupying the leaseholds and maintaining the testator's issue where the gift of the leaseholds was expressly made subject to this right (*Paramour v. Yardley*, Plowd. 539, 546). So assent was inferred from payment by the representative of interest on a legacy (*Wilson v. Rhodes*, 8 Ch. D. 777). But an assent to one article comprised in a bequest was not necessarily an assent to all (*Elliott v. E.*, 9 M. & W. 23). By acts.

Partial assent.

The doctrine of assent applied as well to residuary as to specific gifts (*Austin v. Beddoe*, 41 W. R. 619); and executors could assent so as to vest in the legatee part of the residue without vesting the whole (*Ib.*; see *Elliott v. E.*, *sup.*). But where the executor was himself residuary legatee, an assent to take a part of the residue as legatee was an assent to take the whole (*Hinson v. Button*, 2 Roll. Rep. 158). Assent to
residuary
gifts.

It was necessary that the executor should assent to his own legacy. As to the acts which amounted to such an assent, it was said that where an executor who was also specific legatee did an act respecting the subject of the specific bequest which was referable to either character, that did not prove or amount to an assent (*Trail v. Bull*, 1 Coll. 360; *Doe v. Sturges*, 7 Taunt. 222; see *Young v. Holmes*, 1 Str. 70; *Paramour v. Yardley*, Plowd. 539; *Garrett v. Lister*, 1 Lev. 25). As regards an executor's entry upon leaseholds in which he had an interest under the will, where that interest was absolute his entry amounted to an assent (*Doe v. Sturges*, 7 Taunt. 222). But where his interest was not absolute (e.g., for life) a mere entry was not sufficient (*Ib.*; *Doe v. Tatchell*, 3 B. & Ad. 680; see also *Pannell v. Fenn*, Cro. Eliz. 348; *Cray v. Willis*, 2 P. Wms. 531); not even though the legatee entered alone of the executors appointed by will (*Doe v. Sturges*, *sup.*). Where leaseholds and the residue were given on trust for the testator's wife (one of the executors) for life, and after her death legacies were bequeathed, the surplus being given to four persons, one of whom was the wife of A. (another executor), the executors did not by allowing the testator's wife to take possession assent to the bequest of leaseholds (*A.-G. v. Potter*, 5 Beav. 164); nor did the execution by A. of a deed of arrangement of the interests of the residuary legatees constitute an assent (*Ib.*). And where a chattel was bequeathed to an executrix for life, her taking possession of it while she knew of unpaid debts was not an assent to the bequest in remainder (*Richards v. Browne*, 3 Bing. N. C. 493). But an executor taking possession and disposing of the property by his will was deemed to have assented (*Fenton v. Clegg*, 9 Exch. 683). Assent by
executor to
his own
legacy.

An executor might assent before proving (*Johnson v. Warwick*, 17 C. B. 516); and if he subsequently died without proving, the assent was valid if the will was ultimately proved (*Brazier v. Hudson*, 8 Sim. 67). One of several executors might without his co-executors assent, even in the case of his own legacy (*Townson v. Tickell*, 3 B. & Ald. 40). *Qu.*, however, as to the effect under the L. T. Act, 1897, of an assent by one of several representatives in vesting freeholds in the devisee; see the concluding words of sect. 2, sub-sect. 2. It was said that an administrator *durante minore ætate* could not assent to a legacy, unless there were assets sufficient to pay the debts (*Prince's Case*, 5 Co. 29 a; but see *Re Cope, C. v. C.*, 16 Ch. D. 49). Before the M. W. P. Act, 1882, an executrix who was a married woman could not assent (*Cookes v. Bellamy*, 1 Sid. 188). That act, however, contains special provisions as to a married woman being a representative (sects. 18 and 24, *ante*, pp. 362, 365). And by sect. 1 (*ante*, p. 367) of the M. W. P. Who might
assent.

Married
women.

60 & 61 Vict. c. 65, s. 3. Act, 1907, she can dispose of property held by her as personal representative as if she were a *feme sole*. It seems that under the present law she can assent to a devise of freeholds.

Extent of an assent. An assent to an estate in remainder was an assent to a present estate (Com. Dig. Administration, C. 6). Conversely, if leaseholds were given to A. for life with remainder to B., the assent to A.'s estate also vested that of B. (*Stevenson v. Liverpool*, L. R. 10 Q. B. 81). See, however, the exception where the executor was himself tenant for life, *Doe v. Sturges* (7 Taunt. 222), and other cases quoted *ante*, p. 429. The rule applied, it seems, to a bequest to A. with an executory gift over to B. (*Adams v. Pierce*, 3 P. W. 12; compare *Lampet's Case*, 10 Co. 47 b). In several cases of connected gifts (such as a bequest of leaseholds to A. subject to a charge thereon in favour of B.) an assent to one gift also vested the other (see *Young v. Holmes*, 1 Str. 70; *Goffe v. Haywood*, 1 Roll. Rep. 247, 368; see Plowd. 521 b).

Effect of an assent; on the legatee's title. An assent when given related back to the testator's death (*Wentworth*, 445, 446, 14th ed.; compare *Saunders's Case*, 5 Co. 12 b). Upon the assent of the executor to a specific legacy, the property in the thing bequeathed vested in the legatee (*Doe v. Guy*, 3 East, 120; *Re Culverhouse*, *Cook v. Culverhouse*, 1896, 2 Ch. 251; see *Mead v. Orrery*, 3 Atk. 238; *Re West*, *West v. Roberts*, 1909, 2 Ch. 180). So the legatee might, after assent, bring action to recover possession of the property even against the executor (*Doe v. Guy*, *sup.*; *Williams v. Lee*, 3 Atk. 223). Nor could the executor, after assenting to a bequest of leaseholds, claim indemnity out of the general personal estate in respect of the testator's liability under the leases (*Chadbolt v. Woodfall*, 2 Coll. 30). Upon assenting to a specific bequest given to them on trust, executors became trustees (*Dix v. Burford*, 19 Beav. 409; *Clegg v. Rowland*, 3 Eq. 372). But an executor did not by assenting to an absolute legacy make himself a trustee of that legacy (*Re Rowe*, *Jacobs v. Hind*, 60 L. T. 599). As to an executor in such a case pleading the Stat. of Lim., see *Re Barker*, *Buxton v. Campbell*, 1892, 2 Ch. 491.

Retraction of assent. In general an assent once given could not be withdrawn (*Noell v. Robinson*, 2 Ventr. 358; *Wentworth*, Off. Ex. 415, 14th ed.; Com. Dig. Admon. C. 8) except under very special circumstances (*Crowe v. Menton*, 28 L. R. Ir. 525). But it was said that the executor could probably withdraw his assent in cases where, if the legacy had been paid over, refunding would have been ordered at the instance of the executor (cf. 1 Rep. Leg. 743, 3rd ed.; Wms. Exors. 1108, 10th ed.). It was clear that where a legacy was paid by executors without notice of a debt which they were subsequently compelled to satisfy, the executors could compel refunding (*Whittaker v. Kershaw*, 45 Ch. D. 320).

Legatee's interest before assent. Before assent a legatee had an inchoate right to a legacy which, if he died, went to his executors (*Wentworth*, Off. Ex. 69, 14th ed.); and the legatee could assign his legacy before assent (*Toller*, 311, 7th ed.; cf. *Cooper v. C.*, L. R. 7 H. L. 65, 66; but see *Wentworth*, Off. Ex. *ubi sup.*).

Appropriation of land in satisfaction of legacy or share in estate. 4.—(1.) The personal representatives of a deceased person may, in the absence of any express provision to the contrary contained in the will of such deceased person, with the consent of the person entitled to any legacy given by the deceased person or to a share in his residuary estate, or, if the person entitled is a lunatic or an infant, with the consent of his committee, trustee, or guardian, appropriate any part of the residuary estate of the deceased in or towards satisfaction of that legacy or share, and may for that purpose value in accordance with the prescribed provisions the whole or any part of the property of the deceased person in such manner as they think fit. Provided that before any such appropriation is effectual, notice of such intended appropriation shall be given to all persons

interested in the residuary estate, any of whom may thereupon within the prescribed time apply to the court, and such valuation and appropriation shall be conclusive save as otherwise directed by the court.

60 & 61 Vict.
c. 65, s. 4.

(2.) Where any property is so appropriated a conveyance thereof by the personal representatives to the person to whom it is appropriated shall not, by reason only that the property so conveyed is accepted by the person to whom it is conveyed in or towards the satisfaction of a legacy or share in residuary estate, be liable to any higher stamp duty than that payable on a transfer of personal property for a like purpose.

(3.) In the case of registered land, the production of the prescribed evidence of an appropriation under this section shall authorise the registrar to register the person to whom the property is appropriated as proprietor of the land.

Previous to this act appropriations in or towards discharge of absolute shares or interests in the estate of a deceased person had been held valid. Thus, where there was no trust for conversion, executors could, without conversion and by agreement with a legatee, appropriate to him specific personal assets, even in a case where the legatee was one of the executors (*Re Richardson, Morgan v. Richardson*, 1896, 1 Ch. 512). Similarly, an administrator who was one of the next of kin, could, out of the assets, appropriate to his own share either chattels (*Elliott v. Kemp*, 7 M. & W. 313) or choses in action (*Barclay v. Owen*, 60 L. T. 220). Further, where there was a trust for conversion, trustees could appropriate specific personal assets to answer either an absolute share or interest (*Re Lepine, Dowsett v. Culver*, 1892, 1 Ch. 218, where the legatee consented; see *Hutcheson v. Hammond*, 3 Bro. C. C. 128, 144), or a settled share (*Re Nickels, N. v. N.*, 1898, 1 Ch. 630; see *Re Brooks, Coles v. Davis*, 76 L. T. 771; *Fraser v. Murdoch*, 6 App. Cas. 855). Executors had a similar power as regards a deferred legacy (*Re Waters, Preston v. Waters*, 1889, W. N. 39). The principle on which the power of appropriation was based where there was a trust for conversion, was that the particular assets could be sold to the legatees and the purchase-money set off against the legacy (*Re Beverly, Watson v. Watson*, 1901, 1 Ch. 681). The doctrine extends to chattels real, and real estate subject to a trust for conversion (*Ib.*). An executor's power of appropriation for satisfying vested legacies, whether given absolutely or settled, does not extend to purely contingent legacies (*Re Hall, Foster v. Metcalfe*, 1903, 2 Ch. 233; see *Webber v. W.*, 1 S. & S. 311; see also *Re Bowlby, B. v. B.*, 1904, 2 Ch. 685, where an appropriation in satisfaction of contingent legacies was made under a special power). As to an infant's legacy, see *Re Salaman, De Pass v. Sonnenthal*, 1907, 2 Ch. 50).

Law apart from section :
appropriations independently of express powers :

A valid appropriation could only be made of authorized investments (*Re Waters, Preston v. Waters, sup.*; see *Re Douglas and Powell*, 1902, 2 Ch. 296); including investments retained under a power (*Re Brooks, Coles v. Davis, sup.*); but not necessarily those authorized by the Trustee Act, 1893 (*Re Owthwaite, Owthwaite v. Taylor*, 1891, 3 Ch. 494). Where a will directed a sum of money to be invested on mortgage and held on certain trusts, mortgages which belonged to the testator at his death and were properly secured could be appropriated (*Ames v. Parkinson*, 7 Beav. 379). An appropriation was not valid where the executrix took part of the intermediate interest (*Cooper v. Douglas*, 2 Bro. C. C. 232). After appropriation to answer a particular share, the beneficiary took the appropriated assets for better for worse (*Re Waters, Preston v. Waters*, 1889, W. N. 39; see *Ballard v. Marsden*, 14 Ch. D. 376; *Re Richardson, Morgan v. Richardson*, 1896, 1 Ch. 512). Such assets were liable to provide the

60 & 61 Vict.
c. 65, s. 4.

costs of litigation in respect of such share (*A.-G. v. Lawes*, 8 Ha. 43), but were not applicable in relief of expenses incurred on behalf of other parts of the trust estate (*Fraser v. Murdoch*, 6 App. Cas. 873). Appropriated assets could not be retained or impounded to answer the legatee's debt to the testator (*Ballard v. Marsden*, 14 Ch. D. 374).

It was not, it seems, necessary that an appropriation should be evidenced by deed or writing (*Barclay v. Owen*, 60 L. T. 222). The following acts were held to amount to a valid appropriation:—Handing over a mortgage deed to the legatee, no legal transfer being executed (*Re Lepine, Dowsett v. Culver*, 1892, 1 Ch. 210); making entries in the trust accounts and paying the income of the appropriated stocks to the legatee (*Re Nickels, Nickels v. Nickels*, 1898, 1 Ch. 630; *Fraser v. Murdoch*, 6 App. Cas. 855).

express
powers.

The above cases were decided independently of express powers of appropriation. These were in practice commonly inserted in wills, and the validity of an appropriation made under them would turn on the words of the power.

Operation of
section.

As regards appropriations since the act, it has been decided that where there is a trust for conversion the act does not take away the old general power (*Re Beverly, Watson v. W.*, 1901, 1 Ch. 687). Where there is no such trust, however, the case may be doubtful; and in framing wills at present express powers may prove all the more useful, having regard to the doubt which exists as to the effect of the act on any appropriations made after it came into operation, but not affected in accordance with its provisions (*Re Beverly, sup.*).

Under the section, it will be observed, valuations by the representative of appropriated estates may be made "in accordance with the prescribed provisions"; and beneficiaries (to whom notice of an intended appropriation is required to be given) are to be at liberty to apply to the court "within the prescribed time." Sect. 22, sub-s. 6 (i) of the Land Transfer Act, 1897, provides for the making of general rules for regulating any such matters as are authorized by the act to be prescribed. The rules now in force are the Land Transfer Rules, 1903; to which is attached (among other forms) a form of appropriation of land under this section (see Form 52, Rule 185). But no rules have been made dealing either with the question of the valuation of assets, or the time for an application to the court. Until such rules shall have been made, the powers of the section appear to remain in abeyance.

The marginal note to the section (which forms no part of the statute itself, *A.-G. v. G. E. R.*, 11 Ch. Div. 461) refers only to appropriation of "land," and the words of sub-ss. 2 and 3 are similarly restricted. It has been held, however, that sub-s. 1 is not confined to real estate (*Re Beverly, Watson v. Watson*, 1901, 1 Ch. 687). An appropriation under the section of land by the representative could only be made in the case of a death after 1897. But as regards an appropriation of property other than land, the words of sub-s. 1 appear to apply to a death before as well as since the act.

The expression "personal representative" is defined by sect. 24, sub-s. 2, as meaning "executor or administrator." But if the section is to be applied to the case of intestacy, the words "residuary estate" must refer to the surplus of the intestate's assets after payment of his debts.

The section does not deal with an appropriation by trustees, or an appropriation to a settled share where unborn persons are or may be interested.

Liability for
duty.

5. Nothing in this part of this act shall affect any duty payable in respect of real estate or impose on real estate any other duty than is now payable in respect thereof.

See *Re Palmer, Palmer v. Rose-Innes*, 1900, W. N. 9, quoted *ante*, p. 426.

PART IV.

60 & 61 Vict.
c. 65, s. 24.

Miscellaneous.

24. —(1.) All hereditaments, corporeal and incorporeal, shall be deemed land within the meaning of the principal act and this act, except that nothing in this act shall render compulsory the registration of the title to an incorporeal hereditament, or to mines or minerals apart from the surface, or to a lease having less than forty years to run or two lives yet to fall in, or to an undivided share in land, or to freeholds intermixed and indistinguishable from lands of other tenure, or to corporeal hereditaments parcel of a manor, and included in a sale of the manor as such.

Interpretation.

(2.) In this act the expression "personal representative" means an executor or administrator.

25. This act shall come into operation on the first day of January one thousand eight hundred and ninety-eight.

Commencement of act.

26. This act may be cited as the Land Transfer Act, 1897, and shall be construed as one with the principal act, and that act and this act may be cited together as the Land Transfer Acts, 1875 and 1897.

Short title and construction.

VII.—THE REAL ESTATE CHARGES ACTS, 1854, 1867, AND 1877.

THE REAL ESTATE CHARGES ACT, 1854.

17 & 18 VICT. c. 113.

An Act to amend the Law relating to the Administration of the Estates of Deceased Persons. [11th August, 1854.]

Whereas it is expedient that the law whereunder the real and personal assets of deceased persons are administered should be amended: be it enacted as follows:

17 & 18 Vict.
c. 113, s. 1.

1. When any person shall, after the thirty-first day of December, one thousand eight hundred and fifty-four, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed, or other document, have signified any contrary or other intention, the heir or devisee to whom such land or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real

Heir or devisee of real estate not to claim payment of mortgage out of personal assets.

17 & 18 Vict.
c. 113, s. 1.

estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof; provided always, that nothing herein contained shall affect or diminish any right of the mortgagee on such lands or hereditaments to obtain full payment or satisfaction of his mortgage debt either out of the personal estate of the person so dying as aforesaid or otherwise: provided also, that nothing herein contained shall affect the rights of any person claiming under or by virtue of any will, deed, or document already made or to be made before the first day of January, one thousand eight hundred and fifty-five.

Not to affect
rights claimed
under any
will, &c.
before 1st
January,
1855.

2. This act shall not extend to Scotland.

Extent of
act.

Previous law
as to the pay-
ment of mort-
gage debts.

The rule previous to the above act was, that the personal estate of the deceased debtor was the primary fund to pay off a mortgage, unless an intention was shown to throw the debt on the mortgaged estate. The object of the act was to make the mortgaged estate the primary fund, unless an intention can be shown to throw the debt on the personalty (*Goodwin v. Lee*, 1 K. & J. 378; *Swainson v. S.*, 6 D. M. & G. 652). For the law before this Act, see further *Ancaster v. Mayer* (1 L. C. Eq.). The present act does not impose any personal liability on the devisee (*Syer v. Gladstone*, 30 Ch. D. 616).

Bequests of
personal
estate.

The act does not apply to specific bequests of personal estate (*Re Bourne, Martin v. M.*, 1893, 1 Ch. 191). And in the case of specific bequests of chattels which are subject to charges, a distinction has been taken between charges created by the testator and charges incident to the chattel, such as calls on shares or the rent of leaseholds. In the first case the specific legatee is entitled to have the legacy freed from the charge, in the second case he is not so entitled (*Bothamley v. Sherson*, 20 Eq. 316; see *Lewis v. L.*, 13 Eq. 227). In one case it was held that the legatee of incumbered stock was not entitled to have the incumbrance paid off out of real estate charged with debts (*Re Butler, Le Bas v. Herbert*, 1894, 3 Ch. 250). In the case of bequests of shares not fully paid, any call made before the testator's death but remaining unpaid at that time, must be borne by the residuary estate, and calls made after the death by the legatee (*Armstrong v. Burnet*, 20 Beav. 424; *Addams v. Ferick*, 26 Beav. 384; *Day v. D.*, 1 Dr. & Sm. 261). So in bequests of leaseholds, the rent up to the testator's death must be borne by the residuary estate, and after that time by the specific legatee (*Hawkins v. H.*, 13 Ch. Div. 470). See *Re Betty, B. v. A.-G.* (1899, 1 Ch. 821); *Re Gjers, Cooper v. Gjers* (1899, 2 Ch. 54), and cases there referred to. Compare the case of the specific devise of a reversion, where the testator had entered into onerous covenants in the lease on which the reversion was expectant. The residue bore the burden of such a covenant where it was not incident to the relation of landlord and tenant (*Eccles v. Mills*, 1898, A. C. 360); the devisee, where it was so incident (*Mansel v. Norton*, 22 Ch. Div. 769). Compare also the case where a testator who had contracted for the erection of buildings on his freehold land died before the completion of the buildings, and the cost fell on the general personal estate (*Re Day, Sprake v. Day*, 1898, 2 Ch. 510).

Land, &c.
within the
act.

The act did not originally apply to leaseholds (*Solomon v. Solomon*, 12 W. R. 540; *Gael v. Fenwick*, 22 W. R. 211; *Re Wormsley, Hill v. Wormsley*, 4 Ch. D. 665), but now applies to them (Real Estate Charges Act, 1877, *post*). The act applied to copyholds (*Piper v. Piper*, 1 J. & H. 91). Where freeholds were settled by deed upon trusts for conversion, a share in

the produce, which was under the deed taken as personal estate, was not an "interest in land" within the act (*Lewis v. Lewis*, 13 Eq. 218; see *Re Bennett, Clarke v. White*, 1899, 1 Ch. 316). The act applied where real and personal estate were given on trust for conversion, and after a life estate the mixed fund was divided between persons taking the personalty portion and persons taking the remaining portion (*Elliott v. Dearsley*, 16 Ch. Div. 322). The act did not apply to the gift by will of an option to purchase land at a fixed price (*Given v. Massey*, 31 L. R. Ir. 126; *Re Wilson, W. v. W.*, 1908, 1 Ch. 844).

17 & 18 Vict.
c. 113, s. 1.

Where freeholds and leaseholds were by will settled in the same way, different parts being subject to different charges, the beneficiaries took the aggregate estate, subject to the aggregate burden, the general personal estate being exonerated (*Re Kensington, Longford v. Kensington*, 1902, 1 Ch. 203; see *Frewen v. Law Society*, 1896, 2 Ch. 511; *Honeywood v. H.*, 1902, 1 Ch. 347).

The act only applies where a property is specifically charged (*Dunlop v. Dunlop*, 21 Ch. Div. 590; see *Hepworth v. Hill*, 30 Beav. 476). A banker's general lien is not within the act (*Dunlop v. Dunlop*, 21 Ch. D. 592). A general charge on real estate by a testator, in aid of his personal estate, is not within the act, until the amount has, in the administration of the estate, been accurately defined, and the devisee has expressly taken the estate, subject to it (*Hepworth v. Hill*, 30 Beav. 476). An equitable mortgage by deposit and memorandum is within the act (*Pembroke v. Friend*, 1 J. & H. 132; *Davis v. Davis*, 24 W. R. 962); even where the memorandum expressed that the deposit was made as collateral security (*Coleby v. Coleby*, 2 Eq. 803). In Ireland a judgment mortgage is within the act (*Nesbitt v. Lawder*, 17 L. R. Ir. 553). The R. E. Charges Act, 1877 (*post*), has extended the present act to every description of equitable charge (*Re Bowerman, Porter v. Bowerman*, 1908, 2 Ch. 344; *Re Sharland, Kemp v. Rozey*, 74 L. T. 664; *Nesbitt v. Lawder*, 17 L. R. Ir. 53), including the charge of estate duty under sect. 9 (1) of the Finance Act, 1894 (*Re Bowerman, sup.*), and also the charge under the Judgments Act, 1838, s. 13 (*post*), arising by virtue of a delivery in execution (*Re Anthony, A. v. A.*, 1892, 1 Ch. 450); but not in the case of land of which the debtor is tenant in tail (*S. C.*, 1893, 3 Ch. 498). A lien for unpaid purchase-money was not originally within the act (*Hood v. Hood*, 5 W. R. 74; *Barnwell v. Ironmonger*, 1 Dr. & Sm. 260); but is now within it (R. E. Charges Act, 1867, s. 2, *post*, p. 437); R. E. Charges Act, 1877, *post*, p. 438. Money payable under a building agreement was held to be in the nature of unpaid purchase-money, primarily payable out of the building land (*Re Kidd, Brooman v. Withall*, 1894, 3 Ch. 558). See also *Re Cockcroft, Broadbent v. Groves* (24 Ch. D. 94). An annuity charged on land and secured by covenant was primarily payable, according to the law before this act, out of a testator's personalty (*Yonge v. Furze*, 24 L. J. Ch. 643). But under the R. E. Charges Act, 1877 (*post*), it is primarily payable out of the land (*Re Sharland, Kemp v. Rozey*, 74 L. T. 664).

The negative provision commencing "the heir or devisee, etc." is the Negative and substantial part of the enactment (*Dacre v. Patrickson*, 1 Dr. & Sm. 191). The positive words which follow "but the land, etc.," give effect to the positive provisions in the negative provision (*Re Wilson, W. v. W.*, 1908, 1 Ch. 844). They do not narrow it. Accordingly where personalty went to the Crown who did not claim through the deceased, the negative provision applied and the Crown was not bound to discharge out of the personalty a mortgage debt charged on devised land (*Dacre v. Patrickson, sup.*). Nor do the positive words widen the negative provision. Where a testator gave his son an option to purchase land at a fixed price, he was not an "heir or devisee" within the negative provision, and the positive words which follow did not bring the case within the act (*Re Wilson, W. v. W., sup.*). Having regard to the positive words referring to the persons claiming through the deceased, the act did not affect the case where one partner gave a charge on his separate real estate to secure a joint partnership debt, and at the time of his death the joint assets were sufficient to answer the joint debts (*Re Ritson, R. v. R.*, 1899, 1 Ch. 128).

Negative and
positive provisions in the
Act.

17 & 18 Vict.
c. 113, s. 1.

Proviso in
the act.

Contrary intention with-
in the act.

Cases as to
persons dying
before 1868.

Expressions
not excluding
the act.

Expressions
excluding the
act.

Incidence
of debt as
between
different
properties
in same
mortgage.

Contribution.

Order in
which funds
are applicable
where statu-
tory rule
excluded.

The final proviso applied (*Rolfe v. Perry*, 3 D. J. & S. 481); but not when the claim was by an heir (*Piper v. Piper*, 1 J. & H. 91; *Power v. Power*, 8 Ir. Ch. R. 340; *Nelson v. Page*, 7 Eq. 25).

With regard to a contrary intention each case must rest on its own circumstances (*Rolfe v. Perry*, 3 D. J. & S. 486). See *Eno v. Tatham* (3 D. J. & S. 443); *Mellish v. Vallins* (2 J. & H. 199); *Smith v. Smith* (3 Giff. 263). A contrary intention was collected from a will prior to the mortgage, the mortgage itself and a contemporaneous deed (*Re Campbell, C. v. C.*, 1893, 2 Ch. 206); and from a charge on Scotch land of a debt which had been secured on land in England (*Smith v. Moreton*, 37 L. J. Ch. 6). Regard must now be had to the R. E. Charges Act, 1867 (*post*, p. 437), and the R. E. Charges Act, 1877 (*post*, p. 438).

In the case of persons dying before 1868, it was ruled that when a testator directed his debts to be paid out of some particular fund or property out of which, according to the rule established by the statute, they would not be primarily payable, he signified an intention to exclude the statutory rule: but when he merely directed his debts to be paid, or to be paid out of his estate generally, he did not signify such intention (*Brownson v. Lawrance*, 6 Eq. 5; see *Maxwell v. Hyslop*, 4 Eq. 413). The following were not sufficient to exclude the act. A direction that the testator's debts "be paid as soon as may be" (*Pembroke v. Friend*, 1 J. & H. 132; *Coote v. Lowndes*, 10 Eq. 376), be paid out of his estate (*Brownson v. Lawrance*, 6 Eq. 1), or by his executors out of his estate (*Woolstencroft v. Woolstencroft*, 2 D. F. & J. 347). But in a number of cases the act was excluded by directions to the effect that a testator's debt should be paid out of his personal estate (*Smith v. Smith*, 3 Giff. 263; *Moore v. M.*, 1 D. J. & S. 602; *Porcher v. Wilson*, 12 W. R. 1001; *Mellish v. Vallins*, 2 J. & H. 194; *Eno v. Tatham*, 3 D. J. & S. 443; *Newman v. Wilson*, 31 Beav. 33; *Maxwell v. Hyslop*, 4 H. L. 506; *Stone v. Parker*, 1 Dr. & Sm. 212; *Greated v. Greated*, 26 Beav. 621; *Allen v. A.*, 30 Beav. 395). See, now, the notes, p. 438, *post*.

As between different portions of an estate comprised in one mortgage which are devised to different persons, the act, in the absence of a contrary intention, applies and compels the devisees to contribute rateably (*Newmarch v. Storr*, 9 Ch. Div. 17; which see as to the words "or any other real estate of such person"). As between different freehold estates comprised in the same mortgage, the mortgage debt must be borne rateably although one estate is specifically devised, and the other passes under a residuary devise (*Gibbins v. Eyden*, 7 Eq. 375; *Sackville v. Smyth*, 17 Eq. 153; see *Re Smith, Hannington v. True*, 33 Ch. D. 195). Where freeholds and leaseholds were mortgaged together, and the mortgagor died intestate, it was held, as between his heir and administrator, that the freeholds and leaseholds must bear the burden rateably (*Evans v. Wyatt*, 31 Beav. 217). And where freeholds and a policy were mortgaged together and the mortgagor's will declared different trusts of real and personal estate, the mortgage debt was borne rateably (*Trestrail v. Mason*, 7 Ch. D. 655; *Leonino v. L.*, 10 Ch. D. 460). An intention, however, may be expressed upon the mortgage documents that one property shall be the primary security (*Bute v. Cunyng-hame*, 2 Russ. 299; see 10 Ch. D. 465). Such an intention was found on the documents in *Lipscombe v. L.* (7 Eq. 501); *De Rochfort v. Daves* (12 Eq. 540). The words "for further and better securing" were sufficient for the purpose (*Stringer v. Harper*, 26 Beav. 33); but not the words "collateral security" (*Athill v. A.*, 16 Ch. Div. 211; *Williams v. Early*, 15 Ch. D. 214, n.).

As to the apportionment of a mortgage debt between several estates comprised in the same mortgage, see Story, Eq. Jur., sects. 484, 1233 b.

As to the order in which funds are to be applied in payment of a mortgage debt, where the statutory rule has been excluded by the expression of a contrary intention, see *Allen v. Allen* (30 Beav. 395); and the argument in *Smith v. Moreton* (37 L. J. Ch. 6). It may be the result of a testator's words that a mortgaged estate is to be exonerated only so far as his

personality extends; and that there is no right to go upon the other real estate (17 & 18 Vict. *Rodhouse v. Mold*, 13 W. R. 854). c. 113, s. 1.

Where the mortgage debts of a testator are (under a direction in his will) primarily payable out of his personal estate, the devisees of a mortgaged estate are not entitled to have the mortgage debt satisfied out of the personal estate until the pecuniary and specific legatees and annuitants are satisfied (*Porcher v. Wilson*, 14 W. R. 1011; see *Re Smith, S. v. S.*, 1899, 1 Ch. 365). And where annuities were charged on lands, out of which a mortgage debt was, under this act, held to be primarily payable, the act did not preclude the right of the annuitants to have the assets marshalled (*Buckley v. Buckley*, 19 L. R. Ir. 544). Marshalling.

THE REAL ESTATE CHARGES ACT, 1867.

"*An Act to explain the Operation of*" 17 & 18 Vict. c. 113.

30 & 31 VICT. c. 69.

Whereas by an act passed in the seventeenth and eighteenth years of her present Majesty it is enacted, among other things, that when any person shall, after the thirty-first of December, one thousand eight hundred and fifty-four, die seised of or entitled to any estate or interest in any land or other hereditaments which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, and such person shall not, by his will or deed or other document, have signified any contrary or other intention, the heir or devisee to whom such lands or hereditaments shall descend or be devised shall not be entitled to have the mortgage debt discharged or satisfied out of the personal estate or any other real estate of such person, but the land or hereditaments so charged shall, as between the different persons claiming through or under the deceased person, be primarily liable to the payment of all mortgage debts with which the same shall be charged, every part thereof, according to its value, bearing a proportionate part of the mortgage debts charged on the whole thereof: 30 & 31 Vict. c. 69, s. 1.

And whereas doubts may exist upon the construction of the said act, and it is expedient that such doubts should for the future be removed:

Be it therefore enacted as follows:

1. In the construction of the will of any person who may die after the thirty-first day of December, one thousand eight hundred and sixty-seven, a general direction that the debts or that all the debts of the testator shall be paid out of his personal estate shall not be deemed to be a declaration of an intention contrary to or other than the rule established by the said act, unless such contrary or other intention shall be further declared by words expressly or by necessary implication referring In construing wills, general direction for payment of debts out of personality not to include mortgage debts, unless such intention expressly implied.

30 & 31 Vict. c. 69, s. 1. to all or some of the testator's debts or debt charged by way of mortgage on any part of his real estate.

Expressions not excluding the act. Under this section a declaration of a contrary intention must unmistakably refer to mortgage debts (*Nelson v. Page*, 7 Eq. 28). Directions as to debts and liabilities generally were not sufficient to exclude the act (*Rossiter v. R.*, 13 Ch. D. 355; *Buckley v. B.*, 19 L. R. Ir. 544; *Lewis v. L.*, 13 Eq. 218; *Re Smith*, *Hannington v. True*, 33 Ch. D. 195; *Newmarch v. Storr*, 9 Ch. Div. 12; *Sackville v. Smyth*, 17 Eq. 153; *Re Hooper*, *Ashford v. Brooks*, 1892, W. N. 151; *Elliott v. Dearsley*, 16 Ch. Div. 322). The act, however,

Act excluded. was excluded where there was a bequest of personal estate, "subject to the payment of my trade debts (which I hereby declare shall be a charge upon my personal estate)," and the real estate had been mortgaged to secure a trade account (*Re Fleck*, *Colston v. Roberts*, 37 Ch. D. 677; see *Thompson v. Bell*, 1903, 1 I. R. 489). Again, where there was a direction to pay out of residue debts "except mortgage debts on Blackacre" (*Re Valpy*, V. v. V., 1906, 1 Ch. 531). The act was also excluded in *Re Nevill*, *Robinson v. Nevill* (62 L. T. 864), and in *Re Campbell*, C. v. C. (1893, 2 Ch. 206). The "declaration of intention" to exclude the act must be a general one. It is not sufficient to direct exoneration from a single source, which proves insufficient (*Re Birch*, *Hunt v. Thorn*, 1909, 1 Ch. 787). See now the R. E. Charges Act, 1877, *infra*.

Interpretation of word "mortgage." **2.** In the construction of the said act and of this act, the word "mortgage" shall be deemed to extend to any lien for unpaid purchase-money upon any lands or hereditaments purchased by a testator.

This section did not apply where the purchaser died intestate (*Harding v. H.*, 13 Eq. 493), but did apply where the purchaser devised the land to trustees, but died intestate as to the beneficial interest (*Dowdall v. McCartan*, 5 L. R. Ir. 313). See now R. E. Charges Act, 1877, *infra*.

Extent of act. **3.** This act shall not extend to Scotland.

THE REAL ESTATE CHARGES ACT, 1877

"An Act to amend" 17 & 18 Vict. c. 113, and 30 & 31 Vict. c. 69.

40 & 41 VICT. c. 34.

40 & 41 Vict. c. 34, s. 1. Be it enacted as follows:

Application of acts in schedule.

1. The acts mentioned in the schedule hereto shall, as to any testator or intestate dying after the thirty-first December, one thousand eight hundred and seventy-seven, be held to extend to a testator or intestate dying seised or possessed of or entitled to any land or other hereditaments of whatever tenure which shall at the time of his death be charged with the payment of any sum or sums of money by way of mortgage, or any other equitable charge, including any lien for unpaid purchase money; and the devisee or legatee or heir shall not be entitled to have such sum or sums discharged or satisfied out of any other estate of the testator or intestate unless (in the case of a testator)

he shall within the meaning of the said acts have signified a contrary intention; and such contrary intention shall not be deemed to be signified by a charge of or direction for payment of debts upon or out of residuary real and personal estate or residuary real estate.

40 & 41 Vict.
c. 34, s. 1.

See the notes to R. E. Charges Acts, 1854 and 1867, *supra*. The present act has extended the provisions of the former acts to the leaseholds of a testator (*Re Kershaw, Drake v. Kershaw*, 37 Ch. D. 674), and also it seems (notwithstanding the omission of "next-of-kin" in the second sentence) of an intestate (*Re Fraser, Lowther v. Fraser*, 1904, 1 Ch. 726; compare *Downes v. Morris*, 3 Hare 399). A rent charge issuing out of leaseholds and belonging to an intestate was held to fall within the acts notwithstanding that it was not the subject of tenure (*Ib.*). See as to such tenure Wms. R. P. 19th Ed. p. 428; Challis R. P. 387. As to the construction of the words, "lands or other hereditaments of whatever tenure" compare *G. W. R. v. Swindon Co.*, 9 A. C. 808, a decision on sect. 2 of the L. C. C. Act, 1845. The present act has also, in the case of a vendor's heir, extended the former acts to intestates (*Re Cockcroft, Broadbent v. Groves*, 34 Ch. D. 100). It has been observed that the expression of a contrary intention referred to in this act is limited to the case of a testator, the expression "by deed or other document" of such an intention not being mentioned (*Ib.*).

2. This act shall not extend to Scotland.

Act not to
extend to
Scotland.

SCHEDULE.

17 & 18 Vict. c. 113..	An Act to amend the law relating to the administration of the estates of deceased persons.
30 & 31 Vict. c. 69 ..	An Act to explain the operation of the Act 17 & 18 Vict. c. 113.

AMENDMENT OF THE LAW RESPECTING WILLS.

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THE WILLS ACT, 1837.

1 VICT. c. 26.

An Act for the Amendment of the Laws with respect to Wills.

[3rd July, 1837.]

1 Vict. c. 26,
s. 1.Meaning of
certain words
in this act;

"Will:"

12 Car. 2,
c. 24.14 & 15 Car. 2
(I.)."Real
estate:""Personal
estate:"

BE it enacted, that the words and expressions hereinafter mentioned, which in their ordinary signification have a more confined or a different meaning, shall in this act, except where the nature of the provision or the context of the act shall exclude such construction, be interpreted as follows; (that is to say,) the word "will" shall extend to a testament, and to a codicil, and to an appointment by will or by writing in the nature of a will in exercise of a power (*a*), and also to a disposition by will and testament or devise of the custody and tuition of any child, by virtue of an act passed in the twelfth year of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service and Purveyance, and for settling a Revenue upon his Majesty in lieu thereof," or by virtue of an act passed in the parliament of Ireland in the fourteenth and fifteenth years of the reign of King Charles the Second, intituled "An Act for taking away the Court of Wards and Liveries, and Tenures in capite and by Knights Service," and to any other testamentary disposition; and the words "real estate" shall extend to manors, advowsons, messuages, lands, tithes, rents and hereditaments, whether freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether corporeal, incorporeal or personal, and to any undivided share thereof, and to any estate, right or interest (other than a chattel interest) therein; and the words "personal estate"

shall extend to leasehold estates and other chattels real (b) and also to moneys, shares of government and other funds, securities for money (not being real estates), debts, choses in action, rights, credits, goods, and all other property whatsoever which by law devolves upon the executor or administrator (c), and to any share or interest therein; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

1 Vict. c. 26,
s. 1.

Number :

Gender :

(a) See *Re Barnett, Dawes v. Ixer*, 1908, 1 Ch. 402.

(b) See *Re Grassi, Stubberfield v. Grassi*, 1905, 1 Ch. 590.

(c) See *Chandler v. Pocock*, 15 Ch. D. 498, 16 Ch. Div. 653.

2. An act passed in the thirty-second year of the reign of King Henry the Eighth, intituled "The Act of Wills, Wards and Primer Seisins, whereby a Man may devise his Land;" and also an act passed in the thirty-fourth and thirty-fifth years of the reign of the said King Henry the Eighth, intituled "The Bill concerning the Explanation of Wills;" and also an act passed in the parliament of Ireland in the tenth year of the reign of King Charles the First, intituled "An Act how Lands, Tenements, &c., may be disposed by Will or otherwise, and concerning Wards and Primer Seisins;" and also so much of an act passed in the twenty-ninth year of the reign of King Charles the Second, intituled "An Act for Prevention of Frauds and Perjuries," and of an act passed in the parliament of Ireland in the seventh year of the reign of King William the Third, intituled "An Act for Prevention of Frauds and Perjuries," as relates to devises or bequests of lands or tenements, or to the revocation or alteration of any devise in writing of any lands, tenements or hereditaments, or any clause thereof, or to the devise of any estate *pur autre vie*, or to any such estate being assets, or to nuncupative wills, or to the repeal, altering or changing of any will in writing concerning any goods or chattels or personal estate, or any clause, devise, or bequest therein; and also so much of an act passed in the fourth and fifth years of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," and of an act passed in the parliament of Ireland in the sixth year of the reign of Queen Anne, intituled "An Act for the Amendment of the Law and the better Advancement of Justice," as relates to witnesses to nuncupative wills; and also so much of an act passed in the fourteenth year of the reign of King George the Second, intituled "An Act to amend the Law concerning Recoveries, and to explain and amend an act made in the twenty-ninth year of the reign of King Charles the Second, intituled 'An Act for Prevention of Frauds and Perjuries,'" as relates to estates *pur autre vie*; and also an act passed in the

Repeal of the
Statutes of

Wills,
32 Hen. 8,
c. 1, and 34 &
35 Hen. 8,
c. 5.

10 Car. 1,
sess. 2, c. 2 (I.).

Sects. 5, 6, 12,
19, 20, 21 and
22 of the
Statute of
Frauds,
29 Car. 2, c. 3;
7 Will. 3,
c. 12 (I.).

Sect. 14 of
4 & 5 Anne,
c. 16.

6 Anne, c. 10

Sect. 9 of
14 Geo. 2,
c. 20.

- 1 Vict. c. 26, s. 2, twenty-fifth year of the reign of King George the Second, intituled "An Act for avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates in that part of Great Britain called England, and in his Majesty's Colonies and Plantations in America," except so far as relates to his Majesty's colonies and plantations in America; and also an act passed in the parliament of Ireland in the same twenty-fifth year of the reign of King George the Second, intituled "An Act for the avoiding and putting an end to certain Doubts and Questions relating to the Attestation of Wills and Codicils concerning Real Estates;" and also an act passed in the fifty-fifth year of the reign of King George the Third, intituled "An Act to remove certain Difficulties in the Disposition of Copyhold Estates by Will," shall be and the same are hereby repealed, except so far as the same acts or any of them respectively relate to any wills or estates *pur autre vie* to which this act does not extend.
- 25 Geo. 2, c. 6 (except as to colonies).
- 25 Geo. 2, c. 11 (I.).
- 55 Geo. 3, c. 192.

All property may be disposed of by will,

comprising customary freeholds and copyholds without surrender and before admittance, and also such of them as cannot now be devised;

estates *pur autre vie*;

contingent interests;

3. It shall be lawful for every person to devise, bequeath or dispose of, by his will executed in manner hereinafter required, all real estate and all personal estate which he shall be entitled to, either at law or in equity, at the time of his death, and which, if not so devised, bequeathed or disposed of, would devolve upon the heir-at-law or customary heir of him, or, if he became entitled by descent, of his ancestor, or upon his executor or administrator (*b*); and that the power hereby given shall extend to all real estate of the nature of customary freehold or tenant right or customary or copyhold (*c*), notwithstanding that the testator may not have surrendered the same to the use of his will, or notwithstanding that, being entitled as heir, devisee or otherwise to be admitted thereto, he shall not have been admitted thereto, or notwithstanding that the same, in consequence of the want of a custom to devise or surrender to the use of a will or otherwise, could not at law have been disposed of by will if this act had not been made, or notwithstanding that the same, in consequence of there being a custom that a will or a surrender to the use of a will should continue in force for a limited time only, or any other special custom, could not have been disposed of by will according to the power contained in this act, if this act had not been made; and also to estates *pur autre vie*, whether there shall or shall not be any special occupant thereof, and whether the same shall be freehold, customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether the same shall be a corporeal or an incorporeal hereditament; and also to all contingent, executory or other future interests in any real or personal estate (*d*), whether the testator may or may not be ascertained as the person or one of the persons in whom the same respectively may become vested, and whether he may be entitled thereto under the instrument by which the same respectively were

created or under any disposition thereof by deed or will; and also to all rights of entry for conditions broken, and other rights of entry; and also to such of the same estates, interests and rights respectively, and other real and personal estate, as the testator may be entitled to at the time of his death, notwithstanding that he may become entitled to the same subsequently to the execution of his will.

1 Vict. c. 26,
s. 3.

rights of
entry; and
property
acquired after
execution of
the will.

According to the law of England a will of realty is governed by the *lex loci rei sitæ* (1 Jarm. Wills, 1). As to leaseholds see the note to sect. 1 of the Wills Act, 1861 (*post*); and see as to proceeds of sale of land in a colony *Rea v. R.*, 1902, 1 I. R. 451; or abroad, *Re Piercy, Whitwham v. Piercy*, 1895, 1 Ch. 83, where the proceeds were applied in accordance with English law. In the case of personalty other than leaseholds, the law of the country in which the deceased was domiciled at his death governs the succession thereto (*Lynch v. Paraguay* L. R. 2 P. & M. 258), including questions of testacy and intestacy, and of the construction of the will (*Enohin v. Wylie*, 10 H. L. C. 1, *Abd-ul-Messih v. Farra*, 13 App. Cas. 437); the law applied being the law as it existed at the death (*Lynch v. Paraguay, sup.*). In special cases the law applicable may be the law of the domicile of origin (*Re Johnson, Roberts v. A.-G.*, 1903, 1 Ch. 821; *Re Bowes, Bates v. Wengel*, 22 Times L. R. 711). And the above rule is subject, in the case of British subjects, to the Wills Act, 1861 (*post*). As regards foreign personal assets, however, these are governed by the law of their own locality for the purpose of legal representation, collection, and administration, as distinguished from distribution among the successors (*Blackwood v. The Queen*, 8 App. Cas. 82; *Commr. of Stamps v. Hope*, 1891, A. C. 476; see *Re Kloebe, Kannreuther v. Geiselbrecht*, 28 Ch. D. 175; *Re Doetsch, Matheson v. Ludwig*, 1896, 2 Ch. 836). The provisions of the Wills Act, 1837, apply only to wills of persons who have an English or Irish domicile (*Croker v. Hertford*, 4 Moore, P. C. 339; *Bremer v. Freeman*, 10 Moore, P. C. 306; see *Re Martin, Loustalan v. Loustalan*, 1900, P. 211); or who if foreigners domiciled abroad are disposing of real or leasehold property in England (*Pepin v. Bruyere*, 1902, 1 Ch. 24; see *De Fogassieras v. Duport*, 11 L. R. Ir. 123). As to the form, however, in which wills of personalty may be executed by British subjects dying after 6th August, 1861, see now the Wills Act, 1861, *post*. As to conventions between this country and foreign countries for the purpose of determining the domicile of deceased persons, see the Domicil Act, 1861, *post*.

Wills of realty
governed by
the *lex loci*
rei sitæ; wills of personalty by the
lex domicilii.

Aliens may dispose of personalty by will (1 Wms. Exors. 10th ed. 8). Aliens were formerly incapable of devising realty (*Fourdrin v. Gowdey*, 3 M. & K. 383). As to aliens claiming under a devise, see *Davies v. Lynch* (I. R. 4 C. L. 570). But now real and personal property of every description may be acquired, held, and disposed of by an alien in the same manner as by a natural-born British subject; and title may be derived through an alien, in the same manner (Naturalisation Act, 1870, s. 2). This last section is not retrospective (*Sharp v. St. Sauveur*, 7 Ch. 343); and does not confer upon aliens the privileges of the Wills Act, 1861, *post* (*Bloxam v. Favre*, 9 P. Div. 130).

Aliens.

As to the power of the sovereign to devise realty and to dispose of personalty by will, see the Crown Private Estate Act, 1800, s. 10. See further, *A.-G. v. Windsor* (8 H. L. C. 369); *Re Geo.* 3 (3 Sw. & Tr. 199); *Re Best* (1901, P. 333).

The sovereign.

See as to the wills of infants, sect. 7 of this act; of married women, sect. 8; of soldiers and seamen, sects. 11 and 12; of lunatics, *Smith v. Tebbitt*, L. R. 1 P. & M. 398; *Banks v. Goodfellow*, L. R. 5 Q. B. 549; Pope on Lunacy, 2nd ed. 352.

Infants, married women, soldiers and seamen, lunatics.

The effect of probate as regards wills of real estate is dealt with by sects. 61—64 of the Court of Probate Act, 1857; which sections apply exclusively to cases where the whole will (including codicils) has been executed in

Probate of wills of real estate.

1 Vict. c. 26, accordance with the Wills Act, 1837 (*Campbell v. Lucy*, L. R. 2 P. & M. 209).
s. 3.

If the will be proved in solemn form, probate is conclusive evidence of the validity and contents of the will (sect. 62), and binds the heir even if he has been cited in his character of one of the next of kin (*Beardsley v. Beardsley*, 1899, 1 Q. B. 746).

If the probate be in common form it did not (before the L. T. Act, 1897) bind the heir, but might in a subsequent action (by a notice under sect. 64 of the above act of 1857) have been made *primâ facie* evidence of the validity and contents of the will (*Barraclough v. Greenhough*, L. R. 2 Q. B. 612). The effect, however, of the L. T. Act, 1897, s. 2, sub-ss. 2 and 4, should be considered (see *ante*, p. 427).

As to the jurisdiction of the Chancery Division in the matter of probate, see *Pinney v. Hunt* (6 Ch. D. 98); *Bradford v. Young* (26 Ch. D. 656); and *Priestman v. Thomas* (9 P. Div. 210).

Chose in action.

(b) It was never intended that this section should make any kind of personally bequeathable which was not bequeathable before. Therefore a testator cannot bequeath a promissory note, made to him, so as to pass the right to sue on it: such right is in the executor (*Bishop v. Curtis*, 18 Q. B. 879).

Devisable interests in land.

A person in possession of land without other title has a devisable interest (*Asher v. Whitlock*, L. R. 1 Q. B. 1; *Clarke v. Clarke*, L. R. 2 C. L. 395; *Calder v. Alexander*, 16 Times L. R. 294). Even before the passing of this act a person who had sold an estate under circumstances which entitled him in equity to have the sale set aside had in the estate an interest of such a nature as to be devisable (*Gresley v. Mousley*, 4 De G. & J. 78).

Testator dying without heirs.

A doubt has been suggested whether this act extends to the case of a testator dying without heirs, and whether, therefore, in order to prevent an escheat, three witnesses should not in such a case attest the will as under the old law (Williams, R. P. 56, note (i), 19th ed.).

Copyholds—Estate remains in heir till admittance of devisee.

(c) The effect of this section is to enable a copyholder to devise his estate, dispensing with a surrender to the use of the will, but leaving the estate in the customary heir till admittance of the devisee (*Garland v. Mead*, L. R. 6 Q. B. 441). There may, however, be a custom preventing the admission of more than one of several joint devisees (*Howard v. Gwynn*, 84 L. T. 505). Where a copyholder devised his estate to trustees, appointing them guardians of his customary heir, who was an infant, and the trustees without disclaiming tendered the heir for admittance, and the lord would not admit on account of the devise, the Court refused a mandamus to compel admittance (*R. v. Garland*, L. R. 5 Q. B. 269); but subsequently held, that the lord could not seize *quousque* for want of a tenant (*Garland v. Mead*, L. R. 6 Q. B. 441). The section enables a testator to devise copyholds free from the widow's right to freebench (*Lacey v. Hill*, L. R. 19 Eq. 346).

Contingent and executory interests.

(d) Before this act, contingent and executory estates and possibilities accompanied with an interest were devisable (*Selwin v. Selwin*, Burr. 1131; *Moore v. Hawkins*, 2 Eden's C. C. 342; *Roe v. Griffiths*, 1 Bl. Rep. 605; *Roe v. Jones*, 1 Hen. Bl. 30; *Jones v. Roe*, 3 T. R. 88; *Scawen v. Blunt*, 7 Ves. 300). But not where the person who was to take was not ascertainable before the contingency happened (*Doe v. Tomkinson*, 2 M. & S. 164). As to the exercise by will since the Wills Act, 1837, of a power of appointing an equitable estate given to two persons or the survivor, see *Thomas v. Jones* (1 D. J. & S. 63). By this section contingent interests are devisable whether the testator may or may not be ascertained as the person in whom the same may become vested. A contingent estate in fee under a shifting clause may be devised both under the old and new law (*Ingilby v. Amcotts*, 21 Beav. 585).

Possibilities in personal estate could be disposed of by will as well as assigned in equity before this statute and the Real Property Act, 1845 (Fearne, 439; Pollexf. 44; 2 Freem. 250; 9 Mod. 101; 2 P. Wms. 608; 1 P. Wms. 572; 3 P. Wms. 132). But a *spes successionis* is not a title to property by English law (*Re Parsons, Stockley v. Parsons*, 45 Ch. D. 51).

The possibility of reverter on failure of a fee simple conditional is a "right of entry" within this section (*Pemberton v. Barnes*, 1899, 1 Ch. 544).

See further as to what property may be devised or bequeathed, 1 Jarm. Wills, 48 *et seq.*, 5th ed.

1 Vict. c. 26,
s. 3.

Rights of
entry.

As to the fees
and fines
payable by
devisees of
customary
and copyhold
estates.

4. Provided always, and be it further enacted, that where any real estate of the nature of customary freehold or tenant right, or customary or copyhold, might, by the custom of the manor of which the same is holden, have been surrendered to the use of a will, and the testator shall not have surrendered the same to the use of his will, no person entitled or claiming to be entitled thereto by virtue of such will shall be entitled to be admitted, except upon payment of all such stamp duties, fees and sums of money as would have been lawfully due and payable in respect of the surrendering of such real estate to the use of the will, or in respect of presenting, registering or enrolling such surrender, if the same real estate had been surrendered to the use of the will of such testator: provided also, that where the testator was entitled to have been admitted to such real estate, and might, if he had been admitted thereto, have surrendered the same to the use of his will, and shall not have been admitted thereto, no person entitled or claiming to be entitled to such real estate in consequence of such will shall be entitled to be admitted to the same real estate by virtue thereof, except on payment of all such stamp duties, fees, fine and sums of money as would have been lawfully due and payable in respect of the admittance of such testator to such real estate, and also of all such stamp duties, fees and sums of money as would have been lawfully due and payable in respect of surrendering such real estate to the use of the will, or of presenting, registering or enrolling such surrender, had the testator been duly admitted to such real estate, and afterwards surrendered the same to the use of his will; all which stamp duties, fees, fine or sums of money due as aforesaid shall be paid in addition to the stamp duties, fees, fine or sums of money due or payable on the admittance of such person so entitled or claiming to be entitled to the same real estate as aforesaid.

See the Copyhold Act, 1894, ss. 84, 85, as to the admittance of devisees of copyholds and the fines payable; see Elton, 89, 173; Lewin on Trusts, p. 252, 10th ed.

5. When any real estate of the nature of customary freehold or tenant right, or customary or copyhold, shall be disposed of by will, the lord of the manor or reputed manor of which such real estate is holden, or his steward, or the deputy of such steward, shall cause the will by which such disposition shall be made, or so much thereof as shall contain the disposition of such real estate, to be entered on the court rolls of such manor or reputed manor; and when any trusts are declared by the will of such real estate it shall not be necessary to enter the declaration of such trusts, but it shall be sufficient to state in

Wills or ex-
tracts of wills
of customary
freeholds and
copyholds to
be entered on
the court
rolls;

1 Vict. c. 26,
s. 5.

and the lord
to be entitled
to the same
fine, &c.
when such
estates are
not now de-
visable as he
would have
been from the
heir in case of
descent.

Estates *pur
autre vie*.

the entry on the court rolls that such real estate is subject to the trusts declared by such will; and when any such real estate could not have been disposed of by will if this act had not been made, the same fine, heriot, dues, duties, and services shall be paid and rendered by the devisee as would have been due from the customary heir in case of the descent of the same real estate, and the lord shall, as against the devisee of such estate, have the same remedy for recovering and enforcing such fine, heriot, dues, duties, and services as he is now entitled to for recovering and enforcing the same from or against the customary heir in case of a descent.

6. If no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by reason of special occupancy, as assets by descent, as in the case of freehold land in fee simple; and in case there shall be no special occupant of any estate *pur autre vie*, whether freehold or customary freehold, tenant right, customary or copyhold, or of any other tenure, and whether a corporeal or incorporeal hereditament, it shall go to the executor or administrator of the party that had the estate thereof by virtue of the grant; and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of this act, it shall be assets in his hands, and shall go and be applied and distributed in the same manner as the personal estate of the testator or intestate.

Estates *pur
autre vie*.

An estate *pur autre vie* may arise on a conveyance to A. for the life of B., or again where a tenant for his own life grants over his estate (Co. Litt. 41 b). Where an estate *pur autre vie* is limited (1) to A. and his heirs, the heir takes on A.'s death as special occupant (*Re Michell, Moore v. M.*, 1892, 2 Ch. 96); or (2) to A., his executors and administrators, the executor takes as special occupant (*Northern v. Carnegie*, 4 Drew. 491); or (3) to A., his heirs, executors and administrators, the heir takes as special occupant (*Atkinson v. Baker*, 4 T. R. 229).

Prior to the Statute of Frauds, if the limitation were simply to A. for the life of B., the estate went on A.'s death to the first person who took possession, who was termed a general occupant (*Re Michell, Moore v. Moore, sup.*). Further, inasmuch as an heir who took as special occupant did not take by descent, he was not liable to his ancestor's debts (*Doe v. Luxton*, 6 T. R. 292). To remedy these defects in the law, the 3rd section of the Statute of Frauds and the 9th section of 14 Geo. 2, c. 20, were passed, which sections have been repealed by sect. 2 of the present act and the above section substituted for them.

As to estates *pur autre vie*, see further *Lewis Bowles's case*, Tud. L. C. Conv., 4th ed. 98.

Cases under
the section.

Where rents were devised to A., B., C. and their issue in equal shares during their lives and the life of the longer liver, and A. died before B. and C., leaving a child, the child was held to take an estate *pur autre vie*, and on his death intestate his interest (no special occupant having been named) was held to pass under this section to his legal personal representative (*Re Sheppard, Sheppard v. Manning*, 1897, 2 Ch. 67; compare *Chatfield v. Berchtoldt*, L. R. 7 Ch. 192). Where an estate *pur autre vie* was conveyed to trustees and their heirs upon trust for an infant, the infant's estate passed under this section to his administratrix (*Mount Cashell v. More-Smythe*, 1896, A. C. 158). Where an equitable estate *pur autre vie* limited to A. his heirs

and assigns was devised by A. to trustees their heirs and assigns for the use of B., B.'s estate passed on his death to his administrator (*Re Inman, I. v. I.*, 1903, 1 Ch. 241). 1 Vict. c. 26,
s. 6.

The words "in case there shall be no special occupant" in this section include both the case where there is no special occupant named in the grant, as also the case where the heir is named as special occupant, but the grantee dies without leaving an heir (*Plunket v. Reilly*, 2 Ir. Ch. R. 585; *Reynolds v. Wright*, 2 D. F. & J. 589).

In the case of death since 1897, it seems that all estates *pur autre vie* of Land a freehold nature, which before the Land Transfer Act, 1897, would have come to the heir as special occupant, will vest in the personal representative (L. T. Act, 1897, s. 1, *ante*, p. 421). Transfer Act,
1897.

7. No will made by any person under the age of twenty-one years shall be valid No will of a person under age valid;

Sect. 24 makes a will speak from the testator's death; but this does not extend to the testator's capacity, and the will of an infant would not become operative by his attaining his majority (Sugd. R. P. Stat. 330). The power given by 12 Car. 2, c. 24, s. 8, to infants to appoint guardians of their children by will appears to be repealed (*Ib.*). As to an infant appointing a guardian by deed, see *Morgan v. Hatchell* (19 Beav. 86); *Re Brown* (18 Ch. Div. 61).

A will made by an infant seaman was held valid under sect. 11 (*Re M'Murdo*, L. R. 1 P. & M. 540).

8. Provided also, and be it further enacted, that no will made by any married woman shall be valid, except such a will as might have been made by a married woman before the passing of this act. nor of a *feme covert*, except such as might now be made.

Under sub-sect. (1) of sect. 1 of the M. W. P. Act, 1882, a married woman is, in accordance with that act, capable of disposing by will of any real or personal property as her separate property in the same manner as if she were a *feme sole* (see note to that section, *ante*, p. 347); and by sect. 3 of the M. W. P. Act, 1893, sect. 24 of the Wills Act, 1837, is made applicable to the wills of married women (see *ante*, p. 367). The following note relates to the law independent of the effect of those sections.

A married woman has, properly speaking, no testamentary capacity (*Dye v. Dye*, 13 Q. B. Div. 156). Sect. 8 of the Wills Act, 1837, preserved the incapacity of coverture as it stood before that act (*Bernard v. Minshull*, Johns. 297; *Thomas v. Jones*, 2 J. & H. 483; 1 D. J. & S. 81). The only cases, accordingly, in which a married woman can, independently of the M. W. P. Acts, make a will are as follows:—

(1.) She can dispose by will of separate estate, real and personal (*Taylor v. Meads*, 4 D. J. & S. 597; see *Dye v. Dye*, 13 Q. B. Div. 147).

(2.) She can, in exercise of a power, dispose by will of real and personal estate (*Noble v. Willock*, L. R. 7 H. L. 580; *Thomas v. Jones*, 1 D. J. & S. 63), and to such a will sect. 27 of the Wills Act, 1837, applies (*Bernard v. Minshull*, Johns. 296). As to the revocation of such a will, see *Hawksley v. Barrow* (L. R. 1 P. & M. 147); *Re Tenney* (45 L. T. 78).

(3.) She can, with the assent of her husband, dispose by will of personal estate (*Willock v. Noble*, L. R. 7 H. L. 580). His assent, however, to the particular will must be proved; a general assent is not sufficient (*Ib.* 597). The husband must survive the wife (*Ib.* 591), and if he does he can assent after her death (*Elliot v. North*, 1901, 1 Ch. 424). The husband has a *locus penitentiae* until he has either acted on the will or has assented to probate (*Willock v. Noble*, 8 Ch. 790). An expression by a husband after his wife's death of an intention to prove was held sufficient assent

M. W. P. Acts, 1882 and 1893.

Wills of married women independently of the M. W. P. Acts, 1882 and 1893.

1 Vict. c. 26,
s. 8.

(*Re Cooper*, 6 P. D. 34); but according to the present practice a husband, by proving his wife's will in general form, does not assent to the disposition (*Re Atkinson, Waller v. Atkinson*, 1899, 2 Ch. 1).

(4.) A married woman who is an executrix has, as such, power to make a will and to appoint an executor for the purpose of continuing the representation to the original testator (*Noble v. Willock*, L. R. 7 H. L. 590). The administrator with the will annexed, however, of the estate of a married woman does not, as such, represent an estate of which the married woman was executrix (*Re Bridger*, 4 P. D. 77).

(5.) A married woman who has obtained a protection order can dispose by will of property acquired during desertion (*Re Elliott*, L. R. 2 P. & M. 274).

Law before
M. W. P. Act,
1893, as to the
application
to the wills
of married
women of
sect. 24.

Before the M. W. P. Act, 1893, the will made during coverture of a married woman who died during coverture passed after-acquired separate estate, even where she had no separate estate at the date of her will (*Charlemont v. Spencer*, 11 L. R. Ir. 490; see *Re Bowen, James v. James*, 1892, 2 Ch. 291). Where, however, a married woman, entitled to 3,800*l.* for her separate use, made a will which disposed of the 3,800*l.* and also contained a residuary gift, and her husband subsequently died, having left all his property to his wife, and she died without having re-executed her will after her husband's death, her will only disposed of the 3,800*l.*, and not of the property left by her husband (*Willock v. Noble*, L. R. 7 H. L. 580; see *Re Price, Stafford v. S.*, 28 Ch. D. 709; *Re Cuno, Mansfield v. M.*, 43 Ch. Div. 12; *Re Smith, Bilke v. Roper*, 45 Ch. D. 632, where a married woman's will was held not to have been republished after her husband's death). Where a married woman, entitled for life to a rent-charge for her separate use, made a will during coverture, which she did not re-execute after her husband's death, the will passed accumulations made during coverture, but not afterwards (*Re Wilson, Menteth v. Campbell*, 26 W. R. 848). Where, however, personal estate was settled in case A. should survive her husband, in trust for her separate use absolutely, and A. survived her husband, her will made during the coverture passed the property (*Bishop v. Wall*, 3 Ch. D. 194).

Of sects. 24
and 27.

It was decided that, notwithstanding sect. 8 of the Wills Act, 1837, a general gift in the will of a married woman operated, under sect. 27, to pass property over which she had only a testamentary power (*Bernard v. Minshull*, Johns. 276; see *Re Ludlam*, 63 L. T. 330; *Re Hernando, Hernando v. Sawtell*, 27 Ch. D. 284; *Re Price, Tomlin v. Latter*, 1900, 1 Ch. 442). And where a general power was vested in the survivor of A., B., and C., and C. ultimately became the survivor, it was held (under sects. 24 and 27) that the power was well exercised by a residuary devise in the will of C., made after the death of A., but during the life of B.; C. having been a married woman both at the date of her will and the date of her death (*Thomas v. Jones*, 1 D. J. & S. 63).

Will of mar-
ried woman
in execution
of power
which never
arises.

In a case before the M. W. P. Act, 1893, trust funds were limited to a married woman if she survived her husband, but if she predeceased him, she was to have a general power of appointment by will. During the coverture she made her will disposing of the property; she survived her husband, but did not re-execute her will. It was held that the power had not arisen, and the will was therefore inoperative (*Trimnell v. Fell*, 16 Beav. 537; *Price v. Parker*, 16 Sim. 198; see *Jones v. Southall*, 30 Beav. 187; *Blaklock v. Grindle*, 7 Eq. 215; and compare the decision since the M. W. P. Act, 1893, in *Re James, Hole v. Bethune*, 1910, 1 Ch. 157, quoted *ante*, p. 367).

Function of
the Probate
Division.

Before the Jud. Acts it was held that in the case of a will executed by a married woman, under a power, the Court of Probate must determine whether or not there was a will (*Re Hallyburton*, L. R. 1 P. & M. 90); and should see that every properly executed testamentary paper, material for the consideration of the Court of Chancery, was included in the probate (*Re Fenwick*, L. R. 1 P. & M. 319); but that the Court of Probate would not determine whether or not the testatrix was testable (*Barnes v. Vincent*, 5 Moore, P. C.

201); nor whether the power had been duly executed (*Paglar v. Tongue*, L. R. 1 P. & M. 158); nor would it decide questions of construction (*Re De Pradel*, L. R. 1 P. & M. 454), all of which were questions for the Court of Chancery. The usual form of probate was limited to the property which the deceased had power to dispose of, and had disposed of, accordingly; and her husband or her next of kin were entitled to a grant of administration *cæterorum* (*Re Crofts*, L. R. 2 P. & M. 18; *Re Graham*, *Ib.* 385; *Noble v. Phelps*, *Ib.* 276, where see form of probate).

1 Vict. c. 26,
s. 8.

Form of
probate.

In a case decided after the Jud. Acts, but before the M. W. P. Act, 1882, and where probate had been granted in the limited form, the C. A. laid down that upon an application for probate, the Probate Division should as far as possible determine whether the married woman had separate property or had duly executed the power (*Re Tharp*, 3 P. Div. 76; see *A.-G. v. Ailesbury*, 12 A. C. 696). But that Division may not have the requisite machinery (*Harding v. Sutton*, 59 L. T. 838).

Now, according to the Probate rules of 1887, probates of wills of married women and of widows made during coverture, and letters of administration with such wills annexed, are granted in ordinary form with no limitation (*Re Price*, 12 P. D. 137; see, however, the limited forms of grant in *Re Leman*, 1898, P. 215; *Re Trefond*, 1899, P. 247; *Re Vannini*, 1901, P. 330). The general form was adopted even in the case of a will made in exercise of a power (*Re Jevers*, 13 L. R. Ir. 1). And *semble* upon an application for probate there is a presumption that the married woman had separate property (*Harding v. Sutton*, 59 L. T. 838). The effect of the probate in general form is to enable the executor to get in the wife's assets, whether she had power to dispose of them by will or not, and does not affect the beneficial title, which may be subsequently decided in the Chancery Division (*Smart v. Tranter*, 43 Ch. Div. 587; *Re Lambert*, *Stanton v. Lambert*, 39 Ch. D. 626; see *Re Smith*, *Bilke v. Roper*, 45 Ch. D. 638). As to the effect of probate by a husband, see *Re Atkinson*, *Waller v. Atkinson*, 1899, 2 Ch. 1.

9. No will shall be valid unless it shall be in writing (e) and executed in manner hereinafter mentioned; (that is to say) it shall be signed at the foot or end thereof (f) by the testator or by some other person in his presence and by his direction (g); and such signature shall be made or acknowledged by the testator in the presence of two or more witnesses present at the same time (h); and such witnesses shall attest and shall subscribe the will in the presence of the testator (i), but no form of attestation shall be necessary (k).

Every will
shall be in
writing and
signed by the
testator in the
presence of
two witnesses
at one time.

(e) The contents of a lost will, like those of any other lost instrument, may be proved by secondary evidence (*Sugden v. St. Leonards*, 1 P. D. 154; see *Woodward v. Goulstone*, 11 App. Cas. 469). But declarations made by a testator after the date of an alleged will are not admissible to prove either the due execution thereof (*Re Ripley*, 1 Sw. & Tr. 68; *Sugden v. St. Leonards*, *sup.*; *Eyre v. E.*, 1903, P. 137); or that it was executed in duplicate (*Atkinson v. Morris*, 1897, P. 40).

Where a will, the contents of which have been brought to the knowledge of a testator, has been executed by him, words cannot be omitted therefrom on the ground of error in the preparation of the will (*Harter v. H.*, L. R. 3 P. & M. 11; *Rhodes v. R.*, 7 App. Cas. 192; see rules stated in *Guardhouse v. Blackburn*, L. R. 1 P. & M. 109; *Garnett Botfield v. Garnett Botfield*, 1901, P. 335; *Collins v. Elstone*, 1893, P. 1). But words inserted by fraud or by mistake without the knowledge of the testator may be rejected (*Morell v. M.*, 7 P. D. 68; *Fulton v. Andrew*, L. R. 7 H. L. 448); see *Briscoe v. Baillie Hamilton*, 1902, P. 234. As to the case where such a rejection would alter the sense of the remainder, see *Rhodes v. R.*, 7 A. C. 198; *Re Boehm*, 1891, P. 251.

1 Vict. c. 26, s. 9. (f) As to the position of the signature of the testator, see the Wills Act Amdt. Act, 1852, s. 1, *post*, p. 480, and cases there quoted.

Signature by testator. (g) A signature by the testator of his name after the attestation by the witnesses, although in their presence, is not a compliance with the statute (*Re Olding*, 2 Curt. 865; *Re Byrd*, 3 Curt. 117). A will was held to have been signed before the witnesses subscribed, although the confused recollection of the witnesses raised a doubt upon the point (*Cooper v. Bockett*, 3 Curt. 648; *Brenchley v. Still*, 2 Rob. 162; *Thompson v. Hall*, 16 Jur. 1144; *Re Jones*, 1877, W. N. 10). A mark by the testator for a signature was held sufficient, although the name did not appear (*Re Bryce*, 2 Curt. 325); and even where a wrong name was added to the mark, but there was no doubt as to the identity of the testator, the execution was held good (*Re Clarke*, 1 Sw. & Tr. 22; *Re Douce*, 2 Sw. & Tr. 593).

By some other person by testator's direction. An attesting witness may sign the will for the testator by his direction (*Re Bailey*, 1 Curt. 914). The witness, in fact, attests the *direction* of the testator, and that direction amounts to an acknowledgment (*Smith v. Roberts*, 1 Rob. 262). But such signature, although made by the testator's direction, is insufficient if not made in his presence (*Keril v. Lynch*, L. R. 8 Eq. 244). A party signing a will for a testator, who was too ill to sign, by his direction signed it in his own name, but expressed it to be on behalf of the testator. This was deemed sufficient (*Clark's case*, 2 Curt. 329). Where A., in the presence of a testator, and by his direction, impressed the testator's usual signature at the foot of a codicil, by means of a stamp, the will was duly signed (*Jenkyns v. Gaisford*, 11 W. R. 854). There must be some act or word on the part of the testator to show that the signature was made at his request (*Re Marshall*, 13 L. T. 643).

Signature made in presence of witnesses. (h) The testator's signature must be made or acknowledged in the presence of the witnesses. Where the witnesses had seen the testatrix write what the Court presumed to be her signature, it was held sufficient, although they did not see the signature, and she did not acknowledge it to them (*Smith v. S.*, L. R. 1 P. & M. 143). "Presence" means actual visual presence (*Brown v. Skirrow*, 1902, P. 3).

Acknowledgment of signature in presence of witnesses. There is no sufficient acknowledgment unless the witnesses either saw or might have seen the signature, not even though the testator should expressly declare that the paper to be attested by the witnesses is his will, or state that his signature is inside the will (*Blake v. Blake*, 7 P. Div. 102; following *Hudson v. Parker*, 1 Rob. 14; and disapproving of *Becket v. Howe*, L. R. 2 P. & M. 1; and *Gwillim v. G.*, 2 Sw. & Tr. 200). Both witnesses must sign after the testator's signature shall have been made and acknowledged to them when both are present at the same time (*Moore v. King*, 3 Curt. Ecc. 243; *Wyatt v. Berry*, 1893, P. 5).

Where a will is signed by the testator before the witnesses are called in, the mere circumstance of calling in witnesses to sign without giving them any explanation of the instrument does not amount to a sufficient acknowledgment (*Hott v. Genge*, 4 Moo. P. C. 265; *Re Swinford*, L. R. 1 P. & M. 630; *Pearson v. P.*, L. R. 2 P. & M. 451). It is not, however, necessary that the testator should say in express terms to the witnesses "That is my signature." A request for subscription has been held sufficient (*Keigwin v. K.*, 3 Curt. 607; *Re Ashmore*, *ib.* 756; *Gaze v. G.*, *ib.* 451; *Re Davies*, 2 Rob. 337; *Re Claridge*, 39 L. T. 612; *Daintree v. Butcher*, 13 P. Div. 102). Where the request for subscription was made to the witnesses by a third party in the presence of the testatrix who said no word during the proceeding, there was a sufficient acknowledgment (*Inglesant v. I.*, L. R. 3 P. & M. 172; *Re Bishop*, 30 W. R. 567; but see *Morrill v. Douglas*, L. R. 3 P. & M. 1). Where A. placed his seal on the paper, and delivered it as his act and deed, it was held there was no sufficient acknowledgment (*Re Summers*, 2 Rob. 295).

Attestation and subscription by witnesses. (i) It has long been settled, that after a will has been signed or acknowledged by the testator, there must be the subscription of the witnesses in the presence of the testator (*White v. British Museum*, 6 Bing. 310). To make a valid subscription and attestation to a will there must be either the name of

the witness or some mark intended to represent it. A correction of an error in a previous writing of the witness's name, or his acknowledgment of it, or the adding of a date to it, will not be sufficient for that purpose (*Hindmarsh v. Charlton*, 8 H. L. C. 160). Nor the adding of an address (*Re Trevanion*, 2 Rob. 315). Nor the acknowledgment by a witness of his signature by putting a dry pen over it (*Hindmarsh v. Charlton*, 8 H. L. C. 160; *Playne v. Scriven*, 1 Rob. 772; *Horne v. Featherstone*, 73 L. T. 32). The court must be satisfied that the act done by the witness was intended by him to evidence his attestation. Where a man wrote the word "witness," it was held an insufficient attestation (*Re Eynon*, L. R. 3 P. & M. 92); also where another, after writing his christian name, was unable through feebleness to complete his signature (*Re Maddock*, L. R. 3 P. & M. 169).

1 Vict. c. 26,
s. 9.

The initials of attesting witnesses to a testamentary paper are a sufficient subscription under this act (*Re Christian*, 2 Rob. 110; *Re Martin*, 6 Not. Cas. 694; *Re Blewitt*, 5 P. D. 116; *Margary v. Robinson*, 12 P. D. 8). Where one of the attesting witnesses subscribed his description, without signing his name, it was held sufficient (*Re Sperling*, 12 W. R. 354). A will may be attested by the witnesses making marks (*Re Amiss*, 2 Rob. 116); and the testator may write the names of the witnesses opposite their respective marks (*Re Ashmore*, 3 Curt. 756). But an attesting witness, able to write, cannot subscribe for another witness who is unable to write (1 Not. Cas. 456). A husband who is witness to a will cannot also subscribe for his wife (*Re White*, 2 Not. Cas. 461); nor a wife for her husband (*Re Duggins*, 39 L. J. Prob. 34). A will was attested by one witness in his own handwriting. He also held and guided the hand of a second witness who could neither read nor write; this was held sufficient (*Harrison v. Elvin*, 3 Q. B. 117; *Re Frith*, 27 L. J. Prob. 6). Where the names of two attesting witnesses to a will, who were unable to write, were written by another person whilst they held the top of the pen, the will was duly attested (*Re Lewis*, 31 L. J. Prob. 153; see *Re Cope*, 2 Rob. 335). For a case where the name of a witness was erased by the testator and re-written by the witness, see *Re Coleman* (2 Sw. & Tr. 314); and for a case where the signatures of the witnesses were sworn to be in the handwriting of the testator, see *Re Lee* (4 Jur. N. S. 790).

If both the witnesses are dead, it will not be presumed that they did not both sign at the same time, from the difference in the colour of the ink (*Trott v. T.*, 29 L. J. Prob. 156).

It is not necessary that the name of the witness should be written upon the same side of the paper on which the name of the testator occurs (*Re Chamney*, 1 Rob. 757; *Woodhouse v. Balfour*, 13 P. D. 2; *Margary v. Robinson*, 12 P. D. 8); but the court must be satisfied that the name of the witness was subscribed for the purpose of attesting the testator's signature (*Re Wilson*, L. R. 1 P. & M. 269; *Griffiths v. G.*, L. R. 2 P. & M. 300; see *Re Streatley*, 1891, P. 172); and the testator's signature attested must be the operative one (*Sweetland v. S.*, 4 Sw. & Tr. 6; *Ewen v. Franklin*, 1 Jur. N. S. 1220; *Re Dilkes*, L. R. 3 P. & M. 164; *Phipps v. Hale*, *Id.* 166). The attestation of the witness, if not on the same sheet of paper as the signature of the testator, must be on paper physically connected therewith (*Re Braddock*, 1 P. D. 433; *Re Hatton*, 6 P. D. 204; see *Lewis v. L.*, 1908, P. 1).

The execution must be attested by the witnesses in the actual or constructive presence of the testator (*Newton v. Clarke*, 2 Curt. 320; *Tribe v. T.*, 1 Rob. 275; *Longford v. Eyre*, 1 P. W. 740; *Casson v. Dade*, 1 Br. C. C. 99). Even in the case of a blind person it must appear that the will was so attested that the testator, if he had had his eyesight, could have seen the witnesses subscribe (*Re Piercy*, 1 Rob. 278). Where the subscription of the witnesses takes place in a different room from that in which the testator is, he must be proved to have been in a position whence he could have seen the witnesses as they subscribed their names (*Norton v. Bazett*, 3 Jur. N. S. 1084; *Jenner v. Efinch*, 5 P. D. 106; *Carter v. Seaton*, 17 Times L. R. 671; *Betts v. Gannell*, 19 Times L. R. 304). But it is not necessary that the witnesses should subscribe in the presence of each

Testator's
presence.

1 Vict. c. 26, other (*Faulds v. Jackson*, 6 Not. Cas. Suppl. 1; *Re Webb*, 2 Jur. N. S. s. 9. 309).

Attestation clause should be added.

Presumption in favour of due execution in absence of evidence.

Evidence showing that statutory requisites were not complied with.

Invalid testamentary instrument rendered valid by subsequent instrument duly executed.

Incorporation of unattested papers.

Paper must be in existence,

and capable of identification.

(k) Although a will may be valid without any attestation clause (*Bryan v. White*, 2 Robert. 315), yet one should be added; otherwise, in order to obtain probate, it is necessary to have an affidavit of one of the subscribing witnesses to prove that the provisions of the act, in reference to the execution of the will, have in fact been complied with (*Belbin v. Skeats*, 1 Sw. & Tr. 148; see *Re Thomas*, 1 Sw. & Tr. 255; *Byles v. Cox*, 74 L. T. 222).

If upon the face of a will to which there is no memorandum of attestation there be the signature of the testator at the foot or end thereof, and the subscriptions of two witnesses; in the absence or death of the witnesses, the *prima facie* presumption is, that the testator signed in the joint presence of the two witnesses, and that they subscribed in his presence. If the subscribing witnesses do not remember the facts attendant upon the execution of the will, the presumption is the same (*Burgoyne v. Showler*, 1 Rob. 5; *Foot v. Stanton*, 2 Jur. N. S. 380; *Re Torre*, 8 Jur. N. S. 494; *Re Colyer*, 14 P. D. 48; *Woodhouse v. Balfour*, 13 P. D. 2; *Vinnicombe v. Butler*, 13 W. R. 392; *Re Puddephatt*, L. R. 2 P. & M. 97; see *Re Peverett*, 1902, P. 205). Where, however, the witnesses negative compliance with the requisites of the act, the will cannot be supported unless their evidence be rebutted by proof of circumstances, showing that the witnesses cannot be credited, or that from the facts and circumstances which they state their recollection fails them (*Re Ayling*, 1 Curt. 913; *Gove v. Gawn*, 3 Curt. 151; *Pennant v. Kingscote*, *Id.* 642; *Bennett v. Sharp*, 1 Jur. N. S. 456; *Leech v. Bates*, 1 Rob. 714; *Noding v. Alliston*, 14 Jur. 904; *Glover v. Smith*, 57 L. T. 60; *Crofts v. C.*, 13 W. R. 526; *Wright v. Rogers*, L. R. 1 P. & M. 678; *Bailey v. Frowan*, 19 W. R. 511; *Dayman v. D.*, 71 L. T. 699; see *Pilkington v. Gray*, 1899, A. C. 401). Where witnesses have deposed, the one positively that the will was not executed in the testator's presence, and the other as positively declared that it was, the court has given the preponderance to the witness deposing affirmatively in accordance with the statement set forth in the attestation clause (*Brenchley v. Still*, 2 Rob. 176, 177; *Farmar v. Brock*, 1 Deane, 187; 2 Jur. 670). Declarations by the testator are inadmissible (*Sugden v. St. Leonards*, 1 P. D. 227; *Eyre v. E.*, 1903, P. 137; see *Atkinson v. Morris*, 1897, P. 40; *Re Chappell*, 1894, P. 98).

Although a testamentary instrument is not properly executed or attested, yet, if it is clearly referred to by one of later date properly executed and attested, it will be operative (*Ingoldby v. Ingoldby*, 4 Not. Cas. 493; *Re Hilhouse*, 1 Eccl. & Adm. Rep. 111). The rule applies where there is a will informally executed, which in a codicil duly executed is described as a codicil "to my last will" (*Hill's Case*, 4 Not. Cas. 404; *Hally's Case*, 5 Not. Cas. 510); it is not properly a question of incorporation (see *Id.* 512).

An unattested paper which would have been incorporated in an attested will executed according to the Statute of Frauds, is now incorporated, if the will is executed according to this section (*Allen v. Maddock*, 11 Moore, P. C. 427; see *Anderson v. A.*, 13 Eq. 381). The paper to be incorporated, whether of itself void or valid, is equally entitled to probate (*Sheldon v. S.*, 1 Robert. 81; *Dicken's Case*, 3 Curt. 60; *Willesford's Case*, *Id.* 77; *Bacon's Case*, 3 Not. Cas. 644; *Smartt's Case*, 4 Not. Cas. 38; *Darby's Case*, 4 Not. Cas. 427). But the paper intended to be incorporated must be shown to have been in existence at the time the will was executed (*Singleton v. Tomlinson*, 3 App. Cas. 404; *Ferraris v. Hertford*, 3 Curt. 468; *Re Watkins*, L. R. 1 P. & M. 19; as to lists of articles referred to, see *Re Ash*, 2 Jur. N. S. 526; *Re Rendle*, 68 L. J. Prob. 125; and as to a paper coming into existence between the execution of a will and a codicil, see *Re Truro*, L. R. 1 P. & M. 201). The will must refer to the paper as existing (*Durham v. Northen*, 1895, P. 66; *Re Hyslop*, *Hyslop v. Chamberlain*, 1894, 3 Ch. 522). And the description of it given in the will must clearly identify the paper (*Singleton v. Tomlinson*, *sup.*; *Smart v. Prujean*, 6 Ves. 565; *Von Straubenzee v. Monck*, 11 W. R. 109; *Re Norris*, 14 W. R. 348; *Re Garnett*, 1894, P. 90;

see *Re Daniell*, 8 P. D. 14; *Symes v. Appelbe*, 57 L. T. 599). A reference in a will to documents "accompanying this my will," was an insufficient identification (*Re Yockey*, 29 L. T. 699). So a reference to "any memorandum amongst my papers" (*University Coll. v. Taylor*, 1908, P. 140). Where there is a reference in a duly executed testamentary instrument to another testamentary instrument imperfectly executed, but by such terms as to make it capable of identification, it is necessarily a subject for the admission of parol evidence (*Allen v. Maddock*, 11 Moore, P. C. 427; see Wigram on Evid., prop. 5). Thus, where a codicil referred to "the last will of me," parol evidence was admitted to identify the will (*Re Heathcote*, 6 P. D. 30). The principle, however, will not be extended (*Re Greves*, 1 Sw. & Tr. 250). Where the will did not refer to a document as then existing, the court refused to receive parol evidence, to show that the document was written before the will was signed (*Re Dallow*, L. R. 1 P. & M. 189; *Re Sunderland*, *Ib.* 198). Where a will, if read as speaking at the date of a codicil, contains language which would operate as an incorporation of a document, such document is entitled to probate by force of the codicil, although not in existence until after the execution of the will (*Re Truro*, L. R. 1 P. & M. 201; see *Re Macgregor*, 60 L. T. 840; *Re Rendle*, 68 L. J. Prob. 125); but only if the language of the will refers to the document as existing (*Durham v. Northen*, 1895, P. 66; see *Re Smart*, 1902, P. 238).

Effect of codicil on papers referred to in will.

In requiring the probate of an incorporated document the court exercises a discretion, and does not require it where the person having custody of the document refuses to produce it (*Re Sibthorp*, L. R. 1 P. & M. 106); or where the document is bulky (*Re Balme*, 1897, P. 261), or cannot be found (*Quihampton v. Going*, 24 W. R. 917). Where a foreign will was confirmed by an English will, probate of both was required (*Re Howden*, 30 L. T. 768; 43 L. J. Prob. 26; see *Re Donaldson*, L. R. 3 P. & M. 45; *Re Bolton*, 12 P. D. 202; *Re Lockhart*, 1893, W. N. 80). *Secus*, where there was no such confirmation (*Re Astor*, 1 P. D. 150; see *Re De la Rue*, 15 P. D. 185; *Re Callaway*, *Id.* 147; *Re Seaman*, 1891, P. 253; *Re Fraser*, *Id.* 285; *Re Murray*, 1896, P. 65). As to probate of an English translation of a French will, see *Re Cliff*, 1892, 2 Ch. 229. And see *Re Von Linden*, 1896, P. 148.

Probate of incorporated documents.

Whether probate be granted or not the incorporated document will be regarded as part of the will (*Bizzey v. Flight*, 3 Ch. D. 269; *Quihampton v. Going*, *sup.*). Even where not incorporated, memoranda in a ledger may be *prima facie* evidence as to advances (*Whately v. Spooner*, 3 K. & J. 542; see *Smith v. Conder*, 9 Ch. D. 170).

Probate has been granted of a document in the form of a deed poll, properly executed, upon evidence that it was intended as a will (*Re Slimm*, 15 P. D. 156; *Milnes v. Foden*, *Id.* 105; see *Re Colyer*, 14 P. D. 48).

Will in form of a deed.

10. No appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity.

Appointments by will to be executed like other wills, and to be valid, although other required solemnities are not observed.

A reference should be made to sect. 1 (*ante*, p. 440), which extends the word "will" to "an appointment by will or by writing in the nature of a will in exercise of a power." And it should be observed that the present section is composed of (1) a prohibitory portion and (2) an enabling portion (see *Re Price*, *Tomlin v. Latter*, 1900, 1 Ch. 452).

As regards the prohibitory portion—where a power of appointing personalty was exercisable by writing signed in the presence of two witnesses,

Prohibitory portion of section.

1 Vict. c. 26,
s. 10.

and the donee signed in the presence of two witnesses a writing which from its form was intended to take effect on her death and not before, but the signature not being at the foot, it was not admitted to probate, it was held that such writing was a will within sect. 1, and that the first portion of sect. 10 prevented it from exercising the power (*Re Barnett*; *Dawes v. Ixer*, 1908, 1 Ch. 402; not following *Re Broad*; *Smith v. Draeger*, 1901, 2 Ch. 86; see *Re Daly*, 25 Beav. 456; *Gullan v. Grove*, 26 Beav. 64).

Enabling
portion of
section.

As regards the enabling portion of sect. 10. Where the power is in terms a power to appoint by will, and it further requires the will to be sealed, the enabling portion of the section applies, and declares that a will without sealing is sufficient (*Taylor v. Meads*, 4 D. J. & S. 602).

Where the power is exercisable by an instrument in writing, it may be exercised by will (*Taylor v. Meads*, 4 D. J. & S. 601). Where it was exercisable by an instrument in writing signed, sealed and delivered, it was well exercised by a will signed, sealed and published, publication being equivalent to delivery (*Smith v. Adkins*, 14 Eq. 402). But it was not exercised by a will duly executed in conformity with sect. 9 but not sealed, the enabling portion of sect. 10 not applying (*Taylor v. Meads*, 4 D. J. & S. 602).

Foreign
domicil.

Execution of
wills made
by persons
domiciled
abroad in
exercise of
powers of
appointing
personalty.

The present statute only applies, so far as wills of personalty are concerned, to persons having an English domicil (*Bremer v. Freeman*, 10 Moore, P. C. 359). Accordingly, as regards the necessary formalities for the execution of a will of personalty, the will of a person domiciled abroad is not affected by the prohibitory portion of sect. 10 (*Re Price, Tomlin v. Latter*, 1900; 1 Ch. 452; *Re Walker, MacColl v. Bruce*, 1908, 1 Ch. 566). Thus a power of appointing personalty by will, where no special formalities are required, can be exercised by the will (proved in England) of a domiciled foreigner, invalid according to English law, but valid according to the law of the domicil (*D'Huart v. Hackness*, 34 Beav. 324; *Re Price, sup.*, *Re Walker, sup.*; *contra Hummel v. H.*, 1898, 1 Ch. 642).

Again, in the case of a person domiciled abroad, his will can derive no validity from the enabling portion of the above section (*Re Price, Tomlin v. Latter, sup.*). Thus, where the instrument creating the power requires special formalities, a will which does not comply with such formalities does not execute the power, although it be valid according to the law of domicil and as such admitted to probate in England (*Barretto v. Young*, 1900, 2 Ch. 339, the case of a domiciled French subject; the decision in *Re Kirwan*, 25 Ch. D. 373, the case of a British subject domiciled abroad, may be supported on this ground, see *Re Price, Tomlin v. Latter*, 1900, 1 Ch. 452). But in such a case the defective execution may be aided by a Court of Equity (*Re Walker, MacColl v. Bruce, sup.*).

Construction
of wills made
by persons
domiciled
abroad in
exercise of
powers of
appointing
personalty.

As regards the construction of a will (exercising a power) of a person domiciled abroad, which is invalid according to English law but valid according to the law of the domicil, it is *primâ facie* to be construed according to the law of the domicil (*Re Price, sup.*; *Re D'Este, Poulter v. D'Este*, 1903, 1 Ch. 903). And having regard to this principle, the will in French form of a domiciled Frenchman was not construed in accordance with the English rule introduced by sect. 27 of the present act (*Re D'Este, sup.*; see the apparently contrary decision in *Re Harman, Lloyd v. Tardy*, 1894, 3 Ch. 607). But the words of such a will may show that it was written with reference to the law of England, and if so it may be construed in accordance with sect. 27 (*Re Price, sup.*). Where the will was in English form it was construed in accordance with sect. 27 (*Re Baker, Hunt v. Baker*, 1908, W. N. 161; see *Murray v. Champenoune*, 1901, 2 L. R. 232). The question of the evidence admissible as to intention to exercise the power was treated as a question of English law (*Re Scholefield, Scholefield v. St. John*, 1905, 2 Ch. 408; compromised on appeal, 1907, 1 Ch. 664).

Capacity of
donee.

In the case of a testamentary powers created by English instruments, appointees were held entitled to take under the wills in English form of married women domiciled abroad notwithstanding the limitations imposed upon the donee by the law of the domicil (*Pouey v. Hordern*, 1900, 1 Ch. 492; *Re Megret, Tweedy v. Maunder*, 1901, 1 Ch. 547; compare *De Serre*

v. Clarke, 18 Eq. 587; *Re Bald*, 76 L. T. 462; *Re Hernando*, *Hernando v. 1 Vict. c. 26*,
Sawtell, 27 Ch. D. 284; *Murray v. Champernowne*, 1901, 2 I. R. 232; s. 10.
Murphy v. Deichler, 1909, W. N. 167).

To render a testamentary appointment available probate should be obtained (see *Wms. Exors.*, 10th ed., 44); and in the case of donees domiciled abroad of testamentary powers created by English instruments, the Probate Division has admitted to probate wills valid by the law of the testator's domicile but invalid according to English law (*Barretto v. Young*, 1900, 2 Ch. 339); and also wills invalid according to the law of the domicile but valid according to English law (*Re Hallyburton*, L. R. 1 P. & M. 90; *Re Huber*, 1896, p. 209; *Murphy v. Deichler*, 1909, W. N. 167). In the latter case the rule is to grant administration with the will annexed; the grant in the case of a married woman whose husband does not consent being limited to such property as the deceased had power to dispose of and did dispose of by the document (*Re Trêfond*, 1899, P. 247; *Re Vannini*, 1901, P. 330).

11. Provided always, and be it further enacted, that any soldier being in actual military service (*l*), or any mariner or seaman being at sea (*m*), may dispose of his personal estate as he might have done before the making of this act. Soldiers' and mariners' wills excepted.

(*l*) According to the law existing before the Statute of Frauds, "Testaments as regarded personal property might be either written or verbal, otherwise called nuncupative; of which the former were committed to writing and published or declared by the testator as his will, the latter depended on merely oral evidence, being declared by the testator *in extremis* before a sufficient number of witnesses, and afterwards reduced to writing written wills of personalty needed not in general any witnesses and though written in another man's hand and never signed by the testator, yet if it proved to be according to his instructions and approved by him, it hath been held a good testament of the personal estate" (2 Steph. Com. 202, 203, 5th ed.). Law before the act.

The Statute of Frauds (29 Car. 2, c. 3), which restricted the mode of making wills, contained an exception in favour of the wills of soldiers in actual military service, and of seamen being at sea: and this exception has been continued by the present section. In the case, however, of wills disposing of the wages or effects of merchant seamen, regard must be had to 17 & 18 Vict. c. 104, s. 200, and in the case of wills of petty officers and seamen in the Royal Navy, and of marines and non-commissioned officers of marines, so far as the same relate to money payable by the Admiralty or effects or money in charge of the Admiralty, regard must be had to 28 & 29 Vict. c. 72. Statute of Frauds.

The privilege granted by sect. 11 to soldiers is confined, by the words, "actual military service," to those *on an expedition*; the will of a soldier made while quartered in barracks, either at home (*Drummond v. Parish*, 3 Curt. 522), or in the colonies (*White v. Repton*, 3 Curt. 818; *Re Phipps*, 2 Curt. 368; *Re Johnson*, 2 Curt. 341), is not privileged. The same was held as to the will made at Bangalore of a soldier who died on a tour of inspection (*Re Hill*, 1 Rob. 276). The test is whether under orders some step has been taken preparatory to joining forces in the field (*Re Hiscock*, 1901, P. 78). A letter written by a soldier after mobilisation of his battalion was privileged as a will (*Gattward v. Knee*, 1902, P. 99). And where an officer was on his way from one regiment to another, both regiments being at the time on active service, his will was privileged (*Herbert v. Herbert*, D. & Sw. 10). The will may consist of a declaration made at the instance of the military authorities (*Re Scott*, 1903, P. 243). An unattested will, made by an officer on service at Berbice, was allowed to pass as that of a soldier in actual military service at the prayer of the party whose interest was prejudiced by such will (*Re Phipps*, 2 Curt. 368). The term "soldier" in this section extended to persons in the military service of the East

1 Vict. c. 26, India Company (*Re Donaldson*, 2 Curt. 386). As to obtaining probate of soldiers' wills privileged under this section, see *Re Hackett* (28 L. J. Prob. 42); *Re Neville* (*Ib.* 52); *Re Thorne* (4 Sw. & Tr. 36). Alterations occurring in a will made by a soldier in actual military service will be presumed to have been made during such service (*Re Tweedale*, L. R. 3 P. & M. 204). A will made on active service may be conditional on death during such service (see *Re Spratt*, 1897, P. 28, and cases in the last paragraph of this note).

Scamen. (m) The term "mariner or seaman" does not exclude any person in his Majesty's navy, being "at sea" (though superior of the ship), from the exception contained in this act (*Re Hayes*, 2 Curt. 338). The section applies to the purser of a man-of-war (*Ib.*), and to a surgeon in the navy (*Re Saunders*, L. R. 1 P. & M. 16), and to seamen, whether in the King's or merchant service (*Re Milligan*, 2 Rob. 108; *Morrell v. M.*, 1 Hagg. 51).

At sea. This section applied to the will of a commander-in-chief engaged in a naval operation on board a Queen's ship in a river (*Re Austen*, 2 Rob. 611). But not of a commander-in-chief, living on shore at the official residence (*Seymour's case*, cited 3 Curt. 530; 2 Curt. 339). Where a naval officer, invalidated at a foreign station, was returning home in a steamer, his will was privileged (*Re Saunders*, L. R. 1 P. & M. 16). As also the will of a seaman on board a man-of-war permanently stationed in Portsmouth Harbour (*Re M'Murdo*, L. R. 1 P. & M. 540). Where a man has joined a vessel on service, and has commenced a voyage in it, a will made in the course of that voyage is within the exception, although such will was in fact made on shore (*Re Lay*, 2 Curt. 375). The section applied to a will made on board a ship lying in harbour preparatory to sailing (*Re Patterson*, 79 L. T. 123); but not to a letter stating that the deceased had shipped on board a vessel, where it did not appear whether the letter was written before or after he went on board (*Re Corby*, 18 Jur. 634).

A will under this section remains operative unless expressly revoked, although the maker lives in England several years after (*Re Leese*, 17 Jur. 216). Probate was refused when the will was in a conditional form, e.g., "Instructions to be followed if I die at sea or abroad" (*Lindsay v. Lindsay*, L. R. 2 P. & M. 459; *Re Porter*, *Ib.* 22; *Re Robinson*, *Ib.* 171; see *Re Spratt*, 1897, P. 28). But a letter may operate as a will notwithstanding an expressed intention to make a formal will (*May v. M.*, 1902, P. 103).

Act not to affect certain provisions of 11 Geo. 4 & 1 Will. 4, c. 20, with respect to wills of petty officers and seamen and marines.

12. This act shall not prejudice or affect any of the provisions contained in an act passed in the eleventh year of the reign of his Majesty King George the Fourth and the first year of the reign of his late Majesty King William the Fourth, intituled "An Act to amend and consolidate the Laws relating to the Pay of the Royal Navy," respecting the wills of petty officers and seamen in the royal navy, and non-commissioned officers of marines, and marines, so far as relates to their wages, pay, prize-money, bounty money, and allowances, or other monies payable in respect of services in her Majesty's navy.

This section, and 11 Geo. 4 & 1 Will. 4, c. 20 (which bound the crown: *Re Bevan*, 14 W. R. 147), have been repealed by 28 & 29 Vict. c. 112, s. 1.

Publication not to be requisite.

13. Every will executed in manner hereinbefore required shall be valid without any other publication thereof.

Will not to be void on account of incompetency of attesting witness.

14. If any person who shall attest the execution of a will shall at the time of the execution thereof or at any time afterwards be incompetent to be admitted a witness to prove the execution thereof, such will shall not on that account be invalid.

15. If any person shall attest the execution of any will to whom or to whose wife or husband any beneficial devise, legacy, estate, interest, gift or appointment, of or affecting any real or personal estate (other than and except charges and directions for the payment of any debt or debts), shall be thereby given or made, such devise, legacy, estate, interest, gift or appointment shall, so far only as concerns such person attesting the execution of such will, or the wife or husband of such person, or any person claiming under such person or wife or husband, be utterly null and void, and such person so attesting shall be admitted as a witness to prove the execution of such will, or to prove the validity or invalidity thereof, notwithstanding such devise, legacy, estate, interest, gift or appointment mentioned in such will.

1 Vict. c. 26,
s. 15.

Gifts to an
attesting
witness to be
void.

The will must first be construed and then the above section must be applied (*Aplin v. Stone*, 1904, 1 Ch. 548). Where accordingly there was a devise to A. for life with remainder (in effect) to B. if living at A.'s death, otherwise to B.'s children, and B. was living at A.'s death, but her husband had attested the will, there was an intestacy (*Ib.*).

Where a life estate was rendered void by this section the interest of a remainderman in existence was accelerated (*Jull v. Jacobs*, 3 Ch. D. 703; *Re Clark, Clark v. Randall*, 31 Ch. D. 72; compare *Re Whitehorne, Whitehorne v. Best*, 1906, 2 Ch. 121); *secus* where contingent remaindermen were not in existence (*Re Townsend, T. v. T.*, 34 Ch. D. 357).

As regards class gifts. A person incapable of taking under the section cannot be reckoned in a class (*Re Coleman and Jarrom*, 4 Ch. D. 172). Where, accordingly, there was a devise to A.'s children as tenants in common, and one of A.'s children was an attesting witness, his share went to the rest of the class (*Fell v. Biddolph*, L. R. 10 C. P. 701). The decision was similar where the gift was to a class as joint tenants (*Young v. Davies*, 2 Dr. & Sm. 167).

Where the execution of a will was attested by two marksmen and signed also by two other persons as witnesses, the two latter were held to have attested the will, and a legacy to the wife of one failed (*Wigan v. Rowland*, 11 Hare, 157). And where a devisee attested a will as a third witness at the request of another person, the testator objecting, his interest failed (*Randfield v. R.*, 11 W. R. 847). So where the third attestation was at the request of the testator (*Cozens v. Crout*, 21 W. R. 781). Where a will was executed in the presence of two witnesses, and the signature of a third person, who was residuary legatee, appeared also at foot of the will, the court received evidence that the legatee's name was not written to attest the testator's signature, and ordered it to be omitted in the probate (*Re Sharman*, L. R. 1 P. & M. 661; see *Re Purssglove*, 26 L. T. 405; *Re Smith*, 15 P. D. 2).

Where a legacy was given by will, and the legatee attested a codicil confirming the will, the gift was good (*Gurney v. G.*, 3 Drew, 208; *Tempest v. codicil by T.*, 2 K. & J. 635; *Re Marcus*, 57 L. T. 399; see *Gaskin v. Rogers*, 2 Eq. legatee. 284). So where the legatee had attested one of many separate sheets of Will attested paper which formed the will (*Re Craven, Crewdson v. Craven*, 24 Times by legatee's L. R. 750). Where one of the attesting witnesses to a will which gave wife residue to B. was B.'s wife, and by a codicil, attested by other witnesses, the testatrix confirmed her will, the codicil incorporated the will so as to render the gift to B. valid (*Anderson v. A.*, 13 Eq. 381; see *Burton v. Newbery*, 1 Ch. D. 234). In such a case the benefit is not lost by the legatee attesting a second codicil which confirms the will and first codicil (*Re Trotter, T. v. T.*, 1899, 1 Ch. 764).

The marriage, after attestation of a will, of a devisee to the attesting

1 Vict. c. 26, witness, does not affect the validity of the devise (*Thorpe v. Bestwick*, 6 s. 15. Q. B. D. 311).

Gift in trust. A bequest in trust was not invalidated by the wife of the trustee attesting the signature of the testatrix (*Cresswell v. C.*, 6 Eq. 69). But where, by a codicil attested by A., personal estate was given to B. upon parol trusts in favour (amongst others) of A.; A.'s interest was held to fail, just as it would have done had the trust been declared in the codicil (*Re Fleetwood, Sidgreaves v. Brewer*, 15 Ch. D. 594).

Where a solicitor attested a will in which he was named trustee, and by which he was empowered to make professional charges, the above section deprived him of any right to profit costs (*Re Pooley*, 40 Ch. Div. 1; *Re Barber, Burgess v. Vinnicome*, 31 Ch. D. 665).

Creditor attesting to be admitted a witness.

16. In case by any will any real or personal estate shall be charged with any debt or debts, and any creditor, or the wife or husband of any creditor, whose debt is so charged shall attest the execution of such will, such creditor, notwithstanding such charge, shall be admitted a witness to prove the execution of such will, or to prove the validity or invalidity thereof.

Executor to be admitted a witness.

17. No person shall, on account of his being an executor of a will, be incompetent to be admitted a witness to prove the execution of such will, or a witness to prove the validity or invalidity thereof.

Will to be revoked by marriage.

18. Every will made by a man or woman shall be revoked by his or her marriage (except a will made in exercise of a power of appointment, when the real or personal estate thereby appointed would not in default of such appointment pass to his or her heir, customary heir, executor, or administrator, or the person entitled as his or her next of kin, under the Statute of Distributions).

Old law.

Under the old law the marriage of a testator did not revoke his will; but under certain circumstances there was an implied revocation by marriage and the birth of issue (1 Wms. Exors., 10th ed., 138).

Foreigners.

It seems that this section applies to a will of moveables made either by a male foreigner domiciled in England or by a woman who marries a male foreigner domiciled in England; but not to such will made by a male foreigner domiciled abroad or by a woman who marries a male foreigner domiciled abroad (*Re Martin, Loustalan v. Loustalan*, 1900, P. 211).

Marriage with deceased wife's sister.

Under this section it was held that a will was not revoked by a marriage with a deceased wife's sister; and that there was no distinction in such a case between a natural-born subject and a naturalized British subject (*Mette v. M.*, 1 Sw. & Tr. 416). Consider now the effect of the Deceased Wife's Sister's Marriage Act, 1907 (7 Ed. 7, cap. 47). A will executed after a marriage invalid under the Indian Divorce Act, was revoked by a subsequent marriage between the same parties (*Warter v. W.*, 15 P. D. 152).

Exception in case of wills in execution of powers.

Where by a settlement freeholds were, in default of appointment by A.'s will limited to A., her heirs and assigns, A.'s will exercising the power was revoked by marriage, the exception not applying (*Vaughan v. Vanderstegen*, 2 Drew. 168; see *Logan v. Bell*, 1 C. B. 872). The reason for the exception is, that a revocation of the will in a case to which the exception applies, would operate only in favour of those entitled in default of appointment, and the new family of the testator would derive no benefit from it (*Re Fitzroy*, 1 Sw. & Tr. 133). The exception applies where in any contingency the property, in default of appointment, would not pass to the heir, &c. of the deceased (*Re Fenwick*, L. R. 1 P. & M. 319). Also, where such persons

take under the settlement, and not by descent or under the Statute of Distributions (*Re Fitzroy*, 1 Sw. & Tr. 133; *Re Worthington*, 20 W. R. 260). It also applied where next of kin would have taken, not next of kin under the statute (*Re McVicar*, L. R. 1 P. & M. 671). Where, after making a will exercising a power and disposing of absolute property, a testator married, the exercise of the power was held to fall within the exception and limited administration was granted (*Re Russell*, 15 P. D. 111).

1 Vict. c. 26,
s. 18.

19. No will shall be revoked by any presumption of an intention on the ground of an alteration in circumstances.

No will to be
revoked by
presumption.

See *Re Wells*, *Hardisty v. Wells* (42 Ch. D. 646).

20. No will or codicil, or any part thereof, shall be revoked otherwise than as aforesaid, or by another will or codicil executed in manner hereinbefore required (o), or by some writing declaring an intention to revoke the same, and executed in the manner in which a will is hereinbefore required to be executed (p), or by the burning, tearing, or otherwise destroying the same by the testator, or by some person in his presence and by his direction, with the intention of revoking the same (q).

No will to be
revoked but
by another
will or codicil,
or by a
writing executed
like a
will, or by
destruction.

(o) The use of the words "last and only will" in a testamentary paper does not necessarily import a revocation of all previous instruments (*Simpson* will." *v. Foxon*, 1907, P. 54; see *Cutto v. Gilbert*, 9 Moo. P. C. 131; *Lemage v. Goodban*, L. R. 1 P. & M. 61; and in the case of real estate *Freeman v. Freeman*, 5 D. M. & G. 704).

An express revocatory clause in general terms revokes all former wills (*Sotheran v. Dening*, 20 Ch. Div. 99; *Harvey v. Harvey*, 32 L. T. 141; see *Cottrell v. Cottrell*, L. R. 2 P. & M. 397); even when the testatrix assured it would not have such effect, and only executed on this understanding (*Collins v. Elstone*, 1893, P. 1). A revocatory clause in an Italian will was held to revoke an English will so far as regards personal estate and executors (*Cottrell v. Cottrell*, *sup.*). But an express revocatory clause is not essential (*Dempsey v. Lawson*, 2 P. D. 98). "The question is, What disposition did the testator intend? not Which or what number of papers did he desire or expect to be admitted to probate?" (*Dempsey v. Lawson*, 2 P. D. 107). Where, accordingly, a subsequent will contained all the testamentary dispositions which the testatrix intended at that time to constitute her last will, a prior will was revoked, although the subsequent will contained no residuary or revocatory clauses (*Dempsey v. Lawson*, *ubi sup.*; see *Henfrey v. Henfrey*, 4 Moo. P. C. 29; *McAra v. M'Cay*, 21 L. R. Ir. 138; *Palmer v. Peat*, 58 L. J. Prob. 44; *Cadell v. Wilcocks*, 1898, P. 21). On the other hand, a prior will was admitted to probate on the ground that the subsequent will did not dispose of the residue (*Re Petchell*, L. R. 3 P. & M. 153; *Re Hartley*, 29 W. R. 356). And if on the face of the documents the intention remain in doubt, extrinsic evidence of surrounding circumstances may be admitted (*Re Bryan*, 1907, P. 125; see *Jenner v. Efinch*, 5 P. D. 206; *Paton v. Ormerod*, 1892, P. 247).

Where the subsequent will is not forthcoming, the evidence as to its contents must be conclusive (*Cutto v. Gilbert*, 9 Moo. P. C. 131; *Wood v. W.*, L. R. 1 P. & M. 309; *Brown v. B.*, 8 E. & B. 876).

If a subsequent testamentary paper is only partly inconsistent with one of an earlier date, the latter instrument is only revoked as to those parts where it is inconsistent, and both papers are entitled to probate (*Lemage v. Goodban*, L. R. 1 P. & M. 57; *Geaves v. Price*, 11 W. R. 809; see *Re Howard*, L. R. 1 P. & M. 636; *Cadell v. Wilcocks*, 1898, P. 21; *Townsend v. Moore*, 1905, P. 78). A testator left four testamentary instruments duly executed. After the Ecclesiastical Court had held that the second and third alone were valid

Revocation
by another
will or codicil.

1 Vict. c. 26, s. 20. as to the personal estate (1 Rob. 204), the Court of Chancery, on the certificate of the Common Pleas (6 C. B. 201), decided that, as to the real estate, the last instrument alone constituted the last will (*Plenty v. West*, 16 Beav. 173).

Where two testamentary documents of the same date contain provisions apparently inconsistent, the Court will reconcile them if possible, so that probate may be granted of both. Where reconciliation is impossible probate will be granted of neither (*Townsend v. Moore*, 1905, P. 66).

As regards the beneficial disposition, it has been said that a distinct disposition by will cannot be revoked except through words equally distinct (*Kellett v. K.*, L. R., 3 H. L. 167; *Re Wilcock, Kay v. Dewhirst*, 1898, 1 Ch. 98). Intention to revoke must be shown with reasonable certainty (*Randfield v. R.*, 8 H. L. C. 235; *Foxwell v. Van Grutten*, 1897, A. C. 694); and the revocation must not exceed what is necessary to give effect to the later gift (*Re Freme*, 1895, 2 Ch. 783; *Cleobury v. Beckett*, 14 Beav. 586; *Re Percival Boote v. Dutton*, 59 L. T. 21; *Re Wood, W. v. W.*, 83 L. T. 157; *Re Whitehorne, Whitehorne v. Best*, 1906, 2 Ch. 126).

In the absence of express revocation, a later inconsistent disposition, which is not valid in itself, does not revoke an earlier disposition (*Alexander v. Kirkpatrick*, L. R. 2 H. L. Sc. 403; *Re Fleetwood, Sidgreaves v. Brewer*, 15 Ch. D. 594; *Duguid v. Fraser*, 31 Ch. D. 449; see *contra*, *Baker v. Story*, 31 L. T. 631).

Revocation by writing declaring an intention to revoke.

(p) A testatrix devised real estates, and by a subsequent deed, attested by two witnesses, she conveyed them on other trusts. The deed, however, being void as a *turpis contractus*, was held not to be a writing declaring an intention to revoke (*Ford v. De Pontes*, 30 Beav. 572). A writing, by which a testator merely revokes a prior testamentary disposition, will not be admitted to probate (*Re Fraser*, L. R. 2 P. & M. 40); *secus*, if it be of a testamentary character (*Re Durance, ib.* 406; *Re Hubbard*, L. R. 1 P. & M. 53; *Re Hicks, ib.* 683; see *Tooner v. Sobinska*, 1907, P. 106).

Revocation by an act of destruction. *Animus revocandi* necessary. Dependent relative revocation.

(q) Mere abandonment is not sufficient revocation. There must be some act done (*Andrew v. Motley*, 12 C. B. N. S. 514). All acts by which a testator may destroy or mutilate a testamentary instrument are in their nature equivocal: unless the act be done *animus revocandi*, there is no revocation (*Powell v. P.*, L. R. 1 P. & M. 212). Where, therefore, the destruction is referable solely to the intention of setting up some other paper, the *animus revocandi* has only a conditional existence, the condition being the validity of the other paper; where the condition is unfulfilled, there is no revocation (*Ib.*; *Dancer v. Crabb*, L. R. 3 P. & M. 98; *Cossey v. C.*, 82 L. T. 203; see *Stamford v. White*, 1901, P. 46). So where there was an intention (never carried out) of executing a fresh will (*Dixon v. Treasury Solicitor*, 1905, P. 42). But the evidence must be clear as to the intention of the destruction (*Eckersley v. Platt*, L. R. 1 P. & M. 281); and subsequent declarations by the testator will not be admitted (*Re Weston*, L. R. 1 P. & M. 633; see the principle stated and discussed Wms. Exors., 10th ed., 112).

Mistake.

Where a testator tore up his will under a mistaken impression that it was invalid, there was no revocation (*Giles v. Warren*, L. R. 2 P. & M. 401; *Re Thornton*, 14 P. D. 82; *Beardsley v. Lacey*, 67 L. J. P. 35; 78 L. T. 25; distinguish *Collins v. Elstone*, 1893, P. 1); and so where a man destroyed his will in a fit of delirium tremens (*Brunt v. Brunt*, L. R. 3 P. & M. 37; see *Re Hine*, 1893, P. 282). But a testator may subsequently adopt the act so as to effect a revocation (*James v. Shrimpton*, 1 P. D. 433).

Part of will may be revoked by tearing.

It is not the manual operation which will satisfy the section; there must be the *animus* as well as the act. It is the *animus*, also, which must govern the extent and measure of operation to be attributed to the act (*Clarke v. Scripps*, 2 Rob. 567; *Clarkson v. C.*, 2 Sw. & Tr. 497; see *Doe v. Harris*, 6 Ad. & Ell. 209). Thus, where the first seven or eight lines of a will have been cut and torn off, it was admitted to probate in its incomplete state (*Re Woodward*, L. R. 2 P. & M. 206; *Christmas v. Whinyates*, 3 Sw. & Tr. 81; see *Re Leach*, 63 L. T. 111; *Re Maley*, 12 P. D. 134). But where a testator destroyed some sheets of a will and substituted others, but did not re-execute,

the whole will was revoked (*Treloar v. Lean*, 14 P. D. 49; see *Gullan v. 1 Vict. c. 26, Grove*, 26 Beav. 64; *Leonard v. Leonard*, 1902, P. 243). s. 20.

A testator having made a will executed under seal, and published and attested as a sealed instrument, afterwards for the purpose of revoking it tore off the seal and with it part of a word, the tearing off the seal was sufficient to revoke the will (*Price v. Powell*, 3 H. & N. 341; see *Doe v. Harris*, 6 Ad. & E. 209). By the statement in the witnessing clause at the end that the testator has set his hand to the preceding pages, a testator makes the signatures on those pages a part of his will, and if he afterwards, *animo revocandi*, tears off the signatures from the preceding pages, it is a good revocation (*Williams v. Tyley*, Johns. 530). A will was revoked by the testator cutting out his signature (*Hobbs v. Knight*, 1 Curt. 768; *Walker v. Armstrong*, 21 Beav. 305; on appeal, 4 W. R. 770), or erasing his own signature and those of the witnesses (*Re Morton*, 12 P. D. 141); but not where the signature was cut out under a mistaken belief (*Stamford v. White*, 1901, P. 46). Where the signature was scratched with a knife, but was still legible, probate was granted (*Re Godfrey*, 69 L. T. 22); and the accidental cutting through the signature of one of the witnesses was not a revocation (*Re Taylor*, 63 L. T. 230); nor was the erasure by the witnesses of their own signatures (*Margary v. Robinson*, 12 P. D. 8). Probate was granted in a case where the testator directed the name of an attesting witness to be erased (*Re Greenwood*, 1892, P. 7).

Tearing off seal.

Tearing off signatures.

A testator cut out of his will the names of the attesting witnesses, and afterwards on the same day replaced the piece so cut out, saying that the replaced will would do for the present. The court granted probate (*Re Eeles*, 32 L. J. Prob. 4; see *Re De Bode*, 5 Not. Cas. 189). Where the signature of the testator to a will had been cut out, but gummed on to its former place, the will was not admitted to probate (*Bell v. Fothergill*, L. R. 2 P. & M. 148; *Magnesi v. Hazelton*, 44 L. T. 586); but where a testator partially erased his own signature, and then re-wrote it, probate was granted (*Re Kennett*, 2 N. R. 461).

A will is not destroyed by being struck through with a pen, the name of the testator and the names of the attesting witnesses being struck through. "Otherwise destroying" a will, means some mode of destruction *ejusdem generis* (*Stephens v. Taprell*, 2 Curt. 465; *Re Brewster*, 6 Jur. N. S. 56).

If the act of destruction be done by any person other than the testator, it must be by the testator's order and in his presence (*Re Dadds*, D. & Sw. 290). Destruction by another in the presence of the testatrix was held not ratified (*Mills v. Milward*, 15 P. D. 20).

Cancelling.
Destruction by any person other than the testator.

After proof of execution of a will, the burden lies upon those who set up revocation; and revocation will not be presumed (*Benson v. B.*, L. R. 2 P. & M. 172). But where a will remains in the custody of the testator from the time when it is made until his death, and cannot then be found, the presumption of law is, that it was destroyed by the testator, *animo revocandi* (*Eckersley v. Platt*, L. R. 1 P. & M. 281; *Sudgen v. St. Leonards*, 1 P. D. 231; *Allan v. Morrison*, 1900, A. C. 604). The presumption applies even where a duplicate copy properly executed exists in the custody of the solicitor (*Jones v. Harding*, 58 L. T. 60; *Paige v. Brooks*, 75 L. T. 455). The court must be satisfied that the will in the custody of the testator was not in existence at the time of his death (*Finch v. F.*, L. R. 1 P. & M. 371). Where a will and a codicil revoking part of the will were in the custody of the testator, and only the will was forthcoming, the codicil was presumed to be revoked, but probate of the will was only granted so far as not revoked by the codicil (*Sanger v. Hart*, 77 L. T. 374). To rebut the presumption, declarations made by the testator are admissible in evidence (*Whiteley v. King*, 17 C. B. N. S. 756; *Sudgen v. St. Leonards*, 1 P. D. 231), declarations to a contrary effect being admissible in answer (*Keen v. K.*, L. R. 3 P. & M. 105; see *Re Sykes, Drake v. Sykes*, 23 Times L. R. 747). The presumption does not apply where the testator becomes insane after the execution, and continues insane until his death (*Sprigge v. S.*, L. R. 1 P. & M. 608).

Onus of proof of revocation.
Will in testator's custody not forthcoming at his death;

Where a will in the custody of a testator is found after his death mutilated, found mutilated at his death.

1 Vict. c. 26,
s. 20.

Revocation
of codicils.

the presumption in the absence of evidence is that it was mutilated by him after its execution, and, if there be a codicil, after the execution of the codicil (*Christmas v. Whynates*, 2 Sw. & Tr. 81; 11 W. R. 371).

Under the law before this statute, a codicil stood or fell with the will; under the new law, a codicil can only be revoked by one of the modes indicated in this section, and is not revoked by the revocation of the will (*Re Savage*, L. R. 2 P. & M. 78; *Re Turner*, *ib.* 403; *Black v. Jobling*, L. R. 1 P. & M. 635; *Farrer v. St. Catherine's College*, 16 Eq. 19; *Gardiner v. Courthorpe*, 12 P. D. 14), unless there was an intention to revoke both (*Re Bleckley*, 8 P. D. 169; see the earlier cases, *Re Greig*, L. R. 1 P. & M. 72; *Re Ellice*, 12 W. R. 353).

Where a codicil confirms a will in general terms, the will, together with all previous codicils, is taken to have been confirmed (*Green v. Tribe*, 9 Ch. D. 231, 234); and a reference to the date of the will in the confirming codicil does not constitute an implied revocation of antecedent codicils (*Green v. Tribe*, *sup.*); *Re De La Saussaye*, L. R. 3 P. & M. 42). So where a third codicil confirmed a will (referred to by date) except as altered by a first codicil, it was held there was no implied revocation of a second codicil (*Follett v. Pettman*, 23 Ch. D. 337). An earlier codicil was, however, held under the circumstances to have been impliedly revoked (*McLeod v. McNab*, 1891, A. C. 471; see *Chichester v. Quatrefages*, 1895, P. 186; *Re Carritt*, 66 L. T. 379). And where a codicil is of itself inoperative, a confirmation by a latter codicil of a will which is referred to by date and is antecedent to the inoperative codicil will not operate so as to set up the inoperative codicil (*Burton v. Newbery*, 1 Ch. 234; see *French v. Hoey*, 1899, 2 Ir. 472).

Revocation
by married
woman; or of
testamentary
appoint-
ments.

A married woman may revoke a will made under a power in any of the modes pointed out by this section (*Hawksley v. Barrow*, L. R. 1 P. & M. 147). As to the revocation of testamentary appointments generally, see p. 474, *post*.

No alteration
in a will shall
have any
effect unless
executed as
a will.

21. No obliteration, interlineation, or other alteration made in any will after the execution thereof shall be valid or have any effect, except so far as the words or effect of the will before such alteration shall not be apparent, unless such alteration shall be executed in like manner as hereinbefore is required for the execution of the will; but the will, with such alteration as part thereof, shall be deemed to be duly executed if the signature of the testator and the subscription of the witnesses be made in the margin or on some other part of the will opposite or near to such alteration, or at the foot or end of or opposite to a memorandum referring to such alteration, and written at the end or some other part of the will.

Presumption
as to time of
alterations
in wills.

The mere circumstance of the amount or the name of the legatee being inserted in different ink and in a different handwriting does not alone constitute an obliteration, interlineation or other alteration within the meaning of this section, nor does any presumption arise against a will being duly executed as it appears. The case is different where there is an erasure apparent on the face of the will, and that erasure has been super-induced by other writing. In such circumstances the *onus probandi* lies upon the party who alleges such alteration to have been made prior to execution, to prove by extrinsic evidence that the words were inserted before execution, and that they had the sanction of the testator (*Greville v. Tylee*, 7 Moo. P. C. C. 320; *Williams v. Ashton*, J. & H. 115; *Simmons v. Rudall*, 1 Sim. N. S. 137).

More generally the rule is stated thus:—In the absence of evidence there is a presumption that alterations on the face of a will were made after its execution (*Cooper v. Bockett*, 4 Moo. P. C. C. 439; *Re Sykes*, L. R. 3 P. & M. 26); and when a will has been republished by a codicil, after the execution

of the codicil also (*Lushington v. Onslow*, 6 Not. Cas. 183). This presumption will not be rebutted by the fact that the alterations bear in the handwriting of the testator an earlier date than the will (*Re Adamson*, L. R. 3 P. & M. 253); but may be rebutted by evidence of declarations made by the testator before execution of the will (*Doe v. Palmer*, 16 Q. B. 747; *Dench v. Dench*, 2 P. D. 60), or of the codicil (*Re Sykes*, *sup.*); or by evidence of other persons that the alterations in the will were made prior to the execution of the codicil (*Tyler v. Merchant Taylors' Co.*, 15 P. D. 216; see *Re Greenwood*, 1892, P. 7); or by the language of the codicil (*Re Heath*, 1892, P. 253; see *Re Hay*, *Kerr v. Stinnear*, 1904, 1 Ch. 321). The court may look at any evidence for the purpose (*Re Tonge*, 66 L. T. 60).

1 Viet. c. 26,
s. 21.

Where an expert deposed that in his opinion some trifling alterations and interlineations appearing on the face of a will were written at the same time as the rest, they were admitted to probate (*Re Hindmarch*, L. R. 1 P. & M. 307; *Moore v. M.*, 1. R. 6 Eq. 166); and from the nature of certain interlineations and the internal evidence furnished by the document itself, the court concluded that they were made before execution and admitted them to probate (*Re Cadge*, L. R. 1 P. & M. 543; *Re Duffy*, 1. R. 5 Eq. 506). Certain words were admitted as being in the nature of an interlineation (*Re Birt*, L. R. 2 P. & M. 214; see *Royle v. Harris*, 1895, P. 163). A second codicil included and rendered valid an interlineation in a first codicil (*Oldroyd v. Harvey*, 1907, P. 326).

Where it appears that alterations have been made before execution, the probate is usually engrossed fair; but where the construction may be affected by the appearance of the original paper, probate is sometimes granted in facsimile (1 Wms. Exors., 10th ed. 240). Where probate was granted with lines drawn in ink over the bequest of certain legacies, the Court of Chancery inferred the meaning of the testator from the instrument in that form (*Gann v. Gregory*, 3 D. M. G. 777; *Shea v. Boschetti*, 18 Beav. 321). In some cases the Court of Chancery has looked at the original will (*Manning v. Purcell*, 7 D. M. G. 55; *Compton v. Bloxham*, 2 Coll. 201; see *Oppenheim v. Henry*, 9 Hare, 802, note (6); *Child v. Elsworth*, 2 D. M. G. 683; *Re Harrison*, *Turner v. Hellard*, 30 Ch. Div. 390).

Meaning of
"apparent."

Where alterations made subsequently to the execution of the will are not attested in the manner required by this section, probate will be granted of the will as it originally stood, if that is apparent (*Re Beavan*, 2 Curt. 369; *Re Martin*, 1 Rob. 712; *Re Gaussens*, 16 W. R. 212); but if not, probate will be granted in blank as to such parts of the will as cannot be read (*Re Ibbetson*, 2 Curt. 337). In order to discover the words as they originally stood, the court will submit the will to the examination of persons accustomed to inspect writings; and it is sufficient if they can be made out with the aid of magnifying glasses, or by evidence of that nature (*Ib.*; *Ffinch v. Combe*, 1894, P. 191; *Re Brasier*, 1899, P. 36). Chemical agents have not been resorted to (*Re Horsford*, L. R. 3 P. & M. 211).

Pasting paper over words in a will is "obliteration" (*Ffinch v. Combe*, 1894, P. 191). Paper has been removed where it covered only the amount of a legacy (*Re Horsford*, L. R. 3 P. & M. 211); or to see whether what was written underneath amounted to revocation (*Re Gilbert*, 1893, P. 183). The word "apparent" applies to what is apparent on the face of the instrument itself. Where a testator completely obliterated several pages of his will, this was a complete revocation of those parts (*Townley v. Watson*, 3 Curt. 761; see *Re Horsford*, L. R. 3 P. & M. 211).

Intention must accompany the acts mentioned in this section in the same way as those mentioned in the 20th section. Under the Statute of Frauds (*Bibb v. Thomas*, 2 W. Bl. 1044) and this act, intention is indispensable. Under the former statute, to burn, or to tear, or to obliterate a part of a will, was altogether a nullity, if such act was done without an intention to revoke. Similar principles must be applied under the present statute (*Brooke v. Kent*, 3 Moo. P. C. C. 349, 350). Where a testator intended to substitute a different sum to that originally given, and such substituted sum was not effectually given, the original legacy was not revoked (*Brooke v. Kent*, 3 Moo. P. C. C. 334; *Re Horsford*, L. R. 3 P. & M. 211).

Animus
revocandi.

1 Vict. c. 26, s. 21. The initials of the testator and witnesses placed opposite an alteration are sufficient to render it valid (*Re Blewitt*, 5 P. D. 116); but not the initials of the witnesses only (*Re Shearn*, 43 L. T. 736; see *Re Dewell*, 17 Jur. 1130). As to whether the attestation gives validity to more than one alteration, see *Re Wilkinson* (6 P. D. 100); *Re Treeby* (L. R. 3 P. & M. 242).

Attestation of alteration.

As to when the signature to a will is to be deemed valid, see Wills Act Amendment Act, 1852, s. 1, and note thereto, *post*, p. 480.

No will revoked to be revived otherwise than by re-execution or a codicil to revive it.

22. No will or codicil, or any part thereof, which shall be in any manner revoked shall be revived otherwise than by the re-execution thereof, or by a codicil executed in manner hereinbefore required, and showing an intention to revive the same; and when any will or codicil which shall be partly revoked, and afterwards wholly revoked, shall be revived, such revival shall not extend to so much thereof as shall have been revoked before the revocation of the whole thereof, unless an intention to the contrary shall be shown.

Codicil must show an intention to revive.

Before the act, the mere execution of a codicil to a will was sufficient to revive the will by implication (*Re Steele*, L. R. 1 P. & M. 575, 578). Since this statute a will cannot be revived by mere implication. To revive a will, a codicil must show an "intention to revive"; and the intention must appear on the face of the codicil either by a disposition of the testator's property inconsistent with any other intention, or by some expression conveying the intention with reasonable certainty (*Ib.*). The word "confirm" in a codicil has the operation of "revive" used in the statute (*M'Leod v. M'Nab*, 1891, A. C. 476). As to republication, see *Re Smith, Bilke v. Roper* (45 Ch. D. 632, *post*, p. 480). Mere references in codicils to revoked wills by their dates were insufficient to revive them (*Re Steele, sup.*; *Re Dennis*, 1891, P. 326; see *Re Snowden*, 75 L. T. 279). Unless it can be explained by the special circumstances of the case, *Payne v. Trappes* (1 Rob. 583) seems inconsistent with the above authorities; see also *Re Reynolds* (L. R. 3 P. & M. 35); *Re Ince* (2 P. D. 111); *Re Gordon* (1892, P. 228). A codicil has been held by its language to revive a revoked will, although the reference to such revoked will by its date was inserted by mistake (*Re Stedham*, 6 P. D. 205; *Re Dyke, Ib.* 207; *Re Chilcott*, 1897, P. 223). As to the revival of codicils, see *Green v. Tribe* (9 Ch. D. 232); *Burton v. Newbery* (1 Ch. D. 234; *ante*, p. 462). Where a testator revoked a first will by a second will, and by a subsequent codicil confirmed his last will, the first will was revived (*Re Van Cutsem*, 63 L. T. 252, see the words of confirmation; see also *Re Turner*, 64 L. T. 805).

Destruction of revoking instrument.

Where a testatrix executed second and third wills, both revoking all former wills, and afterwards destroyed the two latter wills, the first will was not thereby revived, and parol evidence was not admissible to show an intention to revive (*Major v. Williams*, 3 Curt. 432; *Powell v. Powell*, 1 P. & M. 209; *James v. Shrimpton*, 1 P. D. 431; *Re Hodgkinson*, 1893, P. 339).

Will to be revived must be in existence.

Where a testator directed that in a certain event a former will which had been revoked by marriage should be revived, the former will was included in the probate (*Re Bangham*, 1 P. D. 429); but where a testatrix purported by a codicil to revive a will not only revoked but destroyed, the court refused to grant probate of the draft (*Hale v. Tokelove*, 2 Robert. 318; *Rogers v. Goodenough*, 2 Sw. & Tr. 342; see *Re Steele*, L. R. 1 P. & M. 577; *Re Chilcott*, 1897, P. 223; *Re Reade*, 1902, P. 75).

Revocation of a substituted legacy.

Where a testator gave 100*l.* to his executor, and by a subsequent codicil gave him 500*l.* in substitution, and then revoked the second gift, the first gift was not set up again (*Boulcott v. B.*, 2 Drew. 25).

23. No conveyance or other act made or done subsequently to the execution of a will of or relating to any real or personal estate therein comprised, except an act by which such will shall be revoked as aforesaid, shall prevent the operation of the will with respect to such estate or interest in such real or personal estate as the testator shall have power to dispose of by will at the time of his death.

1 Vict. c. 26,
s. 23.

A devise not to be rendered inoperative by any subsequent conveyance or act.

This clause of the act applies to cases where testators, after having devised their estates, make conveyances of them which are to have the same effect as fines or recoveries, or where they mortgage the devised estates in fee and afterwards take a reconveyance of them to themselves and a trustee to bar dower; but it does not apply to cases where the thing meant to be given is gone (*Moor v. Raisbeck*, 12 Sim. 139; *Blake v. Blake*, 15 Ch. D. 487). Those cases in which a will was revoked by an alteration of the estate of the testator are put an end to by this section (*Ford v. De Pontes*, 30 Beav. 593). As to revocation by alteration of estate, see, further, *Plowden v. Hyde* (2 D. M. & G. 684; *Jacob v. J.* (82 L. T. 270); 1 Jarm. Wills, 128 *et seq.*); and as to the bearing of this section upon wills prior to 1838, see *Langford v. Little* (2 J. & Lat. 613); *Walker v. Armstrong* (21 Beav. 284).

A testatrix having devised a real estate, afterwards sold it. The purchase was not completed until after her death. It was held that the purchase-money belonged to the personal representatives, and not to the devisees of the testatrix (*Farrar v. Winterton*, 5 Beav. 1). A similar decision was given where the estate devised had been conveyed to a purchaser who had re-mortgaged to the testatrix as a security for the purchase-money (*Moor v. Raisbeck*, 12 Sim. 139; *Re Clowes*, 1893, 1 Ch. 214; compare *Re Carter, Dodds v. Pearson*, 1900, 1 Ch. 801). And where the owner of an estate, after having devised it to an infant, agreed under compulsion to sell a portion of it to a railway company, and died before completion, his executors, and not the devisee, were entitled to the purchase-money (*Re Manchester R. Co.*, 19 Beav. 365; *Ex p. Hawkins*, 13 Sim. 569). The rents, however, until completion will in such a case pass to the devisee (*Watts v. W.*, 17 Eq. 217). Compare with the above cases the similar result arrived at where the owner of an estate granted an option of purchase which was exercised after his death (*Lauves v. Bennett*, 1 Cox, 167; *Re Isaacs, Isaacs v. Reginald*, 1894, 3 Ch. 506).

Devise of lands and the subsequent contract to sell.

On the other hand where the owner of freeholds granted a lease of them with an option of purchase to the lessee, and on the same day executed a codicil confirming a specific devise of these freeholds in a previous will, and the lessee exercised the option after the testator's death, the specific devisee took the purchase-money (*Re Pyle, P. v. P.*, 1895, 1 Ch. 724; see *Drant v. Vanse*, 1 Y. & C. Ch. 580; *Emuss v. Smith*, 2 De G. & Sm. 722).

As to the effect of a devise upon lands contracted to be sold, see, further, 1 Jarm. Wills, 51 *et seq.* And as to the effect, under the old law, of a contract to sell lands upon a prior devise, see *Andrew v. A.* (8 D. M. G. 336; Sugd. R. P. Stat. 360—364).

Where land was settled to such uses as A. should by will appoint, with a power of sale in trustees exerciseable with A.'s consent, an appointment of the land by A. under his general power did not carry the purchase-money of the property which before A.'s death had been sold with his consent, nor the land purchased with such money (*Gale v. G.*, 21 Beav. 349; *Blake v. B.*, 15 Ch. D. 481). There was a similar result in the case of a special power (*Beddington v. Bauman*, 1903, A. C. 13; *Re Dowsett, Dowsett v. Meakin*, 1901, 1 Ch. 398).

Revocation of prior devise by contract under power of sale.

Where a testator bequeathed leaseholds for the residue of the terms for which the same should be held by him at his death, and afterwards acquired the fee, the fee passed (*Struthers v. S.*, 5 W. R. 809; see *Cox v. Bennett*, 6 Eq. 422; *Saxton v. S.*, 13 Ch. D. 359; *Re Knight, Knight v. Burgess*, 34 Ch. D. 518). So with respect to an increased share in a partnership

Bequest of leaseholds and subsequent purchase of fee.

1 Vict. c. 26, business (*Re Russell, Russell v. Chell*, 19 Ch. D. 432). A devise, however, of a mortgage estate was adeemed by a subsequent acquisition of the equity of redemption (*Yardley v. Holland*, 20 Eq. 428).

Where the effect of a testamentary appointment was in question this section was held to cover the case of the creation of a new power by the testatrix herself after the date of her will (*Airey v. Bower*, 12 App. Cas. 263).

A will shall be construed to speak from the death of the testator.

24. Every will shall be construed, with reference to the real estate and personal estate comprised in it, to speak and take effect as if it had been executed immediately before the death of the testator, unless a contrary intention shall appear by the will.

Rule as to wills prior to 1838.

In a will prior to 1838 a gift of a testator's real and personal estate was read as a gift of the real estate belonging to the testator at the date of the will, and of the personal estate belonging to him at the date of his death (1 Jarm. Wills, 5th ed. 290; see Hawk. Wills, 14; *Hance v. Truwhitt*, 2 J. & H. 216).

Cases under section.

In wills since 1837 descriptions of real or personal estate *primâ facie* refer to the property answering to the description at the testator's death (*Re Slater, S. v. S.*, 1906, 2 Ch. 484; *Higgins v. Dawson*, 1902, A. C. 7). Thus a bequest of shares in company A. carried shares of the nature existing at the death, not as they existed at the date of the will (*Re Gillins, Inglis v. Gillins*, 1909, 1 Ch. 345). And where a testator bequeathed money invested in company A. and at his death his previous investment in company A. was represented by stock of company B. which under statute had been issued in respect of investments in company A. as compensation therefor, the bequest failed (*Re Slater, S. v. S.*, 1907, 1 Ch. 665). The section precluded the reception of extrinsic evidence as to the amount of a testator's assets at the date of his will tendered as bearing on its construction (*Higgins v. Dawson*, 1902, A. C. 11).

In wills since 1837, if the words of a specific gift describe a particular property which the testator had at the date of his will, that, and that alone, will pass. But where the specific gift is generic (as "all my lands in the Parish of Dale"), it will now pass all the testator's lands in that parish at his death (*Re Bridger, Brompton v. Lewis*, 1894, 1 Ch. 302; *Re Jameson, King v. Winn*, 1908, 2 Ch. 116). The bequest remains specific in its nature (*Bothamly v. Sherson*, 20 Eq. 313). In the case of general legacies the language is to be applied to the state of things at the death; even though the result may be to alter the effect of the general legacy as against the residuary gifts (*Re Gillins, Inglis v. Gillins*, 1909, 1 Ch. 352). But in general the section leaves open the question whether a particular property passes by the specific or residuary devise (*Re Portal and Lamb*, 30 Ch. D. 50). It is doubtful whether the section applies to the construction of an exception (*Hughes v. Jones*, 1 H. & M. 765).

Contrary intention. Particular description of subject of gift.

The "contrary intention" must be found in the will itself (see *Boyes v. Cook*, 14 Ch. Div. 57), but need not be expressed in so many words (*Cole v. Scott*, 1 Mac. & G. 518). The date may show a contrary intention (*Re Wells, Hardisty v. Wells*, 42 Ch. D. 646). Again, a contrary intention may appear from a particular description of the subject of the gift; which may accordingly be held to pass some particular thing as it existed at the date of the will (*Re Evans, Evans v. Powell*, 1909, 1 Ch. 784). Thus, where a testator devised his freehold estate, which he purchased of C.; but a plot purchased with the estate by the testator of C., and held with it, was leasehold, and the testator subsequently purchased the fee of that plot: the devise did not pass the after-acquired fee (*Emuss v. Smith*, 2 De G. & Sm. 722). See *Pierce v. A.-G.* (3 W. R. 612), where a subsequently-acquired freehold was held not to pass under a gift of leaseholds and all other estate and effects. A devise of freeholds was limited, so as to exclude after-acquired property,

by the words "which I have lately purchased" (*Cave v. Harris*, 57 L. T. 768). Where, however, a testator has bequeathed particular leaseholds, describing them as such, and has subsequently acquired the fee, the fee has been held to pass (*Struthers v. S.*, 5 W. R. 809; *Miles v. M.*, 1 Eq. 462; *Cox v. Bennett*, 6 Eq. 422; *Wedgwood v. Denton*, 12 Eq. 290; *Saxton v. S.*, 13 Ch. D. 359; *Hallett v. H.*, 14 Times L. R. 420).

1 Vict. c. 26,
s. 24.

Leaseholds.

Where a testatrix devised "all my Q. estates in Essex," other estates in the same locality, acquired after the date of her will, did not pass. The term was an arbitrary designation which had acquired a certain meaning in the mind of the testatrix, and could not be extended (*Webb v. Byng*, 1 K. & J. 580). But where a testator devised his estate called C., property acquired after the date of the will, and treated by the testator as additions to C., passed (*Castle v. Fox*, 11 Eq. 542; *Strevens v. Bailey*, 8 Ir. C. L. R. 410). So where a testator had two adjoining properties, a devise by name of one of them which he occupied passed a portion which he also occupied of the other (*Re Potter, Strevens v. Potter*, 83 L. T. 405; see *Re Midland Ry.*, 34 Beav. 525). As to the effect of the words "heretofore mentioned," &c., occurring in the description of the property, see *Jepson v. Key* (2 H. & C. 873). Devises have been held to pass after-acquired real estate, notwithstanding provisions which seemed to refer to personal estate only (*Stokes v. Salomons*, 9 Hare, 75; *O'Toole v. Browne*, 3 El. & Bl. 572; *Lloyd v. Lloyd*, 7 Eq. 458).

Arbitrary
designations
of real estate.

"Heretofore
mentioned."

Descriptions
of money,
stock, etc.

A gift of "all my stock" would pass all stock to which the testator was entitled at his death. But "all my stock which I have purchased," would be enough on the face of the will to show that the property which he intended to give was property then in his possession (*Douglas v. D.*, Kay, 405; see *Re Gray, Dresser v. Gray*, 36 Ch. D. 207). "When I refer to a particular thing, such as a ring or a horse, and I bequeath it as 'my ring' or 'my horse,' there might be considerable difficulty in saying that the 'contrary intention' does not appear; but when a bequest is of that which is generic—which may be increased or diminished, then the act requires more on the face of the will, indicating such 'contrary intention,' than the circumstance that the subject of the bequest is designated by the pronoun 'my'" (*Goodlad v. Burnett*, 1 K. & J. 348). A bequest of "My New Three-and-a-quarter per Cent. Annuities" carried the annuities possessed by the testatrix at her death (*Goodlad v. Burnett*, 1 K. & J. 341; *Trinder v. T.*, 1 Eq. 695; *Bothamley v. Sherson*, 20 Eq. 312). See and distinguish the cases where bequests of "my shares" or "my debentures" have been held to fail on the ground of ademption (*Re Gibson*, 2 Eq. 669; *Re Lane, Luard v. Lane*, 14 Ch. D. 856). A bequest "of my stock in trade and debts accruing therefrom" passed the testator's stock in trade and trade debts existing at the time of his death (*Ferguson v. F.*, 1 L. R. 6 Eq. 199; *Moore v. Madden*, 1 L. R. 2 Eq. 511). Where a testator, after reciting his title to one-third of a business, bequeathed "all my share in the business," and after the date of the will acquired the whole business; the will operated upon the testator's interest at his death (*Re Russell, Russell v. Chell*, 19 Ch. D. 432).

"My."

Again, a contrary intention may appear from the words of the gift referring to the present time. Thus, where a testator devised the house "wherein I now reside," and afterwards devised "all such trust estates as are now vested in me, or as to the leasehold premises as shall be vested in me at the time of my death;" freehold estates purchased between the date of his will and his death, did not pass (*Cole v. Scott*, 1 Mac. & G. 518): The word "now" received the same construction in *Hutchinson v. Barrow* (6 H. & N. 533); "a gift of the house I now live in" was held to refer to the house as occupied by the testatrix at the date of the will (*Williams v. Owen*, 9 L. T. 200; *Re Edwards, Rowland v. Edwards*, 63 L. T. 481). On the other hand, where a testator devised a messuage wherein A. "now resides, with the stables or appurtenances thereto belonging and therewith occupied;" a garden acquired by the testator after the date of his will, passed (*Re Midland R. Co.*, 34 Beav. 525; see *Re Champion, Dudley v. Champion*, 1893, 1 Ch. 101). Under a gift of "any other property that I may now possess,"

Effect of
words refer-
ring to
present time.
"Now."

- 1 Vict. c. 26, personally acquired after the date of the will passed (*Wagstaff v. W.*, 8 Eq. 229 ; s. 24. *Hepburn v. Skirving*, 4 Jur. N. S. 651). A testator bequeathed leaseholds to A. charged with "the annuity of 9l. now charged thereon in favour of my sister;" held, that leaseholds acquired after the date of the will were included in the bequest (*Re Ord, Dickinson v. D.*, 12 Ch. Div. 22). As to the effect of the words "in their present state," see *Re Portal and Lamb* (30 Ch. Div. 50). And as to a reference to lands "lately purchased," see *Cave v. Harris* (57 L. T. 768). Under a devise of lands "of which I am seised" at a particular place, lands acquired after the date of the will have been held to pass (*Doe v. Walker*, 12 M. & W. 591; *Langdale v. Briggs*, 3 Sm. & Giff. 246; *Lilford v. Keck*, 30 Beav. 300).
- Lands "of which I am seised." As to the effect on this question of a codicil confirming the will, see *Re Champion, Dudley v. Champron* (1893, 1 Ch. 101); compare *Re Blackburn, Smiles v. Blackburn* (43 Ch. D. 75); *Re Taylor, Whitby v. Highton* (58 L. T. 842).
- Codicil. A release of all moneys due from A. was construed as a release of moneys due at death, although the will contained a recital as to the sums in which A. was "now indebted" (*Everett v. E.*, 7 Ch. Div. 428). But where a testator exonerated A. from "all claims in respect of moneys laid out by me in improvements of the estate in Scotland, and which money has, according to the laws of Scotland, been charged thereon;" the exoneration only applied to moneys so charged at the date of the will (*Douglas v. D.*, Kay, 400). A release of interest was confined by a recital in the will to interest on a debt due to the testator at the date of the will (*Sidney v. S.*, 17 Eq. 65). A direction to forgive a tenant all rents "due and owing" at the testator's death was held to relate to rent not up to the death but up to the last rent day before the death (*Re Lucas, Parish v. Hudson*, 54 L. T. 30).
- Releases. A gift of "such part of my residue which may by law be given" to charity took effect having regard to the law not at the date of the will, but at the date of the testator's death (*Re Bridger, Brompton v. Lewis*, 1894, 1 Ch. 297; see *Re Hume, Forbes v. Hume*, 1895, 1 Ch. 422). There was a similar decision where a will made prior to the Finance Acts, 1894 and 1896, contained a bequest of legacies "free from duty" and the testator died after those acts (*Re Turnbull, Skipper v. Wade*, 1905, 1 Ch. 732).
- Reference to existing law. A residuary devise of real estate was held to be specific before the Wills Act (*Mirehouse v. Scaife*, 2 M. & Cr. 695). And such a devise remains specific, notwithstanding the Wills Act (*Hensman v. Fryer*, 3 Ch. 420; *Gibbins v. Eyden*, 7 Eq. 371; *Phillips v. Low*, 1892, 1 Ch. 50). Accordingly, lands specifically devised, lands comprised in a residuary devise, and personal estate specifically bequeathed, are to be applied rateably in payment of debts (*Eddels v. Johnson*, 1 Giff. 22; *Pearmain v. Twiss*, 2 Giff. 130; *Clark v. C.*, 4 Giff. 702; *Lancefield v. Iggulden*, 10 Ch. 136). And a pecuniary legatee, unless the legacy is charged on the residuary real estate, has no right to call upon a residuary devisee to contribute to the payment of debts (*Farquharson v. Floyer*, 3 Ch. D. 109; *Re Bawden, National Bank v. Cresswell*, 1894, 1 Ch. 693; see *ante*, p. 407).
- Residuary devise remains specific notwithstanding this statute. By sect. 3 of the M. W. P. Act, 1893 (*ante*, p. 367), this section applies to the wills of married women. See the note to sect. 8 of the present act (*ante*, p. 448).
- Married women. For the bearing of this section on wills in execution of powers, see the note to sect. 27 (*post*, p. 473).
- Powers. After the date of his will a testator was duly declared lunatic, and so remained till his death. During his lunacy changes were made by the court in the state of his property. It was held, that his will must be read as speaking from its date and not from the death of the testator (*Wheeler v. Thomas*, 4 L. T. 173; compare *Re James, Hole v. Bethune*, 1910, 1 Ch. 157).
- Lunatics. This section of the act does not apply to the objects of the testator's bounty. Thus a bequest to the testator's son's "wife" refers *primâ facie* to the wife existing at the date of the will (*Re Coley, Hollinshead v. Coley*, 1903, 2 Ch. 102). See further *Bullock v. Bennett*, 7 D. M. & G. 283; *Gibson v. G.*, 1 Drew. 62; *Radford v. Willis*, 7 Ch. 7; Jarm. Wills, 5th ed. 302.
- Section does not apply to the objects of gift.

25. Unless a contrary intention shall appear by the will, such real estate or interest therein as shall be comprised, or intended to be comprised, in any devise in such will contained, which shall fail or be void by reason of the death of the devisee in the lifetime of the testator, or by reason of such devise being contrary to law or otherwise incapable of taking effect, shall be included in the residuary devise (if any) contained in such will.

1 Vict. c. 26,
s. 25.

A residuary devise shall include estates comprised in lapsed and void devises.

In wills prior to 1838, a residuary devise does not include specific devises which lapse (Hawk. Wills, 44), or which are void (*Smith v. Lomas*, 12 W. R. 949). But a residuary bequest does include lapsed and void legacies (Hawk. Wills, 40; see 1 Jarm. Wills, 5th ed. 609). This section is to be construed upon the principle of assimilating a residuary devise of real estate to a similar bequest of personalty (*Carter v. Haswell*, 26 L. J. Ch. 576; 5 W. R. 308; see *Blight v. Hartnoll*, 23 Ch. Div. 218).

Rule as to wills prior to 1838.

A testatrix devised estate E. to A. absolutely, and "all my freeholds, &c. not hereinbefore devised" to &c. for life, with remainders over; A. died before the testatrix: held, that estate E. passed under the residuary devise (*Green v. Dunn*, 20 Beav. 6). A testator devised specific real estate to M., and devised and bequeathed "*All other real and personal estate of which he might die possessed*" to M. and others of his children. M. died in his lifetime: it was held, that the devise expressed by the words "all other, &c." was a residuary devise within the section, and included the real estate devised to M. (*Cogswell v. Armstrong*, 2 K. & J. 227; and see *Culsha v. Cheese*, 7 Hare, 236; *Hickson v. Wolfe*, 9 Ir. Ch. R. 452).

Residuary devises within this section.

It was held that a residuary devise operating as an appointment under a special power is within this section; *Jessel*, M.R., laying down that the word "devise" in the act includes in general a devise by way of appointment under a power, whether special or general (*Freme v. Clements*, 18 Ch. D. 499). This principle, however, has been disapproved by the C. A., who have held that it does not apply to sect. 33 (*Holyland v. Lewin*, 26 Ch. Div. 266).

The section applies only where there is a universal residuary devise, and does not apply to a gift of a particular residue. Thus where a testatrix devised to A. certain lands in the parish of H., which devise was held void, and to the plaintiff the rest of her hereditaments in the same parish, the plaintiff did not take the lands comprised in the void devise (*Springett v. Jennings*, 6 Ch. 333; *Re Brown*, 1 K. & J. 521). But a residuary gift of freeholds only may be a residuary devise within the section (*Re Mason*, *Ogden v. Mason*, 1903, A. C. 1).

Gift of particular residue.

Compare *McKay v. M.*, 1900, 1 Ir. R. 213, where lapsed legacies were held to fall into a particular residue; and *Johns v. Wilson*, 1900, 1 Ir. R. 342, where there were two residuary gifts.

26. A devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copyhold or leasehold estate, if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold and leasehold estates of the testator, or his customary, copyhold and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will.

A general devise of the testator's lands shall include copyhold and leasehold as well as freehold lands.

- 1 Vict. c. 26, s. 26.** In wills prior to 1838, "if a man has lands in fee and lands for years and devises all his lands . . . the fee simple lands pass only and not the lands for years: but if he has no fee simple the lease for years passes" (*Rose v. Bartlett*, Cro. Car. 293). This rule was in substance overruled by the first portion of the above section (*Butler v. B.*, 28 Ch. D. 72). The act throughout proceeds on the footing that leasehold property is not real but personal estate (see sect. 1); so that sect. 26 was wanted to include leaseholds under "lands" (*Re Grassi, Stubbsfield v. Grassi*, 1905, 1 Ch. 590).
- Law before the act.** Both the reversion in fee and also a derivative leasehold interest in the same land were held to pass under a devise of "freehold land" at a certain place (*Matthews v. M.*, 4 Eq. 278; see *Re Guyton and Rosenberg*, 1901, 2 Ch. 593).
- Cases on the section.** Where a testator gave his "real estates" upon certain trusts and his personal estates upon other trusts, it was argued that the gift of real estates was a "general devise," and included leaseholds; but the leaseholds were held to pass with the personal estate (*Butler v. B.*, 28 Ch. D. 66). Where a testator having bequeathed the residue of his personal estate to A., devised all his lands, &c., at W. in the county of Durham, and at B. in the county of York, and all other his real estates in the counties of Durham and York, and all his estate and interest therein to trustees; it was held, by Sir J. Romilly, following the opinion of the Courts of Exchequer (5 Exch. 752) and Queen's Bench (18 Q. B. 474); but contrary to the opinion of Lord Langdale (11 Beav. 237), that the testator's leaseholds in Durham passed to the trustees (*Wilson v. Eden*, 16 Beav. 153). A gift of real estate situate at a particular place has been held to include leaseholds (*Moase v. White*, 3 Ch. D. 163; *Best v. Standeven*, 1872, W. N. 44; *Re Davison, Greenwell v. Davison*, 58 L. T. 304).
- Devise of land.** Where a testator who had no freeholds, but had leaseholds which he believed to be freeholds, gave his real estate upon trust to make a payment; the leaseholds were charged with the payment (*Gully v. Davis*, 10 Eq. 562).
- Devise of real estate.** The fact of limitations of a will being applicable in their entirety to freehold land only is not by itself sufficient to show a contrary intention within the section (*Wilson v. Eden*, 16 Beav. 153; *contra*, *S. C.*, 11 Beav. 238). But this has great weight when combined with other indications in the will (*Prescott v. Barker*, 9 Ch. 174, where *Wilson v. Eden* was criticised). Where, in addition to a general devise of real estate, the will contained an express bequest of leaseholds, this showed a contrary intention (*Re Guyton and Rosenberg*, 1901, 2 Ch. 593).
- Contrary intention.**
- 27.** A general devise of the real estate of the testator, or of the real estate of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, shall be construed to include any real estate, or any real estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will; and in like manner a bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate, or any personal estate to which such description shall extend (as the case may be), which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will.
- Rule as to wills prior to 1838.** As to wills prior to 1838 "a general devise or bequest will not, independently of the late statute, operate as an execution of a power; but where a

testator disposes of real estate, not having any other than what is subject to the power, he is in such case to be taken as dealing with that estate; and as to both realty and personalty, if the court is satisfied by the manner in which the particular property is referred to, that the testator intended to deal with that property, the disposition will be a valid execution of the power" (*Lake v. Currie*, 2 D. M. & G. 547; see *Hawk. Wills*, 22—26; 1 *Jarm. Wills*, 5th ed. 629 *et seq.*; *Re Comber*, 14 W. R. 172; *Re Bringloe*, 26 L. T. 58). In the case of a married woman donee where the will would be ineffectual unless construed as an execution of the power, that construction prevails, but not if there is any other subject upon which her will may operate (1 *Jarman*, 5th ed. 629, 631; *A.-G. v. Wilkinson*, 2 Eq. 816). Under the new law it is necessary to show a contrary intention in order to exclude the execution of the power; while under the old law it was necessary to show the intention to exercise the power (*Lake v. Currie*, 2 D. M. & G. 548).

1 Vict. c. 26,
s. 27.

New law.

The section is a rule of construction applicable to documents as to which an English or Irish court is the court of construction (*Re D'Este, Poulter v. D'Este*, 1903, 1 Ch. 903). As to wills executed by persons domiciled abroad in exercise of powers, see the note to sect. 10, *ante*, p. 454.

Foreign wills.

This section is confined to general powers, and does not extend to a special or limited power (*Re Williams, Foulkes v. Williams*, 42 Ch. Div. 93). Thus a power to appoint amongst children in such manner as the appointor shall think proper, is not within this section (*Cloves v. Awdry*, 12 Beav. 604; *Russell v. R.*, 12 Ir. Ch. R. N. S. 377). Nor is a power to appoint among relations or friends (*Re Caplin*, 2 Dr. & Sm. 527). Nor is a power to appoint to anyone except A. (*Re Byron, Williams v. Mitchell*, 1891, 3 Ch. 474), but such a power would seem to be within the section after the death of A. (*Ib.*). A power to appoint to all and every "person or persons, child or children," was within this section (*Cofield v. Pollard*, 5 W. R. 774). A power of appointment by will only is within this section (*Re Powell*, 18 W. R. 228). A power to appoint by "will expressly referring to the power" was exercised by a general gift of property "over which I shall have any power of disposition by will" (*Re Lane, Belli v. Lane*, 1908, 2 Ch. 581; *Re Rolt, Rolt v. Burdett*, 1908, W. N. 76; *Re Waterhouse, Waterhouse v. Ryley*, 98 L. T. 30), but not by a general gift of personal estate (*Phillips v. Cayley*, 43 Ch. Div. 222; *Re Davis, D. v. D.*, 1892, 3 Ch. 63). A power to charge real estate with money by will was not exercised by a general gift of personalty (*Re Salvin, Marshall v. Wolseley*, 1906, 2 Ch. 459).

What powers
are within
this section.

Special powers not being within sect. 27, there must be a reference to the power or to the property, or an intention otherwise expressed in the will to exercise the power (*Re Weston, Neeves v. Weston*, 1906, 2 Ch. 624; *Wrigley v. Loundes*, 1908, P. 352; see *Farwell Powers*, 176). As regards real estate, it had been held that where the testator had no real estate at the date of his will, a general devise to an object would exercise the power (*Standen v. S.*, 2 Ves. jun. 589); but having regard to sect. 24 of the act this reason no longer applies (*Re Mills, M. v. M.*, 34 Ch. D. 186; *Re Williams, Foulkes v. Williams*, 42 Ch. Div. 93).

Special
powers.

Under this section a general residuary bequest operates as an exercise of a power to appoint sums of money up to a specified amount (*Re Jones, Greene v. Gordon*, 34 Ch. D. 65); and also of a power to appoint as the donor thinks proper (*Re Spooner*, 2 Sim. N. S. 129; *Clifford v. C.*, 9 Hare, 675; *A.-G. v. Brackenbury*, 1 H. & C. 782). A gift of "all stock which I possess or to which I am entitled" exercised a general power to the extent to which the property subject thereto consisted of stocks (*Re Jacob, Mortimer v. M.*, 1907, 1 Ch. 450).

General
powers exer-
cised by gen-
eral residuary
bequest;

General pecuniary legacies are bequests of personal property described in a general manner; and where the proper assets are inadequate the gift must so far as necessary be satisfied out of personal estate, subject to a general power (*Hawthorn v. Shedden*, 3 Sm. & Giff. 293; *Re Wilkinson*, 4 Ch. 587; see *Williams v. W.*, *inf.*). So a power of appointment over a reversionary fund was exercised by a pecuniary legacy in the will of a married woman who had no property apart from the power (*Ludlam v. L.*, 63 L. T. 330). Where

by general
pecuniary
legacies.

1 Vict. c. 26,
s. 27.

Direction for
payment of
debts.

Appointment
of executor.

a testator having a general power directs payment of his debts without more, and appoints an executor, the appointed fund is liable for his debts, if his own estate is insufficient (*Re Davies*, 13 Eq. 166; *Wilday v. Barnett*, 6 Eq. 193; see *Laing v. Cowan*, 24 Beav. 112; *Re Hodgson, Darley v. Hodgson*, 1899, 1 Ch. 666). It seems that the same rule would apply, though no executor were appointed; but that an appointment of an executor without more would not make the fund assets (*Re Davies*, 13 Eq. 166; *Re Thurston, Thurston v. Evans*, 32 Ch. D. 508; *Re Power, Acworth v. Stone*, 1901, 2 Ch. 665).

The statute, it was said in one case, makes the fund which is subject to the general power part of the testator's personal estate; and for the purpose of paying debts and legacies it went in the same way as the other personal estate (*Williams v. Williams*, 1900, 1 Ch. 159; see, however, *Re Davies*, 13 Eq. 167; *Fleming v. Buchanan*, 3 D. M. G. 979).

Where a general power of appointing personal estate is exercised, and an executor appointed, a good receipt can be given either by an executor (*Re Hadley, Johnson v. Hadley*, 1909, 1 Ch. 30) or an administrator with the will annexed (*Re Peacock, Kelcey v. Harrison*, 1902, 1 Ch. 552). Estate duty in such a case is not a charge on the appointed fund, but is payable out of the testator's personal estate (*Re Hadley, Hadley v. Johnson*, 1909, 1 Ch. 20).

Stock liable
to re-invest-
ment in land.

A general power of appointment over real estate (which was represented by stock liable to re-investment) was not exercised by a bequest of "all moneys that I die possessed of," there being a tenant for life who, after the death of the testator, had a right to call for re-investment (*Re Greaves*, 23 Ch. D. 313). But where there was no such person, the power was exercised by a bequest of "the residue of my personal estate," regard being had to the interpretation of "personal estate" in sect. 1 of this act (*Chandler v. Pocock*, 15 Ch. D. 498; 16 Ch. Div. 648); in which last case the testatrix had procured the stock to be transferred into her own name before her death (see *Re Harman, Lloyd v. Tardy*, 1894, 3 Ch. 607).

Appointee
predeceasing
the testator.

Where under a general testamentary power money is appointed in discharge of a moral obligation, the gift enures to the appointee's estate if he predeceases the testator (*Stevens v. King*, 1904, 2 Ch. 30). Where there is no moral obligation, and the appointee predeceases the testator, the question whether the property appointed passes as in default of appointment or devolves as the property of the appointor, "is one of intention, viz., whether the donee of the power meant by the exercise of it to take the property dealt with out of the instrument creating the power for all purposes, or only for the limited purpose of giving effect to the particular disposition expressed" (*Re de Lusi*, 3 Ir. L. Rep. 232; adopted *Re Pinede*, 12 Ch. D. 672; *Willoughby-Osborn v. Holyoake*, 22 Ch. D. 240). In the case of general powers of appointment over real estate where the donee of the power devised her real estate to trustees in trust for A., who predeceased her, there was a resulting trust for the heir of the testatrix (*Re Van Hagan, Sperling v. Rochfort*, 16 Ch. Div. 18). And the heir also took in the case of a direct appointment to A. (*Willoughby-Osborn v. Holyoake*, 22 Ch. D. 238; *Re Horton, Horton v. Perks*, 51 L. T. 420; *Coxen v. Rowland*, 1894, 1 Ch. 406). In the case of general powers of appointment over personal estate where the will of the donee contained a direct gift of residue to A., who predeceased the testator, the appointed property passed to the next of kin of the appointor (*Re Ickeringill, Hinsley v. Ickeringill*, 17 Ch. D. 151; *Re Pinede*, 12 Ch. D. 667; see *Re Marten, Shaw v. Marten*, 1902, 1 Ch. 314). The last cases were decided on the construction of particular wills. In other cases the property was held to pass as in default of appointment (*Re Davies*, 13 Eq. 163; *Re Thurston, Thurston v. Evans*, 32 Ch. D. 508, where the appointment directed that the property the subject of the power should continue to be held by the trustee of the instrument creating the power; *Re Boyd, Kelly v. Boyd*, 1897, 2 Ch. 232).

Real estate.

Personal
estate.

Where the will of the donee of the power contained an express appointment to A., who predeceased him, and also a residuary gift, the residuary legatee took the property the subject of the power (*Re Spooner*, 2 Sim. N. S. 129; *Re Elen, Thomas v. McKeckine*, 1893, W. N. 90; *Gale v. G.*, 21 Beav.

349). See Farwell, Powers, 238, 2nd ed.; *Bush v. Cowan*, 32 Beav. 228. 1 Vict. c. 26, s. 27. In one case (see the terms of the residuary clause) the next of kin of the appointor were held to take (*Wilkinson v. Schneider*, 9 Eq. 423).

The "contrary intention" referred to in the section must be looked for in the will alone (*Boyes v. Cook*, 14 Ch. Div. 57; *Re Gibbes, White v. Randolph*, 37 Ch. D. 146; *Re Marsh, Mason v. Thorne*, 59 L. T. 595). The rule is to inquire whether there is anything in the will inconsistent with the notion that the gift is meant to operate as an execution of the power (*Scriven v. Sandon*, 2 J. & H. 743). And for the purpose of ascertaining this contrary intention, it makes no difference whether the settlement creating the power was made by the testator himself or by a stranger (*Re Clark, Maddick v. Marks*, 14 Ch. Div. 422). The contrary intention has been found in the fact that the bequest is of personal estate "not otherwise effectually disposed of" (*Moss v. Harter*, 2 Sm. & G. 458); also on the comparison of the words of two successive wills (*Pettinger v. Ambler*, 1 Eq. 510); also in the fact that the will referred to a power different from the one possessed by the testatrix at her death (*Thompson v. Simpson*, 44 L. T. 710). It has not been found in a confirmation of the settlement creating the power (*Hutchins v. Osborn*, 8 De G. & J. 142; *Lake v. Currie*, 2 D. M. & G. 536); or by a reference to property "which I possess or to which I am entitled" (*Re Jacob, Mortimer v. M.*, 1907, 1 Ch. 450).

Coupling sections 24 and 27 together, the true construction of this statute is, that a will may operate as an execution of all general powers vested in the testator immediately before his death (*Thomas v. Jones*, 2 J. & H. 482). General powers have been held to have been executed by wills dated prior to the instrument creating the power (*Patch v. Shore*, 2 Dr. & Sm. 589; *Hodsdon v. Dancer*, 16 W. R. 1101); even where the power has been created by the testator himself subsequently to the will (*Boyes v. Cook*, 14 Ch. Div. 53; *Re Hernando, Hernando v. Sawtell*, 27 Ch. D. 284; *Airey v. Bower*, 12 App. Cas. 263). The circumstances under which a testator has executed the subsequent instrument cannot be looked at to ascertain a contrary intention (*Boyes v. Cook, sup.*, disapproving of *Re Ruding*, 14 Eq. 266; see *Thompson v. Simpson*, 44 L. T. 710; *Airey v. Bower, sup.*; *Re Wells, Hardisty v. Wells*, 42 Ch. D. 646). Where A. bequeathed her residue to such persons as B. should by deed or will appoint, and in default over, and B. died before A., B.'s will did not operate as an execution of the power by anticipation (*Jones v. Southall*, 32 Beav. 31).

Sect. 24 does not apply to a will made in exercise of a special power (*Re Hayes, Turnbull v. Hayes*, 1901, 2 Ch. 529; *Re Moses, Beddington v. B.*, 1902, 1 Ch. 100; *Doyle v. Coyle*, 1895, 1 I. R. 205; see *Re Wells, Hardisty v. Wells*, 42 Ch. D. 657; and see *Stillman v. Weedon*, 16 Sim. 26, where a special power was executed by will of prior date, which referred to the property which was the subject of the power).

A general power given to the survivor of two persons may, under sect. 24, be exercised by the will of the ultimate survivor executed during the joint lives (*Thomas v. Jones*, 1 D. J. & S. 63). A special power cannot be so exercised, *Re Moir*, 46 L. T. 723; see Sugd. Powers, 124, 8th ed.; *Cronin v. Roche* (8 Ir. Ch. R. 103); *Cooper v. Martin* (3 Ch. 47). Where a power to appoint among children is to be exercised by the survivor of the husband and wife "after the decease of the other": a will made during their joint lives by the one who survived does not operate as an execution (*Cave v. C.*, 8 D. M. & G. 131); but does so operate if confirmed by codicil after the death of the other (*Re Blackburn, Smiles v. Blackburn*, 43 Ch. D. 75). A will made during coverture by a woman who died discovert was a good execution of a power "during coverture by will" to appoint (*Re Illingworth, Bevir v. Armstrong*, 1909, 2 Ch. 297).

Sect. 27 applies to the wills of married women (*Bernard v. Minshull*, Johns. 276; see the note to sect. 8, *ante*, p. 447). As to a fund subject to a general power of appointment exercisable and exercised by a married woman's will being liable for her debts, see the note to sect. 4 of the M. W. P. Act, 1882, *ante*, p. 353.

Contrary intention.

Effect of sects. 24 and 27.

General powers executed by wills of prior date.

Special power.

Powers given to survivor of several.

Married women.

1 Vict. c. 26,
s. 27.

Powers of
revocation in
deeds.

With regard to the exercise by will of powers of revocation and new appointments in deeds, a general devise by will subsequent in date to the deed reserving the power does not *per se* amount by virtue of this section to an exercise of such power (*Re Brace, Welch v. Colt*, 1891, 2 Ch. 671; *Charles v. Burke*, 43 Ch. D. 223, n.; *Re Goulding, Dobell v. D.*, 48 W. R. 183). In a case decided apart from this section, it was said that the intention to revoke must be shown; but might either appear by the express terms, or might be inferred from the circumstance that the will would otherwise be ineffectual (*Pomfret v. Perring*, 5 D. M. & G. 775; *Palmer v. Newell*, 20 Beav. 38). *Pomfret v. Perring* (*sup.*) was the case of a special power of appointment, but the reasoning applied to general powers (*Re Brace, Welch v. Colt*, 1891, 2 Ch. 677). In another case a power of revocation reserved by deed was not exercised by a will dated before the deed, the date amounting to a contrary intention within sect. 24 (*Re Wells, Hardisty v. Wells*, 42 Ch. D. 646). Where the original power was to appoint by deed, a revocation by will of an appointment by deed was invalid (*Re Gore Booth*, 1908, 1 Ir. 387).

Revocation
of testamen-
tary appoint-
ments.

As regards appointments by will; a general clause of revocation in a later will revokes an appointment by an earlier will, unless it be entirely unreasonable that it should have that effect. So held in the case of general powers (*Sotheran v. Dening*, 20 Ch. Div. 99; *Harvey v. Harvey*, 32 L. T. 141; *Re Eustace*, L. R. 3 P. & M. 183). The old rule as to this was different (*Re Merritt*, 1 Sw. & Tr. 112; *Re Joys*, 4 Sw. & Tr. 214). Again, where the donee of a general power executes a later testamentary appointment containing no express revocation, but which makes dispositions inconsistent with an earlier testamentary appointment, the latter may revoke the former (*Re Gibbes, White v. Randolph*, 37 Ch. D. 143; see *Re Tenney*, 45 L. T. R. 78; *Cadell v. Willcocks*, 1898, P. 27). In the case of special powers; where an appointment by will was revoked by a general revocatory clause in a later will which did not, however, exercise the power, the revocation was effectual (*Re Kingdon, Wilkins v. Pryer*, 32 Ch. D. 604). So also where the later document purported invalidly to exercise the power, the express revocation was effectual, the doctrine of dependent relative revocation not applying (*Quinn v. Butler*, 6 Eq. 225; see *Re Gentry*, L. R. 3 P. & M. 80). But that doctrine applied where the signature of a will exercising a special power was cut off under an erroneous belief (*Stamford v. White*, 1901, P. 46). Further, in the absence of express revocation a later will which disposed of the property subject to the power in a manner entirely inconsistent with an earlier will revoked the latter by implication. So held where the later will contained the word "appoint" (*Kent v. K.*, 1902, P. 108), or referred to "everything which I have power to will" (*Wrigley v. Lowndes*, 1908, P. 348). Where the dispositions of the later will were only partly inconsistent with the earlier will, there was only a revocation *pro tanto* (*Re Walker, MacColl v. Bruce*, 1908, 1 Ch. 560). And where the appointment by the later will was altogether invalid, there was no revocation at all (*Duguid v. Fraser*, 31 Ch. D. 449).

Words in a codicil revoking all bequests in a will in favour of A. revoked a special power given to A. by the will (*Re Brough, Currey v. Brough*, 38 Ch. D. 456).

A devise
without any
words of limi-
tation shall be
construed to
pass the fee.

28. Where any real estate shall be devised to any person without any words of limitation, such devise shall be construed to pass the fee simple, or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a contrary intention shall appear by the will.

Rule as to
wills prior to
1838.

In wills prior to 1838, a devise of lands to a person without any words of limitation confers an estate for life only (Hawk. Wills, 130). The various cases in which such indefinite devises are enlarged to a fee simple are

considered (Jarm. Wills, 5th ed. 1131; Hawk. Wills, 131; Tudor, L. C. Conv. 166 *et seq.*; and see *Lloyd v. Jackson*, L. R. 2 Q. B. 269; *Bolton v. Bolton*, L. R. 5 Ex. 145; *Pickwell v. Spencer*, L. R. 7 Ex. 105; *Re Harrison*, 5 Ch. 408; *Lander v. Elsmore*, 27 L. T. 603; *Re De la Hunt and Pennington*, 57 L. T. 874; *Yarrow v. Knightley*, 8 Ch. Div. 736; *Hill v. Brown*, 1894, A. C. 125). The mere fact of a devise, otherwise conferring an estate for life only, being to several persons to be divided equally among them, did not enlarge the interest to a fee (*Gatenby v. Morgan*, 1 Q. B. D. 685). 1 Vict. c. 26, s. 28.

Where a testator devised his real estate to a devisee in fee charged with annuities, the annuitants took the annuities for life; it was said that this section of the act only applies to real estate vested in or in the power of the testator, and not to estates or interests created *de novo* by his will (*Nicholls v. Hawkes*, 10 Hare, 342). Cases under this section.

A devise, before 1838, of "rents and profits" to A. without words of limitation passes an estate for life: such a devise, since 1837, passes the fee (Hawk. Wills, 120; *Re Martin, M. v. M.*, 1892, W. N. 120). And a devise of the "income" of land also passes the fee (*Mannox v. Greener*, 14 Eq. 456; *Johnson v. J.*, 35 Ch. D. 348). Where A., seised in fee of freeholds, devised them to B., "to be kept in trust for C., that is, B. is to let the premises, and give the rent to my son C. for his support"; C. took the absolute interest (*Malcolmson v. M.*, 17 L. T. O. S. 44). Where a testator gave to his niece the house she lived in, and grass for a cow in Gill Field, she took an estate in fee simple in the house, and the right of pasture of a cow during her pleasure (*Reay v. Rawlinson*, 29 Beav. 88; conf. *Pym v. Harrison*, 32 L. T. 817, a case under the old law).

Lord St. Leonards considered that cases where, after the devise without any words of limitation, there are gifts over also without words of limitation, were not within the purview of the act, and that it would be dangerous to extend it to them (R. P. Stat. 382).

A "contrary intention" does not appear from the fact that in other parts of the will words of inheritance have been used (*Wisden v. W.*, 2 Sm. & Giff. 396); nor from the fact of a power of appointment in favour of children and a husband being given to a married woman in a devise in her favour of copyholds to be her separate property (*Brook v. B.*, 3 Sm. & G. 280). So, the fact that, in a devise to two persons, power was given to the devisees to sell their property for their life, followed by a direction that the survivor of the devisees should take the property given to the other, was no indication that such survivor should take a life interest only (*Chellev v. Martin*, 21 W. R. 671). Contrary intention.

A contrary intention, however, may be found from the whole will (*Crumpe v. C.*, 1900, A. C. 127; and see *Pelham Clinton v. Newcastle*, 1902, 1 Ch. 34, 45, where the words were held to create an estate in special tail male); and was collected from the circumstance, that by the same will an estate was subsequently given which could not come into existence unless the first devise was construed to be a life estate (*Gravenor v. Watkins*, L. R. 6 C. P. 500). And where a testator devised freeholds to several as joint tenants and to the survivor of them, his heirs and assigns, the latter words indicated a contrary intention, so that the devisees took as joint tenants for life with a contingent remainder in fee to the survivor (*Quarm v. Q.*, 1892, 1 Q. B. 184).

29. In any devise or bequest of real or personal estate the words "die without issue," or "die without leaving issue," or "have no issue," or any other words which may import either a want or failure of issue of any person in his lifetime or at the time of his death, or an indefinite failure of his issue, shall be construed to mean a want or failure of issue in the lifetime or at the time of the death of such person, and not an indefinite failure of his issue, unless a contrary intention shall appear by The words "die without issue," or "die without leaving issue," shall be construed to mean die without issue

1 Vict. c. 26,
s. 29.
living at the
death.

the will, by reason of such person having a prior estate tail, or of a preceding gift, being, without any implication arising from such words, a limitation of an estate tail to such person or issue, or otherwise: provided, that this act shall not extend to cases where such words as aforesaid import if no issue described in a preceding gift shall be born, or if there shall be no issue who shall live to attain the age or otherwise answer the description required for obtaining a vested estate by a preceding gift to such issue.

Old rules of
construction
as to wills
prior to 1838.

In wills prior to 1838, the words "die without issue" and "die without having issue," in gifts both of real and personal estate, are construed to mean the death of the person spoken of and failure of his issue at the time of his death or at any time afterwards; unless the context shows the meaning to be confined to a failure of issue at the time of his death. The words "die without leaving issue" in devises of real estate are construed in the same way as the words "die without issue;" but in bequests of personalty they import a failure of issue at the death of the person spoken of (*Hawk. Wills*, 205, 213).

The various cases in which the words "die without issue," &c., occurring in wills prior to 1838 are restrained by the context to mean a failure of issue at the death of the person are considered in *Hawk. Wills*, 207; *Jarm. Wills*, 5th ed. 1320 *et seq.* As to the effect of similar limitations occurring in a deed, see *Morgan v. M.* (10 Eq. 99); *Olivant v. Wright* (9 Ch. D. 646).

Cases under
new law.

The object of this section is to redress the inconvenience which had arisen from the words "dying without issue," and other similar words having acquired a legal meaning different from the popular meaning (*Greenway v. G.*, 1 Giff. 138). In wills since 1837, words importing failure of issue have been held to mean failure of issue at the death (*Re Mid Kent Co.*, 11 W. R. 417; *Jarman v. Vye*, 2 Eq. 784; *Dowling v. D.*, 1 Ch. 612; see *Re Allen*, 3 Drew. 382).

The section applies to a gift over on death without "male issue" (*Re Edwards, E. v. E.*, 1894, 3 Ch. 644; *Upton v. Hardman*, 1 R. 9 Eq. 157). But the section does not touch the question whether any particular form of words shall import want or failure of issue during the life of the person spoken of, or a want or failure of issue at the time of his death; the only construction excluded by the section being an indefinite failure of issue. In some cases, to which this section has no application, gifts over upon death without leaving issue have been read as gifts over upon death without having had issue (*Treharne v. Layton*, L. R. 10 Q. B. 459; see *Re Ball, Slattery v. Ball*, 40 Ch. Div. 11; *Barkworth v. B.*, 75 L. J. Ch. 754). As to "die without children," see *Mathews v. Gardiner*, 19 Beav. 254; *Re Booth, Pickard v. Booth*, 1900, 1 Ch. 768.

Words
importing
failure of
issue.

As this section is expressly confined to the word "issue," it makes no change in the meaning of the expression "die without heirs of the body" (*Re Sallery*, 11 Ir. Ch. R. 236; *Dawson v. Small*, 9 Ch. 651; *Harris v. Davis*, 1 Coll. 416, and the remarks on that case, *Jarm.* 5th ed. 1322; see *contra*, *Dodds v. D.*, 10 Ir. Ch. R. 476).

This section of the act has no application to cases in which the words "dying without issue" are combined with other words, such as "dying under twenty-one"; which additional words, upon the authority of decided cases, modify their meaning (*Morris v. M.*, 17 Beav. 198).

Contrary
intention.

Contrary intention was inferred from the context in *Neville v. Thacker*, 23 L. R. Ir. 344. It was doubted whether the words "unless a contrary intention shall appear by the will by reason of such person having a prior estate tail" applied to a gift of personalty, or are to be confined to a gift of real estate in which alone, properly speaking, there can be an estate tail (*Greenway v. G.*, 2 D. F. & J. 137). The words had been previously applied to a gift of

personalty (*Green v. G.*, 3 De G. & Sm. 480; see also *Green v. Giles*, 5 Ir. 1 Vict. c. 26, Ch. 25; *Re O'Beirne*, 1 J. & Lat. 352).

The operation of the section is limited by the final proviso. For a case within this proviso, see *Re Bence*, *Smith v. Bence*, 1891, 3 Ch. 242, 249; and see *Re Chinnery*, 1 L. R. Ir. 296. The cases in which words importing a failure of issue refer to the objects of a preceding gift are discussed Jarm. Wills, 5th ed. 1285 *et seq.*

In the case of a will coming into operation after 31 December, 1882, which contains an executory limitation over of land on failure of issue, regard should be had, in ascertaining the effect, to sect. 10 of the Conv. Act, 1882 (see *Re Booth*, *Pickard v. Booth*, 1900, 1 Ch. 768).

30. Where any real estate (other than or not being a presentation to a church) shall be devised to any trustee or executor, such devise shall be construed to pass the fee simple or other the whole estate or interest which the testator had power to dispose of by will in such real estate, unless a definite term of years, absolute or determinable, or an estate of freehold, shall thereby be given to him expressly or by implication.

No devise to trustees or executors, except for a term or a presentation to a church, shall pass a chattel interest.

See note to sect. 31.

31. Where any real estate shall be devised to a trustee, without any express limitation of the estate to be taken by such trustee, and the beneficial interest in such real estate, or in the surplus rents and profits thereof, shall not be given to any person for life, or such beneficial interest shall be given to any person for life, but the purposes of the trust may continue beyond the life of such person, such devise shall be construed to vest in such trustee the fee simple, or other the whole legal estate which the testator had power to dispose of by will in such real estate, and not an estate determinable when the purposes of the trust shall be satisfied.

Trustees under an unlimited devise, where the trust may endure beyond the life of a person beneficially entitled for life, to take the fee.

In wills prior to 1838, where a testator devised lands to his executors for payment of his debts, or until his debts were paid, the executors only took an estate for so many years as were necessary to raise the sum required (Co. Litt. 42 a; 8 Rep. 96 a; 1 P. Wms. 509). It was the same where an estate was devised till such time as a particular sum should be raised out of the rents and profits (*Cordell's case*, Cro. Eliz. 316; 1 P. Wms. 118; Co. Litt. 45 b; Com. Dig. Biens (A. 1)).

According to the old law, trustees under a devise to them and their heirs *primâ facie* took a fee; and that estate could not be cut down unless it could be pointed out on the face of the will what less estate they took (*Collier v. Walters*, 17 Eq. 261, 263; see also *Baker v. White*, 20 Eq. 174). The cases are collected, Theobald, 7th ed. 430.

In wills since 1837 the result of the present act "is, that trustees whose estate is not expressly defined by the will must, in every case, *and whatever be the nature of the duty imposed on them*, take either an estate for life or an estate in fee" (Jarman, 5th ed. 1166).

In wills since 1837 trustees have been held to take an estate in fee from having a power of leasing (*Re Eddel*, 11 Eq. 559), and a power of maintenance (*Berry v. B.*, 7 Ch. D. 657), and from being directed to pay debts (*Marshall v. Gingell*, 21 Ch. D. 790; *Re Brooke*, B. v. B., 1894, 1 Ch. 43).

32. Where any person to whom any real estate shall be devised for an estate tail or an estate in quasi entail shall die in

Devises of estates tail

1 Vict. c. 26, s. 32. the lifetime of the testator leaving issue who would be inheritable under such entail, and any such issue shall be living at the time of the death of the testator, such devise shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

Gifts to children or other issue who leave issue living at the testator's death shall not lapse.

33. Where any person being a child or other issue of the testator to whom any real or personal estate shall be devised or bequeathed for any estate or interest not determinable at or before the death of such person shall die in the lifetime of the testator leaving issue, and any such issue of such person shall be living at the time of the death of the testator, such devise or bequest shall not lapse, but shall take effect as if the death of such person had happened immediately after the death of the testator, unless a contrary intention shall appear by the will.

As to the doctrine of lapse, see Jarman, 5th ed. 307; *Elliot v. Davenport*, Tudor, L. C. Conv. 4th ed. 475.

Date of death of devisee or legatee.

The words "shall die," in this section refer to the period at which the act came into operation. Thus lapse was prevented by this section where the devisee or legatee died before the date of the will, but after the act came into operation (*Winter v. W.*, 5 Hare, 306; *Mower v. Orr*, 7 Hare, 473; *Wisden v. W.*, 2 Sm. & G. 396; and see *Loxley v. Heath*, 27 Beav. 535); *secus*, where he died before the act came into operation (*Wild v. Reynolds*, 5 Not. Cas. 1; *Barkworth v. Young*, 4 Drew. 21).

This section was held to extend to a case where the issue of the legatee, who was alive at the death of the testator, was not the same issue as was in existence when the legatee died (*Re Parker*, 1 Sw. & Tr. 523; but see Sugd. R. P. Stat. 393).

Effect of section.

This section does not substitute for the predeceased devisee or legatee the issue whose existence is the event or condition which excludes the lapse, but renders the subject of the gift the absolute property of the predeceased devisee or legatee. Therefore he can dispose of it by his will, notwithstanding his death in the lifetime of the original testator (*Johnson v. J.*, 3 Hare, 157; *Re Mason*, 34 Beav. 494; see *Pickersgill v. Rodgers*, 5 Ch. D. 163, where a case of election was raised against the estate of the predeceased legatee as if he had survived the testatrix). And if he dies intestate it passes to his representatives as part of his estate (*Re Peerless*, *Peerless v. Smith*, 1901, W. N. 151). Probate duty was held to be payable in the same manner as if the legatee had survived the testator (*Perry v. Reg.*, L. R. 4 Exch. 28; distinguish *A.-G. v. Loyd*, 1895, 1 Q. B. 496). Estate duty is payable in the same way (*Re Scott*, 1900, 1 Q. B. 372).

The fictitious survivorship created by this section will not be extended beyond the limits necessary to carry out the purpose of the act. Therefore, where a married woman in whose settlement there was a covenant to settle property coming to her during the coverture, and to whom a legacy was left by her father's will, predeceased him, but by reason of her having issue the legacy did not lapse, the legacy was not within the covenant (*Pearce v. Graham*, 32 L. J. Ch. 359). Where, however, after a bequest to a daughter, a testator directed that "in case she survived him" the legacy should be subject to the trusts of the daughter's settlement; and the daughter predeceased the testator, leaving issue; the legacy was ordered to be paid to the settlement trustees (*Re Hone*, 22 Ch. D. 663).

The gift is to take effect as if the beneficiary had died immediately after the testator. Accordingly, where a married woman to whom a legacy was left by her father's will died in his lifetime leaving her husband surviving,

who also died before the father, administration to the married woman's estate was granted as if she had died immediately after her father (*Re Councill*, L. R. 2 P. & M. 314; *Re Allen*, 1909, W. N. 181). And where a married woman to whom freeholds were devised in fee by her father's will, died in his lifetime leaving her husband surviving, and also issue of her marriage, the husband was held entitled to an estate by the curtesy (*Eager v. Furnivall*, 17 Ch. D. 118). A child who was held to take under this section having devised to his father, the testator, the devise lapsed (*Re Hensler, Jones v. Hensler*, 19 Ch. D. 612).

This section obliges a testator intending that a legacy given to one child shall go over to another in the event of the death of the first legatee, to express that meaning by his will (*Re More*, 10 Hare, 178). Where a testator gave a legacy to his daughter, with a gift over, in the event of her dying unmarried, to his other children as she should appoint, and in default equally; and the daughter died in the testator's lifetime, unmarried, and without having appointed; the other children took (*Kellett v. K.*, 1 R. 5 Eq. 298).

The section applies wherever the words of the will amount to a gift to children as *personæ designatæ* (*Stansfield v. S.*, 15 Ch. D. 84). As to a gift to "my surviving children," see *Fullford v. F.* (16 Beav. 565). The intention of the legislature was to provide against lapse merely, and not to alter the construction to be put on any will. On arriving at the conclusion that there would have been a lapse, then the statute applies, not otherwise. This section does not apply to the case of a gift to a class, for according to the rule before the act, under a gift to children as a class, the share to which a surviving child would have been entitled did not lapse in consequence of his death in the testator's lifetime (*Olney v. Bates*, 3 Drew. 323; *Browne v. Hammond*, Johns. 215; *Re Jackson, Shiers v. Ashworth*, 25 Ch. D. 164). It is immaterial that the class consists of only one person (*Re Harvey, Harvey v. Gillow*, 1893, 1 Ch. 567).

This section applies to a testamentary appointment made under a general power (*Eccles v. Cheyne*, 2 K. & J. 676), but not under a special power (*Griffiths v. Gale*, 12 Sim. 354; *Freeland v. Pearson*, 3 Eq. 663; *Holyland v. Lewin*, 26 Ch. D. 266).

34. This act shall not extend to any will made before the first day of January, one thousand eight hundred and thirty-eight, and every will re-executed or republished, or revived by any codicil, shall for the purposes of this act be deemed to have been made at the time at which the same shall be so re-executed, republished, or revived; and this act shall not extend to any estate *pur autre vie* of any person who shall die before the first day of January, one thousand eight hundred and thirty-eight.

With respect to wills prior to 1838, acts of revocation done subsequently to 1837 must be considered with reference to the statute (*Hobbs v. Knight*, 1 Curt. 768; *Benson v. B.*, L. R. 2 P. & M. 172).

Formerly wills of personalty might be republished by parol acts or declarations of the testator; and republication made a will speak from the date at which it was republished (1 Wms. Exors. 10th ed. 140, 147). But since this statute nothing short of a re-execution of a will itself, or the formal execution under the act of some document which directly or impliedly affirms it, can confer further testamentary validity upon it beyond that which it derived from its original execution (*Noble v. Phelps*, L. R. 2 P. & M. 282; and see *Rolfe v. Perry*, 3 D. J. & S. 481). As to the effect of republication by codicil before the act, see *Mountcashel v. More-Smyth*, 1895, 1 I. R. 346; 1896, A. C. 158.

Under this section the effect of the confirmation of a will by a codicil is

1 Vict. c. 26,
s. 33.

Section does
not apply to
gifts to a
class.

Gifts in exer-
cise of powers.

Act not to
extend to
wills made
before 1838,
nor to estates
pur autre vie
of persons
who die
before 1838.

Revocation of
wills prior to
1838 by acts
since 1837.
Republica-
tion.

1 Vict. c. 26,
s. 34.

Will repub-
lished by
codicil.

the same as if the testator had at the date of the codicil made a will in the words of the will so re-executed (*Winter v. W.*, 5 Hare, 306; *Anderson v. A.*, 13 Eq. 381; *Re Rayer, R. v. R.* 1903, 1 Ch. 688). A codicil had the effect of bringing a bequest in the will to a deceased daughter under the 33rd section of this act (*Skinner v. Ogle*, 1 Rob. 363); and of bringing within the operation of the will lands acquired subsequently to the date of the codicil (*Langdale v. Briggs*, 3 Sm. & G. 246; *Doe v. Walker*, 12 M. & W. 591), and of making a will operate as an execution of a special power (*Re Blackburn, Smiles, v. Blackburn*, 43 Ch. D. 75). The confirmation, however, of a will by codicil does not revive a legacy adeemed in the interval between the will and the codicil (*Montague v. M.*, 15 Beav. 565; see *Sidney v. S.*, 17 Eq. 65); nor bring the will within the Married Women's Reversionary Interests Act, 1857 (*ante*, p. 337); *Re Elcom, Layborn v. Grover Wright*, 1894, 1 Ch. 303).

Where a codicil contains a confirmation of the will as altered by prior codicils, the result is to effect the same disposition of the testator's estate as if at that date he had made a new will containing the same dispositions as the original will, and with the alterations introduced by the various codicils (*Re Fraser, Lowther v. Fraser*, 1904, 1 Ch. 734; *Re Taylor, Dale v. Dale*, 1909, W. N. 59, see *Re Champion, Dudley v. Champion*, 1893, 1 Ch. 101; *Re Pyle, P. v. P.*, 1895, 1 Ch. 724). A subsequent testamentary instrument which did not refer to a will did not amount to republication (*Re Smith, Bilke v. Roper*, 45 Ch. D. 632). A codicil which refers to a will of a particular date, and does not refer to a subsequent codicil, does not operate as a republication of that subsequent codicil (*Burton v. Newbery*, 1 Ch. D. 234; see *McLeod v. McNab*, 1891, A. C. 471; *French v. Hoey*, 1899, 2 I. R. 472).

For the effect of a confirmatory codicil as regards the incorporation of unattested papers, see note to sect. 9, *ante*, p. 453; and as regards unattested alterations in a will, see the note to sect. 21, *ante*, p. 463.

Act not to
extend to
Scotland.

35. This act shall not extend to Scotland.

As to the adoption of this act in the colonies, see 4 Davidson, Conv. 350, n.; Hayes & Jarm. Wills, 59, 7th ed.

II.—THE WILLS ACT AMENDMENT ACT, 1852.

15 & 16 VICT. C. 24.

An Act for the Amendment of an Act passed in the First Year of the Reign of Her Majesty Queen Victoria, intituled "An Act for the Amendment of the Laws with respect to Wills."

[17th June, 1852.]

WHEREAS the laws with respect to the execution of wills require further amendment: be it therefore enacted as follows:

15 & 16 Vict.
c. 24, s. 1.

1 Vict. c. 26.

1. Where by an act passed in the first year of the reign of her Majesty Queen Victoria, intituled "An Act for the Amendment of the Laws with respect to Wills," it is enacted, that no will shall be valid unless it shall be signed at the foot or end thereof by the testator, or by some other person in his presence,

and by his direction (*r*): every will shall, so far only as regards the position of the signature of the testator, or of the person signing for him as aforesaid, be deemed to be valid within the said enactment, as explained by this act, if the signature shall be so placed at or after, or following, or under, or beside or opposite to the end of the will, that it shall be apparent on the face of the will that the testator intended to give effect by such his signature to the writing signed as his will (*s*), and that no such will shall be affected by the circumstance that the signature shall not follow or be immediately after the foot or end of the will, or by the circumstance that a blank space shall intervene between the concluding word of the will and the signature (*t*), or by the circumstance that the signature shall be placed among the words of the testimonium clause or of the clause of attestation (*u*), or shall follow or be after or under the clause of attestation, either with or without a blank space intervening, or shall follow or be after, or under, or beside the names or one of the names of the subscribing witnesses (*x*), or by the circumstance that the signature shall be on a side or page or other portion of the paper or papers containing the will whereon no clause or paragraph or disposing part of the will shall be written above the signature, or by the circumstance that there shall appear to be sufficient space on or at the bottom of the preceding side or page or other portion of the same paper on which the will is written to contain the signature; and the enumeration of the above circumstances shall not restrict the generality of the above enactment; but no signature under the said act or this act shall be operative to give effect to any disposition or direction which is underneath or which follows it, nor shall it give effect to any disposition or direction inserted after the signature shall be made (*y*).

15 & 16 Vict.
c. 24, s. 1.

When signature to a will shall be deemed valid.

(*r*) The Wills Act, 1837, s. 9, *ante*, p. 449; where see note.

A will was held to be duly executed where the signatures of the testator and the attesting witnesses were written on a separate piece of paper, which placed on had been previously wafered to the foot of the will (*Cook v. Lambert*, 11 W. R. 401; *Re Horsford*, L. R. 3 P. & M. 211). But there must be evidence that the paper was so attached at the time of signature (*Re West*, 12 W. R. 89).

(*s*) Where the signature was at the end of a notarial minute, which immediately followed the will, it was held that such a signature was a compliance with this statute (*Page v. Donovan*, 3 Jur. N. S. 220). Signatures placed beside or opposite to the end of the will have been held good (*Re Wright*, 4 Sw. & Tr. 35; *Re Jones*, 13 W. R. 414; *Re Williams*, L. R. 1 P. & M. 4; *Re Coombs*, *Ib.* 302; *Re Stokes*, 31 L. T. 552; see *Royle v. Harris*, 1895, P. 163).

Where a testator signed the first five sheets of a will, but omitted to sign the sixth, which was the last, and the attesting witnesses signed all six sheets, no part of the will was admitted to probate (*Sweetland v. Sweetland*, 13 W. R. 504; *Re Dilkes*, L. R. 3 P. & M. 164; see *Re Garnett*, 1894, P. 90). So where the testator's mark was placed in the middle of the writing (*Margary v. Robinson*, 12 P. D. 8).

(*t*) Wills have been held duly executed where blank spaces were left after the concluding words (*Hunt v. Hunt*, L. R. 1 P. & M. 209; *Re Archer*,

15 & 16 Vict.
c. 24, s. 1.

Signature in
attestation
clause.

L. R. 2 P. & M. 252). So where the will was on the first page, and the signatures were on the fourth page of an otherwise blank sheet of foolscap (*Re Fuller*, 1892, P. 377). As to the effect of "blanks" in charitable gifts, see *Re White*, 1893, 2 Ch. 41; *Re Macduff*, 1896, 2 Ch. 451.

(u) A. wrote his will, concluding with an attestation clause, in which his name appeared. He afterwards called in two witnesses, told them the paper was his will, read the latter portion of it to them, including the attestation, and requested that they would sign their names, which they did; the execution was valid (*Re Walker*, 2 Sw. & Tr. 354; see *Smith v. Smith*, L. R. 1 P. & M. 143; *Re Casmore*, *Ib.* 653; *Re Harris*, 23 W. R. 734; *Re Pearn*, 1 P. D. 70).

(x) Probate was granted in a case in which the signature of the testator occurred beneath that of the witnesses (*Re Jones*, 1877, W. N. 10; *Byles v. Cox*, 74 L. T. 222).

Words follow-
ing signature,

(y) Words written underneath and following the signature of the testator have been included in the probate (*Re Brompton*, 33 L. J. Prob. 153; *Re Woodley*, *Ib.* 154; *Re Powell*, 13 W. R. 696; *Re Ainsworth*, L. R. 2 P. & M. 151; *Re Birt*, *Ib.* 214), but a clause written underneath the signature, although before execution, has been excluded (*Re Greater*, 2 Jur. N. S. 1172; *Re Dallow*, L. R. 1 P. & M. 189; *Re Dearle*, 39 L. T. 93; *Re White*, 1896, 1 I. R. 269; see *Re Anstie*, 1893, P. 283; *Re Gee*, 78 L. T. 843). As also a clause added by testator after signing his name (*Re Arthur*, L. R. 2 P. & M. 273). In one case the first side of a sheet of paper, where the signature occurred, was held to be the last side (*Re Wotton*, L. R. 3 P. & M. 159; *Re Gilbert*, 78 L. T. 762; see *Royle v. Harris*, 1895, P. 163).

inserted after
signing.

Act to extend
to certain
wills already
made.

2. The provisions of this act shall extend and be applied to every will already made, where administration or probate has not already been granted or ordered by a court of competent jurisdiction in consequence of the defective execution of such will, or where the property, not being within the jurisdiction of the ecclesiastical courts, has not been possessed or enjoyed by some person or persons claiming to be entitled thereto in consequence of the defective execution of such will, or the right thereto shall not have been decided to be in some other person or persons than the persons claiming under the will, by a court of competent jurisdiction, in consequence of the defective execution of such will.

Interpreta-
tion of "will."

3. The word "will" shall in the construction of this act be interpreted in like manner as the same is directed to be interpreted under the provisions in this behalf contained in the said act of the first year of the reign of her Majesty Queen Victoria.

Wills Act, 1837, s. 1, *ante*, p. 440.

Short title
of act.

4. This act may be cited as "The Wills Act Amendment Act, 1852."

III.—THE WILLS ACT, 1861.

24 & 25 VICT. c. 114.

An Act to Amend the Law with respect to Wills of Personal Estate made by British Subjects. [6th August, 1861.]

BE it enacted by, &c., as follows :

1. Every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of her Majesty's dominions where he had his domicile of origin.

Wills made out of the kingdom to be admitted if made according to the law of the place where made.

The present act (which is known as Lord Kingsdown's Act) amends "the law with respect to wills of personal estate made by British subjects" (see Title). This law was contained in the Wills Act, 1837 (*Re Grassi, Stubberfield v. Grassi*, 1905, 1 Ch. 591); and in the last-mentioned act personal estate extends to leaseholds (see sect. 1, *ante*, p. 440). The provisions of the present act (which deal with the formalities of execution) have accordingly been applied to a will of English leaseholds made by a British subject in Italian form (*Re Grassi, sup.*), or in Scotch form (*Re Watson, Carlton v. C.*, 1887, W. N. 142). The wills, however, of English or Irish leaseholds made by foreigners who are not within sects. 1 and 2 of the present act must comply with the formalities of execution required by the Wills Act, 1837. Such leaseholds passed under a will which complied with these formalities (*De Fogassieras v. Duport*, 11 L.R. Ir. 123); but not under a will which did not comply with them (*Pepin v. Bruyere*, 1902, 1 Ch. 24). The beneficial succession to these leaseholds on the death, whether of a British subject or a foreigner, including questions as to the validity of gifts in a will, is governed by the *lex situs* (Dicey's Conflict of Laws, 2nd. ed., p. 505; *Freke v. Carbery*, 16 Eq. 461; *Re Moses, Moses v. Valentine*, 1908, 2 Ch. 235; see *Duncan v. Lawson*, 41 Ch. D. 394; *Re Gentili*, I. R. 9 Eq. 541).

Wills disposing of leaseholds.

As to personalty other than leaseholds see the note *ante*, p. 443.

Although the title of the act refers to "British subjects," sect. 3 has been applied to the will of a foreigner (*Re Groos*, 1904, P. 269). To be within sects. 1 and 2, which also refer to "British subjects," the will must be the will of a person who at the time of making it was a British subject (*Bloxam v. Favre*, 8 P. D. 105; 9 P. D. 130; *Re Buseck*, 6 P. D. 211). The will of an alien is not within the sections, even where his domicile of origin was English (*Ib.*). As regards naturalized British subjects, the certificate of naturalization formerly granted under 7 and 8 Vict. c. 66 excepted from the rights thereby conferred any rights of a natural born subject out of the British dominions. This exception did not prevent sect. 2 of the present act from applying to the will made in England of a British subject so naturalized (*Re Gally*, 1 P. D. 438); but did prevent sect. 1 from applying to his will made out of England (*Re Gatti*, 39 L. T. 639; *secus, Re Lacroix*, 2 P. D. 94). In *Re Grassi, Stubberfield v. Grassi*, 1905, 1 Ch. 591, sect. 1 was applied to the will made out of England of a naturalized British subject. The form of the

British subjects.

Naturalized British subjects.

24 & 25 Vict. c. 114, s. 1. naturalization certificate is not stated; but if the form was similar to that in *Re Gatti*, qu. did not that decision apply? see Naturalization Act, 1870, sect. 7.

Under the first condition in the section a will may be admitted to probate if made according to the law of the place of execution, although such law prescribes no specific forms (*Stokes v. Stokes*, 67 L. J. P. 55). Under the same condition probate will be granted of a will in English form made in France by a British subject which is well executed according to French law (*Re Lacroix*, 2 P. D. 94; see *Milnes v. Foden*, 15 P. D. 105). In determining what papers are testamentary the law of one country only will be regarded (*Pechall v. Hilderley*, L. R. 1 P. & M. 673).

Before this act, a will must have been executed according to the law of the country where the testator was domiciled at the time of his death (Wms. Exors. 10th ed. 275). And a will so executed, though not falling within sect. 1, will still be good under sect. 4.

Probate is conclusive that an instrument is testamentary, but does not determine the validity of the dispositions contained in it (*Whicker v. Hume*, 7 H. L. C. 124). This act leaves the extent of the power of testamentary disposition over personal property in England (other than leaseholds) to be determined by the law of the testator's domicile at his death, except in cases within sect. 3 (4 Davidson, Conv. 349, n.). As to the documents which an English Court will look at in construing a will in a foreign language, see *Re Cliffe*, 1892, 2 Ch. 229; *Di Sora v. Phillips*, 10 H. L. C. 639, Wms. Exors. 10th ed. 445.

See further as to this statute, Sugd. R. P. Stat. 398 *et seq.*; Hayes & Jarm. Wills, 529 *et seq.*, 7th ed. And as to probate of the wills of donees (domiciled abroad) of testamentary powers created by English instruments, see the note to sect. 10 of the Wills Act, 1837 (*ante*, p. 453).

Wills made in the kingdom to be admitted if made according to local usage.

2. Every will and other testamentary instrument made within the United Kingdom by any British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be well executed, and shall be admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be executed according to the forms required by the laws for the time being in force in that part of the United Kingdom where the same is made.

See *Re Gally*, 1 P. D. 438; *Re Watson, Carlton v. Carlton*, 1887, W. N. 142; quoted in note to sect. 1.

Change of domicile not to invalidate will.

3. No will or other testamentary instrument shall be held to be revoked or to have become invalid, nor shall the construction thereof be altered, by reason of any subsequent change of domicile of the person making the same.

Probate was granted of a will made by a domiciled Scotchman who subsequently acquired an English domicile (*Re Reid*, L. R. 1 P. & M. 74). Where a foreigner domiciled in a country where marriage did not revoke a will, made a will valid according to the law of the domicile and subsequently married, and then acquired an English domicile, the section applied notwithstanding the title of the act, and the will was held valid (*Re Groos*, 1904, P. 269).

Nothing in this act to

4. Nothing in this act contained shall invalidate any will or other testamentary instrument as regards personal estate which

would have been valid if this act had not been passed, except as such will or other testamentary instrument may be revoked or altered by any subsequent will or testamentary instrument made valid by this act.

24 & 25 Vict.
c. 114, s. 4.

invalidate
wills other-
wise made.

5. This act shall extend only to wills and other testamentary instruments made by persons who die after the passing of this act.

Extent of
act.

IV.—THE DOMICIL ACT, 1861.

24 & 25 VICT. c. 121.

An Act to amend the Law in relation to the Wills and Domicile of British Subjects dying whilst resident abroad, and of Foreign Subjects dying whilst resident within her Majesty's Dominions.
[6th August, 1861.]

WHEREAS by reason of the present law of domicile the wills of British subjects dying whilst resident abroad are often defeated, and their personal property administered in a manner contrary to their expectations and belief; and it is desirable to amend such law, but the same cannot be effectually done without the consent and concurrence of foreign states: be it therefore enacted by, &c., as follows:

24 & 25 Vict.
c. 121, s. 1.

1. Whenever her Majesty shall by convention with any foreign state agree that provisions to the effect of the enactments herein contained shall be applicable to the subjects of her Majesty and of such foreign state respectively, it shall be lawful for her Majesty by any order in council to direct, and it is hereby enacted, that from and after the publication of such order in the London Gazette no British subject resident at the time of his or her death in the foreign country named in such order shall be deemed under any circumstances to have acquired a domicile in such country unless such British subject shall have been resident in such country for one year immediately preceding his or her decease, and shall also have made and deposited in a public office of such foreign country (such office to be named in the order in council) a declaration in writing of his or her intention to become domiciled in such foreign country; and every British subject dying resident in such foreign country, but without having so resided and made such declaration as aforesaid, shall be deemed for all purposes of testate or intestate succession as to moveables to retain the domicile he or she possessed at the time of his or her going to reside in such foreign country as aforesaid.

No British subject dying in a foreign country to be deemed to have acquired a domicile unless resident there for one year immediately preceding his or her death, &c., and for all purposes of testate or intestate succession shall retain the domicile possessed at the time of going to reside in such foreign country.

24 & 25 Vict.
c. 121, s. 2.

It is believed that no such convention has yet been agreed to. See further, as to the probable operation of the act, Hayes & Jarm. Wills, 540, 7th ed.; Sugd. R. P. Stat. 398.

No foreign subject dying in Great Britain or Ireland to be deemed to have acquired a domicile unless resident therein for one year immediately preceding his or her death, &c.

2. After any such convention as aforesaid shall have been entered into by her Majesty with any foreign state it shall be lawful for her Majesty by order in council to direct, and from and after the publication of such order in the London Gazette it shall be and is hereby enacted, that no subject of any such foreign country who at the time of his or her death shall be resident in any part of Great Britain or Ireland shall be deemed under any circumstances to have acquired a domicile therein, unless such foreign subject shall have been resident within Great Britain or Ireland for one year immediately preceding his or her decease, and shall also have signed, and deposited with her Majesty's secretary of state for the home department, a declaration in writing of his or her desire to become and be domiciled in England, Scotland or Ireland, and that the law of the place of such domicile shall regulate his or her moveable succession.

Who this act shall not apply to.

3. This act shall not apply to any foreigners who may have obtained letters of naturalization in any part of her Majesty's dominions.

When subjects of foreign states shall die in her Majesty's dominions, and there shall be no persons to administer to their estates, the consuls of such foreign states may administer.

4. Whenever a convention shall be made between her Majesty and any foreign state, whereby her Majesty's consuls or vice-consuls in such foreign state shall receive the same or the like powers and authorities as are hereinafter expressed, it shall be lawful for her Majesty by order in council to direct, and from and after the publication of such order in the London Gazette it shall be and is hereby enacted, that whenever any subject of such foreign state shall die within the dominions of her Majesty, and there shall be no person present at the time of such death who shall be rightfully entitled to administer to the estate of such deceased person, it shall be lawful for the consul, vice-consul, or consular agent of such foreign state within that part of her Majesty's dominions where such foreign subject shall die, to take possession and have the custody of the personal property of the deceased, and to apply the same in payment of his or her debts and funeral expenses, and to retain the surplus for the benefit of the persons entitled thereto; but such consul, vice-consul, or consular agent, shall immediately apply for and shall be entitled to obtain from the proper court letters of administration of the effects of such deceased person, limited in such manner and for such time as to such court shall seem fit.

As to administration of property in England belonging to a person domiciled out of this country, see Wms. Exors., 10th ed. 843, 1256; *Re Dost Aly Khan* (6 P. D. 6), and the cases quoted *ante*, pp. 414, 443.

ENACTMENTS RELATIVE TO JUDGMENTS AFFECTING REAL AND PERSONAL PROPERTY.

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I.—THE JUDGMENTS ACT, 1838.

1 & 2 VICT. c. 110.

An Act for abolishing Arrest on Mesne Process in Civil Actions, except in certain Cases; for extending the Remedies of Creditors against the Property of Debtors; and for amending the Laws for the Relief of Insolvent Debtors in England.

[16th August, 1838.]

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§ 18. *Decrees and Orders in Equity to have the Effect of Judgments*
...502.

11. And whereas the existing law is defective in not providing adequate means for enabling judgment creditors to obtain satisfaction from the property of their debtors, and it is expedient to give judgment creditors more effectual remedies against the real and personal estate of their debtors than they possess under the existing law: be it therefore further enacted, that it shall be lawful for the sheriff or other officer to whom any writ of elegit, or any precept in pursuance thereof, shall be directed at the suit of any person upon any judgment, which at the time appointed for the commencement of this act shall have been recovered, or shall be thereafter recovered in any action in any of her Majesty's superior courts at Westminster, to take and deliver execution unto the party in that behalf suing, of all

1 & 2 Vict.
c. 110, s. 11.

Sheriff empowered to deliver execution of lands to judgment creditor.

1 & 2 Vict.
c. 110, s. 11.

Proviso as to
copyhold
lands.

Proviso as to
purchasers,
mortgagees
and creditors.

such lands, tenements, rectories, tithes, rents and hereditaments, including lands and hereditaments of copyhold or customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment, or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he might without the assent of any other person exercise for his own benefit, in like manner as the sheriff or other officer may now make and deliver execution of one moiety of the lands and tenements of any person against whom a writ of elegit is sued out; which lands, tenements, rectories, tithes, rents and hereditaments, by force and virtue of such execution, shall accordingly be held and enjoyed by the party to whom such execution shall be so made and delivered, subject to such account in the court out of which such execution shall have been sued out as a tenant by elegit is now subject to in a court of equity: provided always, that such party suing out execution, and to whom any copyhold or customary lands shall be so delivered in execution, shall be liable and is hereby required to make, perform and render to the lord of the manor or other person entitled all such and the like payments and services as the person against whom such execution shall be issued would have been bound to make, perform and render, in case such execution had not issued: and that the party so suing out such execution, and to whom any such copyhold or customary lands shall have been so delivered in execution, shall be entitled to hold the same until the amount of such payments, and the value of such services, as well as the amount of the judgment, shall have been levied: [*provided also, that as against purchasers, mortgagees, or creditors, who shall have become such before the time appointed for the commencement of this act, such writ of elegit shall have no greater or other effect than a writ of elegit would have had in case this act had not passed*].

The words in italics have been repealed by the Stat. Law Rev. Act, 1874.

What may be
taken under
an elegit.

Before this act the writ of elegit (which was founded on 13 Edw. 1, c. 18, the Statute of Westminster) affected only one moiety of the judgment debtor's lands. This section, however, has extended the remedy of the judgment creditor to the *whole* of the debtor's lands. The section expressly includes (1) copyholds which were not subject to execution under the old law (see *ante*, p. 415). (2) Rectories and tithes, which however are not ecclesiastical but lay (*Hawkins v. Gathercole*, 6 D. M. & G. 24; *Bates v. Brothers*, 2 Sm. & G. 509; *Sweeny v. Fleming*, 14 Ir. Ch. R. 23). (3) Land over which the debtor has a disposing power. A judgment against a husband and wife payable so far as she was concerned out of her separate estate only was not enforceable by elegit against land subject to a general power of appointment (not exercised) vested jointly in the husband and wife (*Goatly v. Jones*, 1909, 1 Ch. 557). See, further, the note to sect. 13 (*post*, p. 494). (4) Land held in trust for the debtor (as to this see before the act the Statute of Frauds, s. 10; *Hunt v. Coles*, 1 Comyns, 226; *Steele v. Phillips*, Beatty, 193; *Hickson v. Aylward*, 3 Molloy, 25). The present section did not change the nature of the trust estates which might be taken under an elegit, and the old

authorities apply (*Re Newcastle*, 8 Eq. 705; *Digby v. Irvine*, 6 Ir. Eq. R. 155). According to these authorities it was held that the trust must be a clear and simple trust for the debtor only (*Doe v. Greenhill*, 4 B. & Ald. 684; *Forth v. Norfolk*, 4 Madd. 503; *Harris v. Booker*, 4 Bing. 96). A term held on trust to attend the inheritance might be taken (*Doe v. Evans*, 1 C. & M. 450); but with regard to a particular equitable interest in leaseholds it was said that it could not be taken (*Re Newcastle*, 8 Eq. 706). An equity of redemption cannot be taken either in freeholds (*Beckett v. Buckley*, 17 Eq. 435; *Wells v. Kilpin*, 18 Eq. 298; *Anglo-Italian Bank v. Davies*, 9 Ch. Div. 282; *Plunket v. Penon*, 2 Atk. 290; see *Thornton v. Finch*, 4 Giff. 515), or in leaseholds (*Salt v. Cooper*, 16 Ch. D. 544).

1 & 2 Vict.
c. 110, s. 11.

The following interests in land may, according to decided cases, be taken under an elegit:—An estate tail (*Ashburnham v. St. John*, Cro. Jac. 85; *Gilb. Exec.* 106; see *Lewis v. Duncombe*, 20 Beav. 398; *Re Anthony, A. v. A.*, 1893, 3 Ch. 498). An estate for life, including an equitable estate for life for the separate use of a married woman (*Goally v. Jones*, 1909, 1 Ch. 557), and a life estate in land excluded from a power of leasing (*Davis v. Marlborough*, 2 Swans. 121). The estate of a joint tenant (*Lord Abergavenny's case*, 6 Rep. 78 b; 2 Cru. Dig. 376), or of a tenant in common or a coparcener (2 Cru. Dig. 54). A reversion expectant on a lease for years or lives (*Bishop of Bristol*, 3 Leon. 113; *R. v. Lane*, 6 M. & W. 489; *Re South*, 9 Ch. 373). In the last-mentioned case the creditor to whom the land has been delivered cannot eject the tenants (*Doe v. Wharton*, 8 T. R. 2); but may sue (*Hatton v. Haywood*, 9 Ch. 236; *Ramsbottom v. Buckhurst*, 2 M. & S. 565), or distrain (*Lloyd v. Davies*, 2 Ex. 103), for rent falling due after the inquisition (*Sharp v. Key*, 8 M. & W. 379); and this without attornment by the tenants (*Lloyd v. Davies*, *sup.*; *Rogers v. Pitcher*, 6 Taunt. 207). As to a reversion expectant on a mortgage for a term of years, see *Poole v. Whitt* (15 M. & W. 571); *Plunket v. Penon* (2 Atk. 293); *Johns v. Pink* (1900, 1 Ch. 296). Leaseholds may be taken (*Re Hobson*, 33 Ch. D. 493; *Carter v. Hughes*, 2 H. & N. 714; *Fleetwood's case*, 8 Rep. 171), notwithstanding the Bankruptcy Act, 1883, s. 146 (*Richardson v. Webb*, 1 Morrell, 40), including the interest of a lessee who had mortgaged but remained in possession (*Johns v. Pink*, *sup.*). Land in ancient demesne (*Cox v. Barnsley*, Hob. 47; *Martin v. Wilks*, Moore, 211). A rent-charge (Moore, 32; see *Wooton v. Shirt*, Cro. Eliz. 742). Land belonging to a railway company; whether surplus (*Re Hull & Barnsley R. Co.*, 40 Ch. D. 119), or that on which the line, &c., is built (*Re Cowbridge R. Co.*, 5 Eq. 413). Land held by a public body for a public purpose (*Worrall Waterworks Co. v. Lloyd*, L. R. 1 C. P. 719; see, however, *Jersey v. Uxbridge Authority*, 1891, 3 Ch. 183). Land of which a receiver has been appointed (*Gooch v. Haworth*, 3 Beav. 428); but the leave of the court must be obtained (*Bowen v. Brecon R. Co.*, 3 Eq. 541). Land subject to an equitable mortgage (*Whitworth v. Gauguain*, 1 Phil. 728; *Brunton v. Neale*, 14 L. J. Ch. 8).

The following interests in land cannot be taken under an elegit:—An equity of redemption either in freeholds or leaseholds comprised in a legal mortgage (*Beckett v. Buckley* and other cases quoted, *sup.*). Land of which the debtor was mortgagee, but which has become vested by conveyance in a purchaser or mortgagee for valuable consideration, the vendor's mortgage being paid off then or previously (the Judgments Act, 1855, s. 11; see *Avison v. Holmes*, 1 J. & H. 544; *Greaves v. Wilson*, 25 Beav. 434). An interest in remainder (*Re South*, 9 Ch. 369; *Re Hamilton*, 31 Ch. Div. 294; see *Re Hambrough, H. v. H.*, 1909, 2 Ch. 620). Land comprised in a prior voluntary conveyance (*Beavan v. Oxford*, 6 D. M. & G. 529). The interest of a debtor in land which has already been taken under an elegit (*Carter v. Hughes*, 2 H. & N. 714). A rent-secck (*Walsall v. Heath*, Cro. Eliz. 656). An inalienable office (*Anon.*, Dyer, 7). Glebe or a churchyard (*Arbuckle v. Cowtan*, 3 Bos. & P. 327; *Parry v. Jones*, 1 C. B. N. S. 345). As to an advowson, see *Robinson v. Tongue* (3 P. Wms. 401).

The goods and chattels personal of a debtor cannot now be taken under an elegit (Bankruptcy Act, 1883, ss. 146, 168). Nor an equitable reversionary

What may
not be taken.

- 1 & 2 Vict. interest in the proceeds of sale of real estate (*Tyrrell v. Painton*, 1895,
c. 110, s. 11. 1 Q. B. 205).
- Nature of Where the land delivered is freehold, the judgment creditor acquires a
interest of chattel interest (see *ante*, p. 117) measured by the satisfaction of the debt;
tenant by while the judgment debtor has remaining in him an interest in the nature of
elegit. a reversion. Where the land is leasehold, the judgment creditor acquires
the whole term, subject to a legal title in the nature of an executory interest
in the judgment debtor (*Johns v. Pink*, 1900, 1 Ch. 304). As to a tenant by
elegit taking a conveyance of parts of the lands extended, see *Hele v*
Bealey (17 Beav. 14).
- Inquisition. In an inquisition on an *elegit* it is sufficient to describe the land in such a
manner as would be sufficient to identify it in a conveyance (*Doe v. Parry*,
13 M. & W. 356).
- Beneficed Where the judgment debtor is a beneficed clerk, and has no lay fee in
clerk. the bailiwick of the sheriff to whom the writ was directed, the creditor may,
as soon as the return is filed, sue out one or more writs of *fieri facias de*
bonis ecclesiasticis, or of sequestration (R. S. C. Ord. 43, rr. 3, 4, 5).
- Sheriff's As to a sheriff's poundage, see 29 Eliz. c. 4, s. 1; the Estreats Act,
poundage. 1716, s. 16; 8 Geo. I, c. 25, s. 5; 1 Vict. c. 55; and the Sheriffs Act, 1887,
ss. 20, 29; *Nash v. Allen*, 4 Q. B. 784; *Pilkington v. Cooke*, 16 M. & W.
615; *Marshall v. Hicks*, 10 Q. B. 15; *Lee v. Dangar*, 1892, 1 Q. B. 231;
1892, W. N. 71; *Shoppee v. Nathan*, 1892, 1 Q. B. 245; *Woolford v. Levy*,
ib. p. 772.
- As to the present form of the writ of *elegit*, see R. S. C. App. H., No. 3.
The writ and inquisition should be filed by the sheriff in the Central Office
(*Johns v. Pink*, 1900, 1 Ch. 296).
- As to other modes of satisfying a judgment by means of the land of the
judgment debtor, see *post*, p. 515.

Sheriff em-
powered to
seize money,
bank notes,
&c., and to
pay money or
bank notes to
execution
creditors, and
to sue for
amount se-
cured by bills
of exchange
and other
securities.

12. By virtue of any writ of *fieri facias* to be sued out of any superior or inferior court, [*after the time appointed for the commencement of this act*,] or any precept in pursuance thereof, the sheriff or other officer having the execution thereof may and shall seize and take any money or bank notes (whether of the Governor and Company of the Bank of England, or of any other bank or bankers), and any cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money belonging to the person against whose effects such writ of *fieri facias* shall be sued out; and may and shall pay or deliver to the party suing out such execution, any money or bank notes, which shall be so seized, or a sufficient part thereof; and may and shall hold any such cheques, bills of exchange, promissory notes, bonds, specialties or other securities for money, as a security or securities for the amount by such writ of *fieri facias* directed to be levied, or so much thereof as shall not have been otherwise levied and raised; and may sue in the name of such sheriff or other officer for the recovery of the sum or sums secured thereby, if and when the time of payment thereof shall have arrived; and that the payment to such sheriff or other officer, by the party liable on any such cheque, bill of exchange, promissory note, bond, specialty or other security, with or without suit, or the recovery and levying execution against the party so liable, shall discharge him to the extent of such payment, or of such recovery and levy in execution, as the case may be, from his liability on any such cheque, bill of exchange,

promissory note, bond, specialty or other security; and such sheriff or other officer may and shall pay over to the party suing out such writ the money so to be recovered, or such part thereof as shall be sufficient to discharge the amount by such writ directed to be levied; and if, after satisfaction of the amount so to be levied, together with sheriff's poundage and expenses, any surplus shall remain in the hands of such sheriff or other officer, the same shall be paid to the party against whom such writ shall be so issued; provided that no such sheriff or other officer shall be bound to sue any party liable upon any such cheque, bill of exchange, promissory note, bond, specialty or other security, unless the party suing out such execution shall enter into a bond, with two sufficient sureties, for indemnifying him from all costs and expenses to be incurred in the prosecution of such action, or to which he may become liable in consequence thereof, the expense of such bond to be deducted out of any money to be recovered in such action.

1 & 2 Vict.
c. 110, s. 12.

Proviso as to
indemnity of
sheriff.

The words in *italics* have been repealed by the S. L. Rev. Act, 1874.

This section places bank notes and money seized under a *fi. fa.* upon the same footing as goods; therefore they are not the property of the execution creditor until handed over by the sheriff to him (*Collingridge v. Paxton*, 11 C. B. 683); and are not available in the sheriff's hands to satisfy a writ of *fi. fa.* lodged with him against such execution creditor at the suit of a third person (*Ib.*). The section creates no lien in favour of the execution creditor before seizure by the sheriff (*Johnson v. Pickering*, 1908, 1 K. B. 8). And the sheriff's power of seizure is limited to money, &c., belonging to a living person. It cannot be exercised after the death of the judgment debtor (*Ib.*).

Effect of
section.

This section does not extend to a debt owing to the judgment debtor (*Helmere v. Smith*, 35 Ch. Div. 447; *Harrison v. Paynter*, 6 M. & W. 387; *Alleyne v. Darcy*, 5 Ir. Ch. R. 56); or to money in the hands of a third party in trust for him (*Robinson v. Peace*, 7 Dowl. P. C. 93; *Fieldhouse v. Croft*, 4 East, 510), as in the hands of a sheriff (*Collingridge v. Paxton*, 11 C. B. 683; see *Harrison v. Paynter*, 6 M. & W. 387; *Masters v. Stanley*, 8 Dowl. P. C. 169), unless the sheriff has appropriated it for the debtor (*Wood v. Wood*, 4 Q. B. 397). A charging order has, however, been made on cash in court to assist an execution on a *fi. fa.* (*Brereton v. Edwards*, 21 Q. B. Div. 488; but see *France v. Campbell*, 9 Dowl. P. C. 914); and leave has been given to seize a cheque drawn in favour of the debtor by the Accountant-General, but not delivered to him (*Watts v. Jeffreys*, 3 Mac. & G. 422; see *Courtoy v. Vincent*, 15 Beav. 486). It has been said that this section applies only to securities of a similar nature to those expressly mentioned (*Rollason v. Rollason*, 34 Ch. D. 496). Policies of assurance, however, have been held within it (*Stokoe v. Cowan*, 29 Beav. 637; see *contra*, *Re Sargent*, 7 L. R. Ir. 66), also the covenant to pay in a mortgage (*Avison v. Holmes*, 1 J. & H. 530).

Cases under
this section.

Independently of this section, the sheriff can, under a *fi. fa.*, seize all goods and chattels belonging to the debtor, including, in particular, the following: (1) Terms of years and leaseholds (*Fleetwood's case*, 8 Rep. 171; *Doe v. Smith*, 1 M. & R. 137; *Taylor v. Cole*, 3 T. R. 292; *Doe v. Donston*, 1 B. & Ald. 230; see *Doherty v. Nelson*, 1895, 2 Ir. R. 90); which may be sold without seizing or taking possession of either the indenture of lease or the property (*Coleman v. Rawlinson*, 1 F. & F. 330). The term remains in the debtor until assignment by the sheriff (*Playfair v. Musgrove*, 14 M. & W. 239; *Giles v. Grover*, 9 Bing. 128; *Doe v. Jones*, 9 M. & W. 372), which must be by deed (8 & 9 Vict. c. 106, s. 3, *post*); and the tenants in possession

Fieri facias
generally.
What may
be taken.

1 & 2 Vict.
c. 110, s. 12.

cannot be turned out by the sheriff (*R. v. Deane*, 2 Show. 85; see *Taylor v. Cole*, 3 T. R. 292; *Burden v. Kennedy*, 3 Atk. 739; *Doe v. Brawn*, 5 B. & Ald. 243). (2) A rent-charge (*York v. Twiner*, Cro. Jac. 78). (3) Growing crops (*Re Woodham*, 20 Q. B. D. 40; *Gwilliam v. Barker*, 1 Price, 274; see the Landlord and Tenant Act, 1851, s. 2). (4) Fixtures which the debtor can remove as against his landlord (*Place v. Flagg*, 4 M. & R. 277; *Winn v. Ingleby*, 5 B. & Ald. 625; *Pitt v. Shew*, 4 B. & Ald. 206; *Evans v. Roberts*, 5 B. & C. 841; see *Dumergue v. Rumsey*, 2 H. & C. 777). (5) Ships or shares in ships (*Harley v. Harley*, 11 Ir. Ch. R. 451; *Dickinson v. Kitchen*, 8 El. & Bl. 789). (6) The interest of a pawnbroker in a pledge (*Rollason v. Rollason*, 34 Ch. D. 495; see *Squire v. Huetson*, 1 Q. B. 308). (7) Goods let to the debtor (*Lancashire Co. v. Fitzhugh*, 6 H. & N. 502). (8) The property of a partnership where judgment has been recovered against the firm (Partnership Act, 1890, s. 23; for the case where a partner is an infant, see *Lovell v. Beauchamp*, 1894, A. C. 607), but not when it has been recovered against an individual partner (Partnership Act, 1890, s. 23; see *Brown Janson v. Hutchinson*, 1895, 1 Q. B. 737; 1895, 2 Q. B. 126). For the old practice, see *Helmore v. Smith*, 35 Ch. Div. 436. As regards goods, the writ of *fi. fa.* binds them as from the delivery of the writ to the sheriff, but without prejudice to a title acquired in good faith for valuable consideration and without notice (Sale of Goods Act, 1893, sects. 26, 62, sub-s. 1; see *Murgatroyd v. Wright*, 1907, 2 K. B. 333; *Birstall v. Daniels*, 1908, 2 K. B. 254).

What may
not be taken.

The following cannot be seized under a *fi. fa.*:—Clothes, bedding, and tools, to the value of 5*l.* (Small Debts Act, 1845, s. 8); certain farm produce (Sale of Farming Stock Act, 1816). An equitable interest in leaseholds (*Re Newcastle*, 8 Eq. 700; *Scott v. Scholey*, 8 East, 467), or an equity of redemption of leaseholds (*Lyster v. Dolland*, 1 Ves. 431). Fixtures annexed to the debtor's freehold (*Winn v. Ingleby*, 5 B. & Ald. 625). Rolling stock, plant and buildings of a railway which is open for traffic (Rail. Cos. Act, 1867, s. 4; see *Re East India Dock Co.*, 38 Ch. D. 576; *Midland Co. v. Potteries R. Co.*, 6 Q. B. D. 36; *Re Knott End Ry. Act*, 1898; 1901, 2 Ch. 8). Stock or shares (*Brereton v. Edwards*, 21 Q. B. Div. 499; see sect. 14, *post*); or an equitable interest in stock (*Horn v. Horn*, Amb. 78). Goods pawned by the debtor (*Young v. Lambert*, L. R. 3 P. C. 142). Goods over which the debtor has a lien (*Legg v. Evans*, 6 M. & W. 36). Goods of the debtor over which another has a lien (*Rogers v. Kennay*, 9 Q. B. 592). The copyright of a newspaper (*Ex p. Foss*, 2 De G. & J. 230). Goods sold for valuable consideration, though with the intention of defeating an execution (*Wood v. Dixie*, 7 Q. B. 892); goods validly mortgaged (*Scarlett v. Hanson*, 12 Q. B. Div. 213; *Re Opera, Limited*, 1891, 3 Ch. 260); unless in either of the last two cases the purchaser, or mortgagee, had notice of the writ being in the hands of the sheriff (19 & 20 Vict. c. 97, s. 1). Goods over which a receiver has been appointed, unless with leave of the court (*Russell v. East Anglian R. Co.*, 3 Mac. & G. 104; see *Edwards v. Edwards*, 2 Ch. Div. 291). Goods which the debtor holds solely as trustee (*Fenwick v. Laycock*, 2 Q. B. 108; *Re Morgan, Pillgrem v. Pillgrem*, 18 Ch. Div. 93; see *Sykes v. Sykes*, L. R. 5 C. P. 113).

Lunatic
debtor.

Goods of a lunatic not in the custody of the Court of Lunacy may be taken under a *fi. fa.* (*Re Clarke*, 1898, 1 Ch. 336); but goods in such custody cannot be seized, and can only be made available for the creditor after provision has been made for the maintenance of the lunatic and for costs (*Re Winkle*, 1894, 2 Ch. 519; see *Re Seager Hunt*, 1900, 2 Ch. 54; *Davies v. Thomas*, 1900, 2 Ch. 462).

Landlord's
rent.

The sheriff is not bound or able to levy under a *fi. fa.* whatever the value of the goods may be, unless the execution creditor first satisfies the landlord's rent (*Cocker v. Musgrove*, 9 Q. B. 230; *Risley v. Ryle*, 11 M. & W. 16), to the extent of one year's arrears (8 Anne, c. 18, s. 1; see the Execution Act, 1844, s. 67), which is due at the time of taking possession under the writ (*Hoskins v. Knight*, 1 M. & S. 245; see *Wintle v. Freeman*, 11 Ad. & Ell. 539). As to the usual practice of the sheriff paying the landlord, see *Re*

Mackenzie, 1899, 2 Q. B. 575. And as to the liability of the sheriff to the landlord, see *Thomas v. Mirehouse*, 19 Q. B. D. 563; Woodfall, 530, 16th ed. As to cases within the County Courts Act, 1888, s. 160, see *Hughes v. Smallwood*, 25 Q. B. D. 306. As to taxes, see Taxes Management Act, 1880, s. 88. 1 & 2 Vict. c. 110, s. 12.

Where the goods have been seized but not sold, the judgment creditor may, as soon as the return has been filed, sue out a writ of *venditioni exponas* (R. S. C. Ord. 43, rr. 2, 5; see D. C. P. 861; Chitty's Archbold, 865). Where the judgment debtor is a beneficed clerk and has no goods in the bailiwick of the sheriff to whom the writ was directed, the creditor may as soon as the return is filed, sue out one or more writs of *fieri facias de bonis ecclesiasticis*, or of sequestration (R. S. C. Ord. 43, rr. 3, 4 and 5; see *Allen v. Williams*, 2 Sm. & G. 455; Bankruptcy Act, 1883, s. 52 (1); D. C. P. 863; Chitty's Archbold, 1176). Taxes. Beneficed clerk.

As to execution against corporations and companies, see R. S. C. Ord. 42, r. 31; Chitty's Archbold, 1052, 1070, 14th ed.; and as to execution against companies in liquidation, see Buckley, 9th ed. 330, 486. Corporations and companies.

13. A judgment already entered up, or to be hereafter entered up, against any person in any of her Majesty's superior courts at Westminster, shall operate as a charge upon all lands, tenements, rectories, advowsons, tithes, rents and hereditaments (including lands and hereditaments of copyhold or customary tenure), of or to which such person shall at the time of entering up such judgment, or at any time afterwards, be seized, possessed of, or entitled for any estate or interest whatever, at law or in equity, whether in possession, reversion, remainder or expectancy, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power, which he might without the assent of any other person exercise for his own benefit, and shall be binding as against the person against whom judgment shall be so entered up, and against all persons claiming under him after such judgment, and shall also be binding as against the issue of his body, and all other persons whom he might, without the assent of any other person, cut off and debar from any remainder, reversion or other interest, in or out of any of the said lands, tenements, rectories, advowsons, tithes, rents and hereditaments; and every judgment creditor shall have such and the same remedies in a court of equity against the hereditaments so charged by virtue of this act or any part thereof, as he would be entitled to in case the person against whom such judgment shall have been so entered up had power to charge the same hereditaments, and had by writing, under his hand, agreed to charge the same, with the amount of such judgment debt and interest thereon: provided that no judgment creditor shall be entitled to proceed in equity to obtain the benefit of such charge until after the expiration of one year from the time of entering up such judgment; [or in cases of judgments already entered up, or to be entered up, before the time appointed for the commencement of this act, until after the expiration of one year from the time appointed for the commencement of this act,] nor shall such charge operate to give the judgment creditor any preference in case of the bankruptcy of the person against whom judgment shall have Judgment to operate as a charge on real estate. Charge not to be enforced until after expiration of a year.

1 & 2 Vict.
c. 110, s. 13.

Proviso as to
purchasers.

been entered up unless such judgment shall have been entered up one year at least before the bankruptcy; [*provided also, that as regards purchasers, mortgagees or creditors, who shall have become such before the time appointed for the commencement of this act, such judgment shall not affect lands, tenements or hereditaments, otherwise than as the same would have been affected by such judgment if this act had not passed:*] provided also, that nothing herein contained shall be deemed or taken to alter or affect any doctrine of courts of equity, whereby protection is given to purchasers for valuable consideration without notice.

The words in *italics* have been repealed by the S. L. R. Act, 1874.

Under sect. 2 of the Land Charges Act, 1900 (*post*, p. 512, where see note), a judgment does not now operate as a charge on land until a writ or order for enforcing it is registered under sect. 5 of the Land Charges Act, 1888 (*post*, p. 507).

Order of
Probate
Division.

Before the Judicature Acts an order of the Probate Court did not operate as a charge under this section (*Pratt v. Bull*, 1 De G. J. & S. 141; *Crispin v. Cunnano*, L. R. 1 P. & M. 622; as to a decree of the Divorce Court for alimony, see *Exp. Holden*, 13 C. B. N. S. 641; *Sidney v. Sidney*, 1867, W. N. 248). Since the Judicature Acts a judgment of the Probate Division operates as a charge under the section (*Re Harrison and Bottomley*, 1899, 1 Ch. 469; see *Oliver v. Lowther*, 42 L. T. 47). As to orders of Courts of Equity, see sect. 18, *post*, p. 502 and note.

Lands in
Middlesex
and York-
shire.

According to the decisions in the case of lands in Middlesex and Yorkshire, the charge under this section did not take effect until registration in the local registry (*Westbrook v. Blythe*, 3 El. & Bl. 737; *Johnson v. Holdsworth*, 1 Sim. N. S. 106; see *Hughes v. Lumley*, 4 El. & Bl. 274; *Cathrow v. Eade*, 1 Sm. & Giff. 423). By the Land Registry (Middlesex Deeds) Act, 1891, s. 6, it is provided that it shall not be necessary for the validity of any judgment, statute or recognizance, that it should be registered under the Middlesex Registry Act, 1708. The priority of judgments affecting lands in Yorkshire depends on local registration (*Neve v. Flood*, 33 Beav. 666; Yorkshire Registries Act, 1884, ss. 4, 14). Notice of an earlier unregistered judgment was held immaterial (*Benham v. Keane*, 3 D. F. & J. 318; see as to mortgages, *Rolland v. Hart*, 6 Ch. 678).

What lands
are affected
by judgments
under this
section.

It has been said that this section includes every possible interest in lands of every possible description, except, perhaps, land held in ancient demesne (*Harris v. Davison*, 15 Sim. 133). But where an intending purchaser was let into possession before completion, and a judgment creditor of the purchaser obtained a receiver of the purchaser's interest in the land, and subsequently on the vendor paying a sum of money to the purchaser the contract was rescinded and possession delivered up to the vendor, the judgment creditor had no charge under this section (*Ridout v. Fowler*, 1904, 2 Ch. 93). The following interests in land have been held to be within the section. Lands of which the debtor is tenant in tail (*Re Anthony*, A. v. A., 1893, 3 Ch. 498; see *Lewis v. Duncombe*, *inf.*). Leaseholds assigned to the judgment debtor to secure an annuity (*Harris v. Davison*, 15 Sim. 133). Land charged with money covenanted to be paid to the debtor (*Russell v. M'Culloch*, 1 K. & J. 313, see *Youngusband v. Gisborne*, 1 De G. & S. 209). The interest of a mortgagee (*Clare v. Wood*, 4 Hare, 81). The interest of a *cestui que trust* in a mortgage investment of a trust fund (*Avison v. Holmes*, 1 J. & H. 530). As to a legal estate in remainder, see *Re Harrison and Bottomley*, 1899, 1 Ch. 471. The words referring to land over which the debtor has a disposing power, extend only to the beneficial interest of the debtor therein, such as the interest of an heir subject to the debts of his ancestor (*Kinderley v. Jervis*, 22 Beav. 1); and do not include lands comprised in a prior voluntary conveyance (*Beavan v. Oxford*, 6 D. M. & G. 509). A tenant in tail in possession has, under these words, been ordered to execute a disentailing

deed to give effect to the charge under this section (*Lewis v. Duncombe*, 20 Beav. 398; see *Re Anthony*, A. v. A., 1893, 3 Ch. 502). As to the effect of a judgment on the lands of a corporation, see *Arnold v. Gravesend*, 2 K. & J. 574. 1 & 2 Vict. c. 110, s. 13.

This section does not extend to an ecclesiastical benefice (*Hawkins v. Gathercole*, 6 D. M. & G. 1; *Bates v. Brothers*, 2 Sm. & Giff. 509; *Long v. Storie*, 3 De G. & S. 308; *Metcalf v. York*, 1 M. & C. 547); or a share in the proceeds of land devised on an absolute trust for sale (*Thomas v. Cross*, 2 Dr. & Sm. 423); or land of which the debtor was mortgagee, but which has become vested by conveyance, in a purchaser or mortgagee for valuable consideration, and the debtor's mortgage paid off thereupon or previously (Judgments Act, 1855, s. 11; see *Greaves v. Wilson*, 25 Beav. 434). What are not affected.

It has been said that that which formerly, by force of the Statute of Westminster, 13 Edw. 1, st. 1, c. 18, was a general charge upon lands, by force of this section became a specific charge (*Rolleston v. Morton*, 1 Dru. & War. 171, 195; Sugd. V. & P. 663, 11th ed.). So judgment creditors of an insolvent plaintiff, whose estates were sold by order of court, were necessary parties to the conveyance (*Hotham v. Somerville*, 9 Beav. 63). So also were judgment creditors of the heir of a devisee of land, which had been sold in a suit to administer the real estate of the testator (*Craddock v. Piper*, 14 Sim. 310). So also those of a prior purchaser who had entered into possession, but not paid in full, where the land was resold under an order of court in an action by the vendor (*Greycoat Hospital v. Westminster Commrs.*, 1 De G. & J. 531). The charge arising under this section is within the Real Estate Charges Act, 1877 (*Re Anthony*, A. v. A., 1892, 1 Ch. 450). But it is an equitable charge; so it does not vest the rents in the creditor (*Seymour v. Lucas*, 1 Dr. & Sm. 177). So an equitable mortgagee has priority over a subsequent judgment creditor, although the latter may have acquired the legal seisin and possession of the land, under an *elegit*, without notice of the mortgage (*Whitworth v. Gaugain*, 1 Phil. 728; *Langton v. Horton*, 1 Hare, 561; see the cases as to charging orders quoted under sect. 14, *post*, p. 499). And it was held that a judgment was not such a charge on land as would, by means of registration in Middlesex, take precedence of an unregistered mortgage created before the act (*Cathrow v. Eade*, 1 Sm. & Giff. 423). Nature of the charge created by this section.

Proceedings in equity to enforce the charge given by this section must be by the person to whom the money is payable under the judgment (*Crowther v. Crowther*, 4 W. R. 351). After a year from entering up his judgment, a creditor might enforce his equitable charge, although a year had not elapsed since registration of the judgment (*Derbyshire R. Co. v. Bainbrigge*, 15 Beav. 146); but he could not proceed before a year from the entering up of the judgment (*Smith v. Hurst*, 10 Hare, 30). And within the year the court declined to appoint a receiver (*Smith v. Hurst*, 1 Coll. C. C. 705); even where fraud was alleged (*Smith v. Hurst*, 10 Hare, 30); except where the debtor was entitled to a life interest (*Yescombe v. Landor*, 28 Beav. 80; see *Partridge v. Foster*, 34 Beav. 1; *Tillett v. Pearson*, 22 W. R. 209). Upon a bill of foreclosure filed by a mortgagee after the bankruptcy of his mortgagor, a judgment creditor, who had entered up judgment against the mortgagor less than one year previously to the bankruptcy, was properly made a defendant (*Harrison v. Pennell*, 6 W. R. 712). Under the Land Charges Act, 1900 (*post*, p. 513), registration must now be effected, not of the judgment, but of the writ or order enforcing it. Proceedings in equity to enforce judgments against land under this section.

As regards the right method of enforcing the charge, the better opinion (arrived at after some conflict of authority: *Footner v. Sturgis*, 5 De G. & Sm. 736; *Bull v. Faulkner*, 1 De G. & Sm. 685; *Ford v. Wastell*, 2 Phil. C. C. 591; *Jones v. Bailey*, 17 Beav. 582; *Messer v. Boyle*, 21 Beav. 559) appears to be that the remedy is foreclosure, not sale (*Re Owen*, 1894, 3 Ch. 227; *Sadler v. Worley*, 1894, 2 Ch. 175). A judgment creditor, who has been in possession under an *elegit*, must account in the same manner as a mortgagee in possession (*Bull v. Faulkner*, 1 De G. & S. 685). Judgment creditors were not allowed successive periods of three months each to redeem, but one period of three months was given to them or any of them (*Radcliff v. Salmon*,

1 & 2 Vict. c. 110, s. 13. 4 De G. & S. 526; *Stead v. Banks*, 5 De G. & S. 560; *Bates v. Hillcoat*, 16 Beav. 139). As to proceedings by a tenant by *elegit* to redeem a mortgage, see *post*, p. 515.

Contribution. As to contribution between various portions of the judgment debtor's real estate where some of them had been aliened for value after judgment, see 3 Rep. 11 b; *Hartly v. O'Flaherty*, Beatty, 61; and see 16 & 17 Car. 2, c. 5; *Averall v. Wade*, Lloyd & G. 252; *Handcock v. Handcock*, 1 Ir. Ch. R. N. S. 444.

Stock and shares in public funds and public companies belonging to the debtor and standing in his own name to be charged by order of a judge.

14. If any person against whom any judgment shall have been entered up in any of her Majesty's superior courts at Westminster, shall have any government stock, funds, or annuities (*a*), or any stock or shares of or in any public company in England (whether incorporated or not) (*b*) standing in his name in his own right, or in the name of any person in trust for him (*c*), it shall be lawful for a judge of one of the superior courts (*d*), on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon, and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor (*e*); provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order (*f*).

3 & 4 Vict. c. 82, s. 1.

Dividends, interest, &c.

Stock, &c., in court.

The Judgments Act, 1840, s. 1, after reciting the above section, declares that the aforesaid provisions of the said act shall be deemed and taken to extend to the interest of any judgment debtor, whether in possession, remainder or reversion, and whether vested or contingent as well in any such stocks, funds, annuities or shares as aforesaid as also in the dividends, interest or annual produce of any such stock, funds, annuities or shares: and whenever any such judgment debtor shall have any estate, right, title or interest, vested or contingent, in possession, remainder or reversion in, to, or out of any such stock, funds, annuities or shares as aforesaid, which now are or shall hereafter be standing in the name of the accountant-general of the Court of Chancery, or the accountant-general of the Court of Exchequer, or in, to, or out of the dividends, interest, or annual produce thereof, it shall be lawful for such judge to make any order as to such stock, funds, annuities or shares, or the interest, dividends or annual produce thereof, in the same way as if the same had been standing in the name of a trustee of such judgment debtor: provided always, that no order of any judge as to any stock, funds, annuities or shares standing in the name of the accountant-general of the Court of Chancery or the accountant-general of the Court of Exchequer, or as to the interest, dividends or annual produce thereof, shall prevent the Governor and Company of the Bank of England, or any public company, from permitting any transfer of such stock, funds, annuities or shares or payment of the interest, dividends or annual produce thereof, in such manner as the Court of Chancery or the Court of Exchequer respectively may direct, or shall have any greater effect than if such debtor had charged such stock, funds, annuities, or shares, or the interest, dividends or annual produce thereof, in favour of the judgment creditor, with the amount of the sum to be mentioned in any such order.

Judgment in respect of

The judgment in respect of which a charging order is asked must be for an ascertained sum (*Wiggery v. Tepper*, 6 Ch. Div. 364; *Chadwick v. Holt*,

8 D. M. & G. 584); but the sum may be a sum payable at a future date (*Bagnall v. Carlton*, 6 Ch. D. 130). A judgment for costs is not sufficient, until they have been taxed (*Wiggery v. Tepper*, *sup.*; *Jones v. Williams*, 8 M. & W. 349; *contra*, *Burns v. Irving*, 3 Ch. D. 291). As to an order for payment of money to the credit of a cause, see *Ward v. Shakeshaft* (1 Dr. & Sm. 272). A charging order cannot be made against an executor in respect of judgment recovered against his testator (*Stewart v. Rhodes*, 1900, 1 Ch. 386), and leave to issue execution against the executor does not enable such an order to be made (*Ib.*). An order under sect. 109 of the Lunacy Act, 1890, charging costs is not within this section and Ord. 46, r. 1 (*Re Cathcart*, 1893, 1 Ch. 466).

1 & 2 Vict.
c. 110, s. 14.

which charging order is made.

(a) Arrears of a government annuity are not chargeable (*Taylor v. Turnbull*, 4 H. & N. 495). Nor is a pension granted by the East India Co. (*Morris v. Manesty*, 7 Q. B. 674). As to a charging order on an annuity "payable out of the suitor's fund" by order of the Lord Chancellor, in pursuance of 46 Geo. 3, c. 128, see *Withan v. Lynch* (1 Exch. 391).

What can be charged.

Annuities.

(b) A banking co-partnership, which made returns to the Stamp Office pursuant to the Country Bankers Act, 1826, was within this section (*Macintyre v. Connell*, 1 Sim. N. S. 225; see *Graham v. Connell*, 19 L. J. Ex. 361). It is doubtful whether a mining company on the cost-book principle is within the section (*Nicholls v. Rosewarne*, 6 C. B. N. S. 480). Debentures cannot be charged (*Sellar v. Charles Bright*, 1904, 2 K. B. 446).

Public companies within this section.

(c) The following interests in stock, &c., can according to decided cases be charged under this section:—A contingent equitable interest in stock (*Baker v. Tynte*, 29 L. J. Q. B. 233; *Cragg v. Taylor* (2), L. R. 2 Ex. 131); a reversionary interest in stock (*South-Western Co. v. Robertson*, 8 Q. B. D. 17); an equity of redemption in stock (*Re Royal Bank of Australia*, 25 L. J. Ch. 649; see *Fuller v. Earle*, 7 Ex. 796); stock in court to the credit of a lunatic debtor (*Horne v. Pountain*, 23 Q. B. D. 264; *Re Leavesley*, 1891, 2 Ch. 1; *Re Plenderleith*, 1893, 3 Ch. 332; *Re Brown, Llewellyn v. Brown*, 1900, 1 Ch. 489); the interest of a legatee in stock standing in the name of the testator (*Errington v. Prior*, 10 L. R. 79); the interest of the debtor in stock held on trust for him and another (*South Western Co. v. Robertson*, 8 Q. B. D. 17; see *Fowler v. Churchill*, 11 M. & W. 57). In such last-mentioned case the order need not define the extent of the chargeable interest, the trustees being responsible for giving proper effect to the order (*South Western Co. v. Robertson*, *sup.*, where there was a clause of forfeiture on alienation; see *White v. O'Grady*, 2 Ir. Ch. R. 333; *Hodgens v. Hodgens*, I. R. 11 Eq. 439). Where stock is subject to an imperative trust for conversion at a definite time the interest of the judgment debtor in the proceeds cannot be charged (*Dixon v. Wrench*, L. R. 4 Ex. 154; but see *Ideal Bedding v. Holland*, 1907, 2 Ch. 168); *secus* where there is no imperative trust for conversion (*Bolland v. Young*, 1904, 2 K. B. 831; *Ideal Bedding v. Holland*, *sup.*).

What interest of judgment debtor can be charged.

The following cannot be charged under this section:—Stock of a deceased judgment debtor in the hands of his representative (*Finney v. Hinde*, 4 Q. B. D. 102; *Stewart v. Rhodes*, 1900, 1 Ch. 386; *Wallace v. M'Cann*, 4 Ir. Eq. R. 522). Stock to which the debtor is entitled as executor, though he is also beneficially interested as legatee (*Taylor v. Turnbull*, 4 H. & N. 495; see *Hodgens v. Hodgens*, I. R. 11 Eq. 439). Stock or shares of which the debtor is only trustee (*Re Blakeley Ordnance Co.*, 25 W. R. 111; 35 L. T. 617; *Gill v. Continental Gas Co.*, L. R. 7 Ex. 332; see as to the old practice, *Rogers v. Holloway*, 5 Man. & G. 292; *Fuller v. Earle*, 7 Ex. 796; *Cragg v. Taylor*, L. R. 1 Ex. 148); even where the shares were qualification shares standing in the name of a director, and which according to the articles of association of the company were to be held by him "in his own right" (*Cooper v. Griffin*, 1892, 1 Q. B. 740; *Howard v. Sadler*, 1893, 1 Q. B. 1; see *Sutton v. English Co.*, 1902, 2 Ch. 502). Property of a married woman which she is restrained from anticipating (*Stanley v. Stanley*, 7 Ch. D. 589; *Smith v. Whitlock*, 34 W. R. 414). Cash in court

What cannot be charged.

1 & 2 Vict. c. 110, s. 14. to the credit of the judgment debtor (*Brereton v. Edwards*, 21 Q. B. Div. 488); but such cash can be charged under the general jurisdiction of the court (*Ib.*; see *Re Bell, Carter v. Stadden*, 54 L. T. 370; 34 W. R. 363). Cash in the hands of a trustee for the judgment debtor cannot be charged (*Robinson v. Pearce*, 7 Dowl. 93; see *Wallace v. McCann*, 4 Ir. Eq. R. 522). An order charging an equitable debt could not be obtained (*Horsley v. Cox*, 4 Ch. 92); but such a debt can be attached (*Wilson v. Dundas*, 1875, W. N. 232).

Practice. (d) Charging orders may be made by any judge of the Supreme Court (R. S. C., Ord. 46, r. 1; see *Brereton v. Edwards*, 21 Q. B. Div. 488); where a judge in chambers refuses an order on the ground that the shares are worthless, the court will not review his decision (*Wicks v. Shanks*, 67 L. T. 609). In the Queen's Bench Division the order *nisi* may be made by a master, though it cannot be discharged by him (*Mitchell v. De Vesey*, 67 L. T. 53). But the order absolute must be made by a judge (R. S. C., Ord. 54, r. 12 (l)). The person to show cause against making the order absolute must be the person against whom the judgment was recovered. So an executor cannot show cause in the case of a judgment recovered against his testator (*Stewart v. Rhodes*, 1900, 1 Ch. 386). The writ in an action to enforce a charging order made under this section cannot be served out of the jurisdiction (*Mority v. Stephan*, 58 L. T. 850; 36 W. R. 779; see *Re Gethin*, 1 R. 11 Eq. 512). See further as to the practice, Dan. Ch. Pr.; Chit. Arch. 919; *Brown v. Bamford* (9 M. & W. 42); *Graham v. Connell* (19 L. J. Ex. 361); *Robinson v. Burbidge* (9 C. B. 289).

Forms of order. When the fund is large and the debt small an adequate part only of the fund should be charged (*Horne v. Pountain*, 23 Q. B. D. 267; see *Stanley v. Bond*, 8 Beav. 50). In the case of a lunatic debtor the order may provide that the charge should not be enforceable till the death of the lunatic or further order (*Re Leavesley*, 1891, 3 Ch. 1). For a form of order charging shares in a company, see *Re Connell* (35 L. J. Ch. 649); *Re Imperial Association* (1868, W. N. 80). For the case of a charging order against a corporation, see *A.-G. v. Thetford* (8 W. R. 467). See further as to forms of orders, Seton, 477 *et seq.*; 6th ed.

Charge operates from date of order nisi. A charging order, when made absolute, operates from the making of the order *nisi* (*Haly v. Barry*, 3 Ch. 452; *Brereton v. Edwards*, 21 Q. B. Div. 488; see *Warburton v. Hill*, Kay, 470). A decree for administration subsequent to the order *nisi* will not prevent its being made absolute (*Haly v. Barry*, *sup.*; see *Stewart v. Rhodes*, 1900, 1 Ch. 386).

Effect of charging order. (e) The effect of a charging order depends on the validity of the judgment, not on the capacity of the judgment debtor to give a valid charge (*Re Leavesley*, 1891, 2 Ch. 1). So a charging order founded on a valid judgment against a lunatic is good (*Ib.*; *Horne v. Pountain*, 23 Q. B. D. 264), and will be given effect to by the High Court in respect of funds in that court (*Re Brown, Llewellyn v. Brown*, 1900, 1 Ch. 489). Such an order, however, does not deprive the court in lunacy of its power to dispose for the benefit of the lunatic of the funds charged (*Re Plenderleith*, 1893, 3 Ch. 332); but when his maintenance is provided for, the creditor will be allowed his legal rights (*Re Seager Hunt*, 1900, 2 Ch. 54). A charging order founded on a judgment for money lent to the judgment debtor during his infancy will have no effect at all (*Re Onslow*, 20 Eq. 677). A charging order may or may not, according to the terms of the gift, determine an interest of the debtor determinable on alienation (*Montefiore v. Behrens*, 1 Eq. 171; *Roffey v. Bent*, 3 Eq. 759; *Re Kelly, West v. Turner*, 59 L. T. 494; see *South Western Co. v. Robertson*, 8 Q. B. Div. 17). A charging order is not an execution within sect. 45 of the Bankruptcy Act, 1883 (*Re Hutchinson*, 16 Q. B. D. 515). Nor is it a "transaction" protected by sect. 49 of the same Act (*Re O'Shea, Courage v. O'Shea*, 1895, 1 Ch. 325). After an order has been made charging stock standing in the names of trustees, the bank is still bound to pay the dividends to the trustees, who alone are responsible for the application thereof (*Bristed v. Wilkins*, 3

Hare, 235; *Fowler v. Churchill*, 11 M. & W. 57, 323; *South Western Co. v. Robertson*, 8 Q. B. D. 17). 1 & 2 Vict. c. 110, s. 14.

A charging order only gives to the judgment creditor what the debtor can honestly give him (*Re Anglesey, Galve v. Gardner*, 1903, 2 Ch. 732). The order does not give a judgment creditor priority over a prior charge, legal or equitable, even if he has no notice of it (*Re Bell, Carter v. Stadden*, 54 L. T. 370; 34 W. R. 363; *Haly v. Barry*, 3 Ch. 452; *Brearclyff v. Dorrington*, 4 De G. & S. 122; see *Gill v. Continental Gas Co.*, L. R. 7 Ex. 338); and even if the mortgage was made after the judgment (*Scott v. Hastings*, 4 K. & J. 633; *Dunster v. Glengall*, 3 Ir. Ch. R. 47; see *Gray v. Stone*, 69 L. T. 282); and (in the case of stock held on trust) even if no notice was given by the mortgagee to the trustees (*Beavan v. Oxford*, 6 D. M. & G. 524, 532; *Kinderley v. Jervis*, 22 Beav. 28; *Scott v. Hastings, sup.*; see *Pickering v. Ilfracombe R. Co.*, L. R. 3 C. P. 235; *Robinson v. Nesbitt*, *Id.* 264; overruling *Watts v. Porter*, 3 El. & Bl. 743). A surety who, under the Public Money Drainage Act, 1856, is entitled to be recouped for over contribution out of certain stock, has priority over a judgment creditor who has a charging order on such stock (*Silk v. Eyre*, I. R. 9 Eq. 393).

Effect as against mortgagees.

Where a fund in court had been recovered by the exertions of a solicitor, he was held entitled (in respect of his lien for costs) to priority over a judgment creditor of his client, who had obtained both a charging order and a stop order (*Haymes v. Cooper*, 33 Beav. 431). Effect as against solicitor's lien.

(f) The proviso does not prevent the creditor from obtaining a stop order as regards dividends accruing within the six months (*Watts v. Jefferyes*, 3 Mac. & G. 372; see *Bristed v. Wilkins*, 3 Hare, 235), and during the six months a receiver may be appointed (*Re Kelly, West v. Turner*, 59 L. T. 498). Final proviso

The remedy of the judgment creditor who has obtained a charging order is sale, not foreclosure (*D'Auvergne v. Cooper*, 1899, W. N. 256; see *Ricketts v. Ricketts*, 1891, W. N. 29). Such a sale can only be ordered in a separate action brought for the purpose (*Leggott v. Western*, 12 Q. B. D. 287; *Kolchmann v. Meurice*, 1903, 1 K. B. 534), which may be commenced by originating summons under R. S. C., Ord. 55, r. 5 a (*Cohen v. Beadell*, 92 L. T. Jo. 250). A charging order, after it has been made absolute, is not within the proviso in sect. 15 (*post*), and cannot be rescinded (*Jeffreys v. Reynolds*, 48 L. T. 358; *Drew v. Willis*, 1891, 1 Q. B. 450). A judgment creditor may, however, be restrained from proceeding on a charging order if improperly obtained (*Leese v. Martin*, 17 Eq. 224). Enforcement of order.

Where stock is in court to the credit of the debtor, a charging order, made by any judge of the High Court and duly notified to the paymaster-general, will bind it without any stop order (*Brereton v. Edwards*, 21 Q. B. Div. 488; S. C. Funds Rules, 99). A stop order may be obtained without any preliminary charging order having been made (*Hopewell v. Barnes*, 1 Ch. D. 630; *Shaw v. Hudson*, 48 L. J. Ch. 689). See further as to stop orders, R. S. C., Ord. 46, rr. 12 and 13, and the forms in Seton, 6th ed. 491 *et seq.* Stop orders.

In addition to powers contained in the above sections, charging orders may be made by way of equitable execution under the general equitable jurisdiction of the court. Such orders have been made in the case of cash in court (*Brereton v. Edwards*, 21 Q. B. Div. 488), and in the case of the assets of a firm in the hands of a receiver (*Kewney v. Attrill*, 34 Ch. D. 345; *Re Cardus, Armstrong v. Paris*, 1888, W. N. 17). Charging orders under other jurisdiction.

In the case of a judgment against a partner the partnership assets cannot be taken in execution, but an order charging his interest in the partnership may be obtained (Partnership Act, 1890, s. 23). Such an order is not a transaction protected by sect. 49 of the Bankruptcy Act, 1883 (*Wild v. Southwood*, 1897, 1 Q. B. 317). The section applies in the case of foreign firms having a branch in England (*Brown, Janson & Co. v. Hutchinson*, 1895, 1 Q. B. 737). Accounts should only be directed under this section Partnership.

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c. 110, s. 14.

under special circumstances (*S. C.*, 1895, 2 Q. B. 126). Such an order was enforced by sale in *Re Seager Hunt* (1900, 2 Ch. 54). See generally, as to the practice, *R. S. C.*, Ord. 46, rr. 1 a, 1 b.

Cost in
Lunacy.

The costs of proceedings in lunacy may be charged on the property of the lunatic or alleged lunatic (*Lunacy Act*, 1890, s. 109; *Re Cathcart*, 1893, 1 Ch. 466).

Order of
judge to be
made in the
first instance
ex parte, and
on notice to
the bank or
company to
operate as a
distringas.

15. [*And in order to prevent any person against whom judgment shall have been obtained from transferring, receiving, or disposing of any stock, funds, annuities or shares hereby authorized to be charged for the benefit of the judgment creditor under an order of a judge, be it further enacted that*] every order of a judge charging any government stock, funds or annuities, or any stock or shares in any public company, under this act, shall be made in the first instance ex parte, and without any notice to the judgment debtor, and shall be an order to show cause only; and such order, if any government stock, funds or annuities standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is to be affected by such order, shall restrain [*the Governor and Company of*] the Bank of England from permitting a transfer of such stock in the meantime, and until such order shall be made absolute or discharged; and if any stock or shares of or in any public company standing in the name of the judgment debtor in his own right, or in the name of any person in trust for him, is or are to be affected by any such order, shall in like manner restrain such public company from permitting a transfer thereof; and [*that*] if, after notice of such order to the person or persons to be restrained thereby, or in case of corporations to any authorized agent of such corporation, and before the same order shall be discharged or made absolute, such corporation, or person or persons, shall permit any such transfer to be made, then and in such case the corporation, or person or persons so permitting such transfer, shall be liable to the judgment creditor for the value or amount of the property so charged and so transferred, or such part thereof as may be sufficient to satisfy his judgment; and [*that*] no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, [*that*] unless the judgment debtor shall within a time to be mentioned in such order show to a judge of one of the said superior courts sufficient cause to the contrary, the said order shall, after proof of notice thereof to the judgment debtor, his attorney or agent, be made absolute: provided that any such judge shall, upon the application of the judgment debtor, or any person interested, have full power to discharge or vary such order, and to award such costs upon such application as he may think fit.

See the note to preceding section. The words in italics have been repealed by the Stat. Law Rev. Act, 1874. For the notice which has now been substituted for the old writ of distringas, see *R. S. C.*, Ord. 46, r. 3 *et seq.*

[Sect. 16 as to taking the body of a debtor was repealed by S.L.R. 1 & 2 Vict.
Act, 1874.] c. 110, s. 17.

17. Every judgment debt shall carry interest at the rate of four pounds per centum per annum from the time of entering up the judgment [or from the time of the commencement of this act in cases of judgments then entered up and not carrying interest,] until the same shall be satisfied, and such interest may be levied under a writ of execution on such judgment. Judgment debts to carry interest.

The words in italics were repealed by the Civil Procedure Acts Repeal Act, 1879.

Formerly a judgment did not carry interest, but interest might be recovered in the shape of damages (*Gaunt v. Taylor*, 3 M. & K. 302).

A judgment given for securing an annuity carries interest under this section (*Knight v. Bowyer*, 4 De G. & J. 619). Where a judgment was entered by consent for a sum to be paid by half-yearly instalments, no interest was payable so long as the instalments were duly paid (*Caudery v. Finnerty*, 66 L. T. 684). A judgment of a county court does not carry interest (*R. v. Essex*, 18 Q. B. D. 704).

The interest payable under this section is a debt due from the judgment debtor (*Re Clagett*, 36 W. R. 653); and may be included in a bankruptcy notice on the judgment (*Re Lehmann*, 62 L. T. 941). On the recovery of judgment on a covenant the covenant is merged in the judgment (*Ex parte Fewings*, 25 Ch. D. 355). But a mortgagee may on the construction of his deed be entitled to retain his security until paid interest at a rate higher than 4 per cent. (*Economic Society v. Osborne*, 1902, A. C. 147; see cases quoted *ante*, p. 204). The interest given by this section runs, if the judgment is pronounced in court, from that date (R. S. C. Ord. 41, r. 3; Ord. 42, r. 16), otherwise from the date of the entering up (R. S. C. Ord. 41, rr. 3, 4; Ord. 42, r. 16).

The judgment carries interest until satisfaction. As to when a judgment at law is satisfied for the purpose of carrying interest, see *Sinclair v. G. E. R. Co.* (L. R. 5 C. P. 391).

Where execution is delayed by an appeal, interest is given under R. S. C. Appeal Ord. 58, r. 19. Interest where the judgment of a colonial court is reversed by the privy council is dealt with in *Rodger v. Comptoir d'Escompte* (L. R. 3 P. C. 465).

This section applies to judgments as well for costs as for the subject-matter of the action (*Pitcher v. Roberts*, 12 L. J. Q. B. 178; see *Newton v. Conyngham*, 17 L. J. C. P. 288); interest running in the absence of special order, from the date of the judgment (*Pyman v. Burt*, 1884, W. N. 100; *Landowners Co. v. Ashford*, 33 W. R. 41; *Re London Wharfing Co.*, 53 L. T. 112; 33 W. R. 836; *Boswell v. Coaks*, 57 L. T. 742; 36 W. R. 65; *Taylor v. Roe*, 1894, 1 Ch. 413). The section does not apply where the costs are directed to be paid out of an estate, as in an administration action (*Re Marsden, Withington v. Neumann*, 40 Ch. D. 475; *A.-G. v. Nethercote*, 11 Sim. 529; see the Solicitors Act, 1860, s. 27). Nor does the section apply to costs given in a foreclosure action (*Eardley v. Knight*, 41 Ch. D. 537); but where in such a case the costs are ordered to be added to the security, then, independently of this section, interest at 4 per cent. runs from the date of the taxing master's certificate (*Ib.*; *Lippard v. Ricketts*, 14 Eq. 291). Where upon the C. A. reversing an order the defendant paid costs to the plaintiff, and the original order was afterwards restored by the H. L. the defendant was entitled to be repaid those costs with interest (*Ashworth v. English Co.*, 1904, 1 Ch. 704). See further as to the payment of interest on costs on an appeal, *Edge v. Gallon* (1899, W. N. 137).

See also as to payment as between solicitor and client of interest on costs, Solicitors' Remuneration Act, 1881, Ord. 7; *Blair v. Cordner* (19 Q. B. D. 516).

See further the note as to interest generally, *ante*, p. 203.

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c. 110, s. 18.
Decrees and
orders of
courts of
equity, &c.
to have effect
of judgments.

18. All decrees or orders of courts of equity, and all rules of courts of common law, [*and all orders of the Lord Chancellor or of the court of review in matters of bankruptcy,*] and all orders of the Lord Chancellor in matters of lunacy, whereby any sum of money, or any costs, charges or expenses, shall be payable to any person, shall have the effect of judgments in the superior courts of common law, and the persons to whom any such moneys or costs, charges or expenses, shall be payable shall be deemed judgment creditors within the meaning of this act; and all powers hereby given to the judges of the superior courts of common law with respect to matters depending in the same courts shall and may be exercised by courts of equity with respect to matters therein depending, [*and by the Lord Chancellor and the court of review in matters of bankruptcy,*] and by the Lord Chancellor in matters of lunacy; and all remedies hereby given to judgment creditors are in like manner given to persons to whom any moneys or costs, charges or expenses are by such orders or rules respectively directed to be paid.

The words in *italics* were repealed by the S. L. Rev. Act, 1874.

This section is extended to the equity court of Durham as to lands within its jurisdiction (Judgments Act, 1855, s. 2). As to enforcing a judgment of the Durham court against land outside its jurisdiction, see Palatine Court of Durham Act, 1889, s. 3. As to the Lancaster court, see the Court of Chancery of Lancaster Act, 1850, s. 24.

Cases under
this section.

A decree ordering a defendant to pay a sum of money, interest and costs, when ascertained, was held to be within this section (*Beaufort v. Phillips*, 1 De G. & Sm. 321). Also a judgment entered up under the Solicitors Act, 1843, s. 43 (*Griffiths v. Hughes*, 16 M. & W. 809); and an interlocutory order for payment of costs by one person to another (*Taylor v. Roe*, 1894, 1 Ch. 413); but not a decree for an account and payment of what should be found due (*Chadwick v. Holt*, 8 D. M. & G. 584; *Garner v. Briggs*, 6 W. R. 378); nor an order for a foreclosure (*Burrows v. Holley*, 35 Ch. D. 123); nor the chief clerk's certificate finding money to be due to a party, though adopted by the judge (*Mansfield v. Ogle*, 4 De G. & J. 38); nor a decree directing payment to the credit of a cause (*Ward v. Shakeshaft*, 1 Dr. & Sm. 269; *Ward v. Docker*, 5 Jur. N. S. 1287; compare *Re Leeds Bank*, 1 Ch. 150; *Johnson v. Burgess*, 15 Eq. 398; see *Gibbs v. Pike*, 9 M. & W. 351; see *Ex p. Hammond Brown*, 67 L. T. 234). As to enforcing a decree in the last-mentioned form, see R. S. C. Ord. 42, r. 4; *Re Coney*, *Coney v. Bennett*, 29 Ch. D. 993; *Re Whiteley*, *Whiteley v. Learoyd*, 56 L. T. 846; *De la Pole v. Dick*, 29 Ch. Div. 351. A rule for taxation of costs, and an allocatur of the master, did not amount to a judgment within this section (*Shaw v. Neale*, 6 H. L. C. 581); nor a judge's order for payment of money obtained *ex parte* (*Richards v. Patterson*, 8 M. & W. 313; see *Neale v. Postlethwaite*, 8 Dowl. P. C. 100).

Present
practice as to
enforcement
of judgments
or orders.

By the Jud. Act, 1873 (see sect. 16), the jurisdiction of the Court of Chancery and of the Superior Courts of common law was transferred to the High Court. And under R. S. C. Ord. 42, r. 3, a judgment of the High Court for the payment to any person of money may be enforced by any of the modes by which a judgment or decree for the payment of money of any court whose jurisdiction was transferred by the Jud. Act, 1873, might have been enforced at the time of the passing thereof. Under R. S. C. Ord. 42, r. 24, every order of the court or a judge in any cause or matter may be enforced against all persons bound thereby in the same manner as a judgment to the same effect. Any person not a party to a cause or matter in whose favour any order is made may enforce such order by the same process as if he were

a party, and a judgment or order may be enforced against him as if he were a party (R. S. C. Ord. 42, r. 26). By sects. 93 and 94 of the Bankruptcy Act, 1883, the Court of Bankruptcy was united with the Supreme Court. And under the Bankruptcy Rules, 1886, No. 93, every order of the court in bankruptcy may be enforced as if it were a judgment to the same effect (see also r. 107). 1 & 2 Vict.
c. 110, s. 18.
Orders in
bankruptcy.

Every person to whom any sum of money or any costs shall be payable under a judgment shall, so soon as they are payable, be entitled to execution (R. S. C. Ord. 42, r. 17; see before this rule *Doe v. Barrell*, 10 Q. B. 531; *Doe v. Hampson*, 5 Dowl. & L. 484; *Wallis v. Sheffield*, 3 Jur. 1002; *Hill v. Brown*, 16 M. & W. 796). And where costs are given to be ascertained by taxation, a separate writ may be issued for them when taxed (R. S. C. Ord. 42, r. 18; *Harris v. Jewell*, 1883, W. N. 216; see before this rule, *Jones v. Williams*, 8 M. & W. 349; *Hodgson v. Patterson*, 5 Scott, N. R. 76; *Cetti v. Bartlett*, 9 M. & W. 840). As to a judgment on a condition, see R. S. C. Ord. 42, r. 9; *Gibbs v. Flight* (13 C. B. 803). Execution.

Under the Arbitration Act, 1889, a submission, unless a contrary intention is expressed therein, has the same effect as if it had been made an order of court (sect. 1), and an award may, by leave of the court or a judge, be enforced in the same manner as a judgment or order to the same effect (sect. 12). Awards.

For the older cases as to enforcing awards under this section, see *Jones v. Williams* (11 Ad. & Ell. 175); *Dickenson v. Allsop* (13 M. & W. 722); *Farwell v. E. C. R. Co.* (6 Dowl. & L. 54); *Mackenzie v. Sligo R. Co.* (9 C. B. 250); *Lambe v. Jones* (9 C. B. N. S. 478); *Lloyd v. Harris* (8 C. B. 63).

[Sect. 19, providing for the registration of judgments, was repealed by the Land Charges Act, 1900.]

Sect. 20, providing for new or altered writs to give effect to the Judgments Act, 1838, was repealed by the Civil Procedure Acts Repeal Act, 1879. See now R. S. C. Ord. 42, r. 14.

Sect. 21 extended the provisions of the Judgments Act, 1838, to the Common Law Courts of Lancaster and Durham, the jurisdiction of which was transferred to the High Court by the Judicature Act, 1873, s. 16.

Sect. 22 contains provisions for the removal of judgments of inferior courts into the High Court for the purpose of enforcement.]

II.—JUDGMENTS ACT, 1839.

2 & 3 VICT. C. 11, s. 7.

Registration of *Lis Pendens*.

7. No *lis pendens* shall bind a purchaser or mortgagee without express notice thereof, unless and until a memorandum or minute, containing the name and the usual or last known place of abode, and the title, trade or profession, of the person whose estate is intended to be affected thereby, and the court of equity, and the title of the cause or information, and the day when the bill or information was filed, shall be left with the senior master of the said Court of Common Pleas, who shall forthwith enter the same particulars in a book as aforesaid, in 2 & 3 Vict.
c. 11, s. 7.
Purchasers
not to be
affected by
any *lis pen-
dens*, unless
such suit is
duly regis-
tered as
directed by
this act.

2 & 3 Vict. c. 11, s. 7. alphabetical order, by the name of the person whose estate is intended to be affected by such *lis pendens*; and such officer shall be entitled for any such entry to the sum of two shillings and sixpence; and the provisions hereinbefore contained in regard to the re-entering of judgments every five years, and the fee payable to the officer thereon, shall extend to every case of *lis pendens* which shall be registered under the provisions of this act.

Re-registration. Sect. 4 of the Judgments Act, 1839, provided that judgments after five years from entry on the register should be void unless re-entered. By the Land Charges, 1900 (*post*, pp. 517, 518), this section was repealed except so far as it applied to *lis pendens*. The section was discussed in *Beavan v. Oxford*, 6 D. M. & G. 492; *Shaw v. Neale*, 6 H. L. C. 581. It will be found set out at length in Shelf. R. P. S. 8th ed. 600.

Meaning of *lis pendens*. *Lis pendens* affects a purchaser not because it amounts to notice, but because the law does not allow one party, *pendente lite*, to alienate the property in dispute so as to affect his opponent (*Bellamy v. Sabine*, 1 De G. & J. 578; *Price v. P.*, 35 Ch. D. 302). There should be no registration as a *lis pendens*, unless a claim is made in the proceeding against some specific property (*Ex p. Thornton*, 2 Ch. 178). As to the doctrine of *lis pendens* generally, see *Bellamy v. Sabine* (1 De G. & J. 566); *Kinsman v. K.* (1 R. & M. 617); *Wigram v. Buckley* (1894, 3 Ch. 483). As to the protection afforded by registration, see *Beyfus v. Bullock* (7 Eq. 391). And as to negligence on the part of a solicitor for not registering a *lis pendens*, see *Plant v. Pearman* (20 W. R. 314).

What is *lis pendens*. An order under sect. 7 of the S. L. A. 1884, may be registered as a *lis pendens* (see sub-sects. (5) and (6) of that section, *post*). In the following cases the proceeding was held to be a *lis pendens*: a suit to establish a will (*Garth v. Ward*, 2 Atk. 174); a redemption action by a mortgagor (*Ib.*); a foreclosure action by a mortgagee (*Winchester v. Paine*, 11 Ves. 194); an action for specific performance (*Baxter v. Middleton*, 1898, 1 Ch. 313). A case where there are questions between co-defendants may be a *lis pendens*, as regards a purchaser from one of them (*Tylor v. Thomas*, 25 Beav. 47; see *Bellamy v. Sabine*, 1 De G. & J. 566). When debts are charged upon real estate, a creditor's action to administer real and personal estate, if registered as a *lis pendens*, will give the plaintiff priority over the assign of any defendant entitled to real estate under the will, except when such assign had a right to suppose that such defendant was selling to pay debts (*Price v. P.*, 35 Ch. D. 304). When debts are not charged, registration of such an action will give priority, when, and only when, the real estate sought to be charged is sufficiently indicated; the above exception, however, applying in this case also (*Ib.* 305). The registration as a *lis pendens* of an English action affects lands in Scotland which are the subject-matter of the action (*Huntly v. Gaskell*, 1905, 2 Ch. 656).

What is not *lis pendens*. In the following cases the proceeding was held not to be a *lis pendens*. An action relating to money secured on the land (*Worsley v. Scarborough*, 2 Atk. 392; see, however, *Norris v. Stuart*, 16 Beav. 359). A partnership action, as against the real estate of one of the partners (*Ex p. Thornton*, 2 Ch. 176). A suit for a divorce is not a *lis pendens*, as regards the property included in the marriage settlements, until decree (*Wigney v. Wigney*, 7 P. D. 228). After decree and before execution there is no *lis pendens* (*Kinsman v. K.*, 1 R. & M. 617; *Worsley v. Scarborough*, 3 Atk. 392), unless the decree is only for an account, and is not final (*Worsley v. Scarborough*, *sup.*). The doctrine of *lis pendens* does not apply to personal property other than chattel interests in land (*Wigram v. Buckley*, 1894, 3 Ch. 483; see *Berry v. Gibbons*, 8 Ch. 747).

Satisfaction. Satisfaction may be entered as to a registered *lis pendens* under the Crown Debts and Judgments Act, 1860, s. 2; and the court may order the vacating of the registration of a *lis pendens* where the suit has determined,

or where the court is satisfied that the litigation is not being prosecuted *bonâ fide* (*Lis Pendens* Act, 1867, s. 2). Thus registration was vacated where plaintiff did not appear at trial (*Reilly v. Richardson*, 43 S. J. 457). An order under the section may be made upon separate motion (*Clutton v. Lee*, 7 Ch. D. 541, n.; *Poolley v. Bosanquet*, *Id.*; *Jervis v. Berridge*, 23 W. R. 43), or may be included in the judgment dismissing the action (*Baxter v. Middleton*, 1898, 1 Ch. 313; where the order was made "unless an appeal is set down within a fortnight"). Registration against a person not party to the action may be vacated (*Schofield v. Solomon*, 52 L. T. 679; 54 L. J. Ch. 1101).

2 & 3 Vict.
c. 11, s. 7.

Palatine
Courts.

With respect to land within the jurisdiction of a Palatine Court, no *lis pendens* shall bind purchasers unless registered in the Palatine Court (Judgments Act, 1855, s. 3; see Land Charges Act, 1900; s. 5 and schedule).

III.—JUDGMENTS ACT, 1864.

27 & 28 VICT. c. 112, ss. 4—7.

4. Every creditor (*g*) to whom any land of his debtor shall have been actually delivered in execution (*h*) by virtue of any such judgment (*i*), statute, or recognizance [*and whose writ or other process of execution shall be duly registered*], shall be entitled forthwith, or at any time afterwards while the registry of such writ or process shall continue in force, to obtain from the Court of Chancery, upon petition in a summary way, an order for the sale of the debtor's interest in such land, and every such petition may be served upon the debtor only; and thereupon the court shall direct all such inquiries to be made as to the nature and particulars of the debtor's interest in such land, and his title thereto, as shall appear to be necessary or proper (*k*); and in making such inquiries, and generally in carrying into effect such order for sale, the practice of the said court with respect to sales of real estates of deceased persons for the payment of debts shall be adopted and followed, so far as the same may be found conveniently applicable.

27 & 28 Vict.
c. 112, s. 4.

Creditor to whom land delivered in execution entitled to obtain summary order from Court of Chancery for sale.

(*g*) The Land Charges Act, 1900 (*post*, pp. 517, 518), has repealed sects. 1—3 of the present act and also the words in the above section printed in italics. By sect. 2 of the Land Charges Act, 1900, no judgment can operate as a charge on land until a writ or order for enforcing it has been registered under sect. 5 of the Land Charges Act, 1888. Having regard to this provision and to the unrepealed words of the present section "while the registry of such writ or process shall continue in force," it would seem that before a judgment creditor can obtain an order for sale under the section, he must still obtain and register a writ or order for enforcing his judgment.

Land Charges
Act, 1900.

A plaintiff in an administration suit who had obtained an order for payment into court, and issued sequestration, was not a creditor within this section (*Johnson v. Burgess*, 15 Eq. 398).

Who is a
creditor.

(*h*) A sale has been refused where there had been no delivery (*Re Actual Cowbridge R. Co.*, 5 Eq. 413; see *Guest v. Cowbridge R. Co.*, 6 Eq. 619; *Re Newcastle*, 8 Eq. 700; *Kidd v. Tallentire*, 1877, W. N. 21).

Actual
delivery
necessary.

(*i*) As regards the question, what amounts to actual delivery in execution within the present section, the decisions under (the repealed) delivery in sect. 1 of the Judgments Act, 1864, appear to apply. That section execution.

Actual
execution.

27 & 28 Vict.
c. 112, s. 4.

Receivership
order.

Receivership
orders as to
land, gener-
ally.

Lands of a
railway
company.

provided that no judgment, statute or recognizance should affect land until such land should have been actually delivered in execution by virtue of a writ of elegit or other lawful authority in pursuance of such judgment, statute or recognizance. And under that section the following were held to amount to actual delivery in execution, viz.:—The return on the sheriff to a writ of elegit, the land not having been entered on (*Champneys v. Burland*, 19 W. R. 148); delivery of the seisin before the return (*Re Hobson*, 55 L. T. 225); sequestration (*Re Rush*, 10 Eq. 442). But not (as regards freeholds) the mere issue of an elegit which cannot be executed, because the land is already taken under a prior elegit (*Re Cowbridge R. Co.*, 5 Eq. 413; *Hatton v. Haywood*, 9 Ch. 229), nor (as regards an equitable interest in leaseholds) the issue and registration of a *fi. fa.* (*Backhouse v. Siddle*, 38 L. T. 487).

Further, as regards a receivership order, it was held that this amounted to actual delivery of the land in execution within sect. 1 of the Judgments Act, 1864 (*Anglo-Italian Bank v. Davies*, 9 Ch. D. 293; *Ex p. Evans*, 13 Ch. Div. 257; *Re Pope*, 17 Q. B. Div. 751). See *Blackman v. Fysh*, 1892, 3 Ch. 209; and *Thompson v. Gill*, 1903, 1 K. B. 769, where the appointment of a receiver amounted to “execution” within sect. 4 of the Judgments Extension Act, 1868. But in the case of a legal estate in remainder the appointment of a receiver was not an actual delivery in execution (*Re Harrison and Bottomley*, 1899, 1 Ch. 465; see *Jones v. Barnett*, 1900, 1 Ch. 370).

It has been laid down generally, in a case where a judgment was sought to be enforced against land, that the appointment of a receiver is not execution, but equitable relief, which is granted on the ground that there is no remedy by execution at law (*Re Shephard, Atkins v. Shephard*, 43 Ch. D. 136; *Levasseur v. Mason*, 1891, 2 Q. B. 79). There is no jurisdiction to appoint a receiver merely because it would be more convenient than the usual mode of execution (*Harris v. Beauchamp*, 1894, 1 Q. B. 801; see *Manchester Co. v. Parkinson*, 22 Q. B. Div. 173). A receiver has been appointed—(1) where legal delivery in execution of land was impossible owing to a legal impediment, such as a legal mortgage (*Anglo-Italian Bank v. Davies, sup.*; *Smith v. Cowell*, 6 Q. B. Div. 75; *Chatterton v. Watney*, 17 Ch. Div. 261; *Cadogan v. Lyric Theatre*, 1894, 3 Ch. 338; see the cases where the legal estate was in trustees; *Wells v. Kilpin*, 18 Eq. 298; *Tillett v. Pearson*, 43 L. J. Ch. 93); (2) where the judgment debtor’s interest in land was that of a purchaser who had not completed (*Ridout v. Fowler*, 1904, 1 Ch. 659); (3) of a legal remainder in real estate (*Re Harrison and Bottomley*, 1899, 1 Ch. 465; see *Re Hamilton*, 31 Ch. Div. 294; *Cadman v. Cadman*, 33 Ch. Div. 400; and compare the cases where a receiver has been appointed of reversionary interests in personalty, *Fuggle v. Bland*, 11 Q. B. D. 711; *Macnicoll v. Parnell*, 35 W. R. 773; *Tyrrell v. Painton*, 1895, 1 Q. B. 202; *Flegg v. Prentiss*, 1892, 2 Ch. 428; *Beamish v. Stephan*, 18 L. R. Ir. 319; *Ideal Bedding v. Holland*, 1907, 2 Ch. 157). In the case of equitable interests in land a receiver may be appointed by a County Court (*R. v. Selfe*, 1908, 2 K. B. 121).

A receivership order as regards land obtained by a judgment creditor made him a secured creditor in bankruptcy (*Ex p. Evans*, 13 Ch. Div. 252); *secus* as regards personal estate (*Re Anglesey, Galve v. Gardner*, 1903, 2 Ch. 730).

(k) An order was made under this section for the sale of lands of a railway company (*Re Bishop’s Waltham R. Co.*, 14 W. R. 1008); on appeal, the court expressed an opinion that the railway was not saleable, and directed inquiries as to the nature of the company’s interest (*S. C.*, 2 Ch. 382). Superfluous lands belonging to a railway company have been ordered to be sold (*Re Calne R. Co.*, 9 Eq. 658; *Re Hull and Hornsea R. Co.*, 2 Eq. 262; *Ex p. Grissell*, 2 Ch. 385; *Re Ogilvie*, 7 Ch. 174; *Re Hull and Barnsley R. Co.*, 40 Ch. D. 119). Debenture holders have not under the Railway Cos. Act, 1867, s. 23, a charge on surplus land in priority to creditors selling under the present section (*Re Hull and Barnsley R. Co., sup.*). As to schemes of arrangement by railway companies and the restraining of actions and executions in such a case, see Railway Cos. Act, 1867; *Re Cambrian R. Co.* (3 Ch. 278); *Re Potteries, &c. R. Co.* (5 Ch. 67).

The application for a sale should be made by originating summons (R. S. C. Ord. 55 r. 9B). If made by petition, only the costs of a summons will be allowed (*Re Harrison and Bottomley*, 1899, 1 Ch. 465; *Re Martin and Varlow*, 43 W. R. 247). Where the land had been delivered in execution the court refused to appoint a receiver until sale (*Re Nixon*, 1886, W. N. 191).

27 & 28 Vict.
c. 112, s. 4.
Practice.

Inquiries were dispensed with where sufficient evidence was adduced at the hearing of the petition (*Re Bithray*, 61 L. T. 383; 38 W. R. 60; *Re Calne R. Co.*, 9 Eq. 658). For general form of order with inquiries, see Seton, 6th ed. 2062 *et seq.*; *Re Cowper* (60 L. T. 95; 37 W. R. 330); *Re Holder* (1890 W. N. 55); *Howson v. Trant* (21 W. R. 781). As to inquiries where an official liquidator petitioned for sale of the lands of a contributory, see *Re Kirby* (14 L. T. 615); and as to inquiries in other cases, see *Ex p. Clark* (6 N. R. 335).

As to service on other judgment creditors, see sect. 5, *infra*.

5. If it shall appear on making such inquiries that any other debt due on any judgment, statute, or recognizance is a charge on such land, the creditor entitled to the benefit of such charge (whether prior or subsequent to the charge of the petitioner) shall be served with notice of the said order for sale, and shall after such service be bound thereby, and shall be at liberty to attend the proceedings under the same, and to have the benefit thereof; and the proceeds of such sale shall be distributed among the persons who may be found entitled thereto, according to their respective priorities.

Where there are other creditors, notice of sale to be served upon them.

The priorities of judgment creditors *inter se* are determined by the date at which the writs issued upon their judgments are placed in the hands of the sheriff (*Guest v. Cowbridge R. Co.*, 6 Eq. 619).

6. Every person claiming any interest in such land through or under the debtor, by any means subsequent to the delivery of such land in execution as aforesaid, shall be bound by every such order for sale, and by all the proceedings consequent thereon.

Parties claiming interest through debtor bound by order for sale.

7. This act shall not extend to Ireland.

Extent of act.

IV.—THE LAND CHARGES REGISTRATION AND SEARCHES ACT, 1888.

51 & 52 VICT. c. 51.

PART I.—INTRODUCTORY.

1. This act may be cited as the Land Charges Registration and Searches Act, 1888.

51 & 52 Vict.
c. 51, s. 1.

2. This act shall come into operation on the first day of January one thousand eight hundred and eighty-nine, which day is in this act referred to as the commencement of this act:

Short title.
Commence-
ment.

51 & 52 Vict.
c. 51, s. 2. Provided that any rules under this act may be made, and any other thing for the purpose of bringing this act into operation may be done, at any time after the passing thereof, but any such rules or thing shall not take effect until the commencement of this act.

Extent. 3. This act shall not extend to Scotland or Ireland.

Interpretation.

4. In this act:

"Land" includes lands, messuages, tenements, and hereditaments corporeal and incorporeal of any tenure.

"Purchaser for value" includes a mortgagee or lessee, or other person who for valuable consideration takes any interest in land or in a charge on land, and "purchase" has a meaning corresponding with purchaser.

"Person" includes a body of persons corporate or unincorporate.

"Prescribed" means prescribed by any general rules made in pursuance of this act.

"Act of Parliament" includes local and personal act.

"Land charge" means a rent or annuity or principal moneys payable by instalments, or otherwise, with or without interest charged, otherwise than by deed, upon land, under the provisions of any act of parliament, for securing to any person either the moneys spent by him or the costs, charges, and expenses incurred by him under such act, or the moneys advanced by him for repaying the moneys spent, or the costs, charges, and expenses incurred by another person under the authority of an act of parliament, and a charge under the thirty-fifth section of the Land Drainage Act, 1861, or under the twenty-ninth section of the Agricultural Holdings (England) Act, 1883, but does not include a rate or scot (*l*).

"Deed of arrangement" has the same meaning as in the Deeds of Arrangement Act, 1887.

"Judgment" does not include an order made by a court having jurisdiction in bankruptcy in the exercise of that jurisdiction, but, save as aforesaid, includes any order or decree having the effect of a judgment.

(*l*) The charge arising under the Public Health Act, 1875, s. 257, for repayment of expenses incurred by a local authority is not a "land charge" within this act, and need not be registered (*R. v. Land Registry*, 24 Q. B. Div. 178).

PART II.—REGISTRATION OF WRITS AND ORDERS AFFECTING LAND.

Register of writs and

5.—(1.) There shall be established and kept at the Office of Land Registry a register of writs and orders affecting land, and

there may be registered therein, in the prescribed manner, any writ or order affecting land issued or made by any court for the purpose of enforcing a judgment, statute, or recognizance, and any order appointing a receiver or sequestrator of land (*m*). 51 & 52 Vict
c. 51, s. 5.
orders affect-
ing land.

(2.) Every entry made in pursuance of this section shall be made in the name of the person whose land is affected by the writ or order registered.

(3.) The registration of a writ or order in pursuance of this act shall cease to have effect at the expiration of five years from the date of the registration, but may be renewed from time to time, and, if renewed, shall have effect for five years from the date of the renewal.

(4.) Registration of a writ or order in pursuance of this section shall have the same effect as, and make unnecessary, registration thereof in the Central Office of the Supreme Court of Judicature in pursuance of any other act.

(*m*) The registration of a writ or order affecting land may be vacated pursuant to an order of the High Court or any judge thereof (S. L. A. 1890, s. 19, *post*; see *Cook v. Cook*, 15 P. D. 116).

6. Every such writ and order as is mentioned in section five, and every delivery in execution or other proceeding taken in pursuance of any such writ or order, or in obedience thereto, shall be void as against a purchaser for value of the land unless the writ or order is for the time being registered in pursuance of this act. Protection of
purchasers
against non-
registered
writs and
orders.

Provided that—

* * * *

(b) where the proceeding in which the writ or order was issued or made is for the time being registered as a *lis pendens* in the name of the person whose land is affected by the writ or order, nothing in this section shall affect the operation of such registration.

This section has been extended to Crown judgments by sect. 3 of the Land Charges Act, 1900 (*post*, p. 517); and by sect. 5 of the same act proviso (a), which was temporary, has been repealed.

As to registering a *lis pendens*, see ante, p. 504.

PART III.—REGISTRATION OF DEEDS OF ARRANGEMENT.

7. A register (in this act called the register of deeds of arrangement affecting land) shall be kept at the Office of Land Registry, and deeds of arrangement may be registered therein, in the prescribed manner, in the name of the debtor. Register of
deeds of
arrangement
affecting
land.

8. A deed of arrangement may be registered in the register of deeds of arrangement affecting land on the application of a trustee of the deed, or of a creditor assenting to or taking the benefit of the deed, and the registration may be vacated Registration
of deeds of
arrangement.

51 & 52 Vict.
c. 51, s. 8.

pursuant to an order of the High Court of Justice or any judge thereof.

Protection of
purchasers
against un-
registered
deeds of
arrangement.

9. Every deed of arrangement, whether made before or after the commencement of this act, shall be void as against a person who, after the commencement of this act, becomes a purchaser for value of any land comprised therein or affected thereby, unless and until such deed is registered in the register of deeds of arrangement affecting land: Provided that nothing in this section shall affect any deed of arrangement made before the commencement of this act until the expiration of one year from the commencement of this act if registered within that year.

PART IV.—REGISTRATION OF LAND CHARGES.

Registry of
land charges.

10. A register, in this act called the register of land charges, shall be kept at the Office of Land Registry, and land charges may be registered therein in the prescribed manner:—

(1.) In the case of freehold land, in the name of the person beneficially entitled to the first estate of freehold at the time of the creation of the land charge:

(2.) In the case of copyhold land, in the name of the tenant on the court rolls at the time of the creation of the land charge.

Provided that where the person by or on behalf of whom the application was made pursuant to which the land charge was created was beneficially entitled to a lease for lives or a life at a rent or to a term of years the land charge shall be registered also in the name of that person.

Expenses.

11. The expenses incurred by the person entitled to a land charge created before the commencement of this act in causing the charge to be registered in the register of land charges shall be deemed to form part of such land charge, and shall be recoverable by him accordingly on the day for payment of any part of such land charge next after such expenses are incurred.

Protection of
purchasers
against un-
registered
charges.

12. A land charge created after the commencement of this act shall be void as against a purchaser for value of the land charged therewith, or of any interest in such land, unless and until such land charge is registered in the register of land charges in the manner mentioned in this act.

Non-regis-
tered land
charge exist-
ing at com-
mencement
of this act.

13. After the expiration of one year from the first assignment by act *inter vivos*, occurring after the commencement of this act, of a land charge created before the commencement of this act, the person entitled thereto shall not be able to recover the same, or any part thereof, as against a purchaser for value of the land charged therewith or of any interest in such land,

unless such land charge is registered in the registry of land charges in the manner mentioned in this act prior to the completion of the purchase. 51 & 52 Vict.
c. 51, s. 13.

14. The registration of a land charge may be vacated pursuant to an order of the High Court of Justice or any judge thereof. Vacation of
entry.

PART V.—SUPPLEMENTAL.

15. An alphabetical index in the prescribed form shall be kept at the Office of Land Registry of all entries made in any register kept at that office pursuant to this act. Index to
registers.

16. Any person may search in any register or index kept in pursuance of this act on paying the prescribed fee. Searches.

See, generally, as to searches for judgments, writs, or orders, Elphinstone and Clark on Searches.

17. The provisions as to searches in the Central Office, requisitions, certificates, officers, clerks, persons, and for the protection of solicitors, trustees, agents, and other persons in a fiduciary position contained in the second section to the Conveyancing Act, 1882, except so much of those provisions as relates to the making of general rules, shall apply to searches in any register or index kept in pursuance of this act, in the register of *lis pendens*, the register of deeds of arrangement affecting land, and the register of land charges, in the same manner as if this act had been described in Part I. of the First Schedule to the Conveyancing and Law of Property Act, 1881. Official
searches.
45 & 46 Vict.
c. 39.
44 & 45 Vict.
c. 41.

18. The Lord Chancellor may at any time after the passing of this act, and from time to time, with the concurrence of the Commissioners of her Majesty's Treasury as to fees, make such general rules as may be required for carrying this act into effect. General rules.

The following rules have been issued :—

Rule 1.—The several registers established by the act shall contain the following particulars respectively, or such other particulars as the registrar shall from time to time determine :—

1. The register of writs and orders shall contain : (a) The name, address, and description of the person whose land is affected. (b) The date and nature of the writ or order, and the court, and the action or matter, by and in which the writ or order was issued or made. (c) The date of registration, and of any renewal of registration. (d) The name and address of the applicant or of the solicitor (if any) making the application.
2. The register of deeds of arrangement shall contain : (a) The name, address, and description of the person whose land is affected. (b) The date of the deed and the names of the parties, provided that where the creditors are numerous it shall not be necessary to specify more than three. (c) The date of registration. (d) The name and address of the applicant or of the solicitor (if any) making the application.

51 & 52 Vict.
c. 51, s. 18.

3. The register of land charges shall contain: (a) The name, address, and description, and capacity (that is to say, whether—(i.) beneficially entitled to the first estate of freehold; (ii.) tenant on the court rolls; or (iii.) beneficially entitled to a lease for lives or a life at a rent or for years) of the person in whose name the registration is made. (b) The date of the charge, the statute under which it is made, and the parish in which the land charged is situated. (c) The date of registration. (d) The name and address of the applicant or of the solicitor (if any) making the application.

Rule 2.—Every application for registration shall, unless made by a solicitor, be supported by the statutory declaration of the applicant as to the truth of the particulars set forth in it.

Rule 3.—The alphabetical index shall consist of the registers themselves, all entries in such registers being made alphabetically in the manner now used in the register of judgments in the Central Office of the High Court of Justice, or in such other manner as the registrar shall from time to time determine.

Rule 4.—Application for registration, searches (official and otherwise), and official certificates shall be made on, and shall furnish the particulars set forth in, the several forms for those purposes given in the schedule hereto, or in such other forms as the registrar shall from time to time determine.

Rule 5.—Forms shall be sold at the office of Land Registry.

Rule 6.—Certificates of official searches shall be marked with the stamp of the Search Department of the Land Registry, and shall be issued as soon as possible after receipt of the applications.

Rule 7.—In any case of modification or cancellation of entries on the register, such evidence in respect thereof as the registrar shall from time to time think necessary, shall be required.

Rule 8.—These rules may be cited as the Land Charges Rules, 1889.

January 1, 1889.

HALSBURY, C.

For the forms, see W. N. 12 Jan. 1889; and the fees, see W. N. 8 Sept. 1900.

V.—THE LAND CHARGES ACT, 1900.

63 & 64 VICT. C. 26.

An Act to amend the Law relating to Charges on Land and to matters connected therewith. [30th July, 1900.]

63 & 64 Vict.
c. 26, s. 1.

Transfer to
Land
Registry;
Office of
business
relating to
the registry
of judgments.

- 1.—(1.) The business of the registrar of judgments hitherto conducted in the Central Office of the Supreme Court shall be conducted in the Office of Land Registry, and the Lord Chancellor may by order provide for transferring to the office of Land Registry such officers as may be required for conducting that business, and such books and papers as may be needed in connexion therewith, and for carrying out any arrangements incidental to or consequential on the transfer, and for abolishing the office of registrar of judgments.

(2.) Provided that nothing in this section shall apply to the registry of Scotch and Irish judgments established under the Judgments Extension Act, 1868, and the Inferior Courts Judgments Extension Act, 1882, or any Act amending the same.

31 & 32 Vict.
c. 54.
45 & 46 Vict.
c. 31.

(3.) This section shall come into operation on such day as the Lord Chancellor at any time after the passing of this Act may by order direct. 63 & 64 Vict.
c. 26, s. 1.

Under order dated the 3rd August, 1900, this section came into operation on the 1st Sept. 1901; and there were directed to be transferred to the Office of the Land Registry: (1) All registers and applications for registration relating to English judgments, *lis pendens*, Crown debts, executions and annuities; (2) All day books and account books; (3) All certificates of official searches; (4) All *præcipes* for ordinary searches from the 1st day of January, 1900 (L. R. Current Index, 1900, p. xcii.).

The duties of the registrar of judgments are referred to in R. S. C., Ord. 61, r. 22. They included the registration of annuities under the Judgments Act, 1855, s. 12. As to an unregistered annuity, see *Greaves v. Tofield*, 14 Ch. D. 563.

2.—(1.) A judgment or recognizance, whether obtained or entered into on behalf of the Crown or otherwise, and whether obtained or entered into before or after the commencement of this act, shall not operate as a charge on land, or on any interest in land, or on the unpaid purchase-money for any land, unless or until a writ or order for the purpose of enforcing it is registered under section five of the Land Charges Registration and Searches Act, 1888. Closing of
register of
judgments.

51 & 52 Vict.
c. 51.

(2.) This section shall apply to any inquisition finding a debt due to the Crown, and any obligation or specialty made to the Crown, and any acceptance of office from or under the Crown, whatever may have been its date, in like manner as it applies to a judgment.

(3.) Except under an order of the High Court, no entry shall be made in any register kept under sections nineteen and twenty-one of the Judgments Act, 1838, section eight of the Judgments Act, 1839, the Law of Property Amendment Act, 1860, the Judgments Act, 1864, or the Crown Suits, &c., Act, 1865.

1 & 2 Vict. c. 110.
2 & 3 Vict. c. 11.
23 & 24 Vict.
c. 38.
27 & 28 Vict.
c. 112.
28 & 29 Vict.
c. 104.

- (1) *Previous Law as to Registration of Judgments, &c.*...513.
- (2) *Present Law*...514.
- (3) *Methods of enforcing Judgments against Land*...514.
- (4) *Crown Debts*...515.
- (5) *Priority of Judgments in Administration*...517.

The words of this section read together with the repeal contained in sect. 5 render it necessary to state in outline the legislation in relation to the registration of judgments and writs. (1)
Previous law
as to registra-
tion of
judgments
and writs.

Prior to the Judgments Act, 1838, judgments, in order to affect lands as to *bonâ fide* purchasers, had to be docketed under 4 & 5 Will. & M., c. 20, made perpetual by 7 & 8 Will. 3, c. 36, s. 3. These docketed judgments were closed, and judgments docketed directed to be registered under Judgments Act, 1838 (Judgments Act, 1839, ss. 1, 2; see *Bedford v. Forbes*, 1 Carr. & K. 33). Dockets.
1692 to 1838.

By the Judgments Act, 1838, s. 11, the sheriff was empowered under a writ of *elegit* to deliver in execution to the judgment creditor the whole of the judgment debtor's lands. By sect. 13, judgments were made a charge on land. But, as against purchasers, mortgagees or creditors (see as to creditors, *Simpson v. Morley*, 2 K. & J. 71), no judgments could affect any land until registered as prescribed by sect. 19. It was necessary to repeat 1838 to 1860.

63 & 64 Vict. the registration every five years (Judgments Act, 1839, s. 4; Judgments
c. 26, s. 2. Act, 1855, s. 6). Where these conditions were not complied with a purchaser was not bound even though he had notice (Judgments Act, 1840, s. 2; Judgments Act, 1855, ss. 4, 5). And even where judgments were duly registered, they did not affect purchasers and mortgagees without notice further than a judgment of one of the superior courts would have done before the Judgments Act, 1838, where such judgment had been docketed according to the then law (Judgments Act, 1839, s. 5). See *Westbrook v. Blythe*, 3 E. & B. 737; *Robinson v. Woodward*, 4 De G. & Sm. 562; *Hughes v. Lumley*, 4 E. & B. 274; *Benham v. Keane*, 1 J. & H. 685; 3 D. F. & J. 318. See further as to notice, Judgments Act, 1840, s. 2; Judgments Act, 1855, ss. 4, 5; *Nortcliffe v. Warburton*, 10 W. R. 635; *Lee v. Green*, 6 D. M. & G. 155; *Freer v. Hessey*, 22 L. J. Ch. 597.

As to registration and re-registration under above Acts, see, further, *Beavan v. Oxford*, 3 Sm. & G. 11; 6 D. M. & G. 492; *Ex p. Ness*, 5 C. B. 155; *Shaw v. Neale*, 6 H. L. C. 581; *Re Kensington*, *Bacon v. Ford*, 29 Ch. D. 527.

As to entering satisfaction to registered judgments, see 23 & 24 Vict. c. 115, s. 2; R. S. C., Ord. 61, rr. 26, 27; Cent. Off. Practice Rules, 17; Daniell, Ch. Forms. And as to vacating registration, see *Wells v. Gibbs*, 3 Beav. 399; *Ex p. Holden*, 13 C. B. N. S. 641.

1860 to 1864. By the Law of Property Amendment Act, 1860, ss. 1 and 2, no judgments entered up after 23rd July, 1860, could, as against purchasers or mortgagees, whether with notice or not, affect land, unless (1) execution had been issued and registered in the name of the creditor, and unless (2) such execution had been put in force within three months from the registration (see *Appleton v. Sturgis*, 10 W. R. 312; *Wallis v. Morris*, 12 W. R. 997).

1864 to 1888. By the Judgments Act, 1864, no judgment, statute or recognizance entered up after 29th July, 1864, could affect land until such land had been actually delivered in execution by virtue of a writ of elegit or other lawful authority in pursuance of such judgment, statute or recognizance (sect. 1). Every writ or other process by virtue whereof any land should have been actually delivered in execution was to be registered in the name of the debtor instead of the creditor, and no other or prior registration of such judgment, statute or recognizance was to be necessary for any purpose (sect. 3). A sale could be obtained under sect. 4 (*ante*, p. 505) by a judgment creditor to whom land had been actually delivered in execution.

Under this statute it was held, that where land had been actually delivered in execution, it was unnecessary to register the judgment, writ, or other process, except to obtain a sale (*Re Pope*, 17 Q. B. Div. 743).

1888 to 1900. Finally, by the Land Charges Act, 1888, s. 6 (*ante*, p. 509), writs and orders affecting land and every delivery in execution in pursuance thereof were made void as against purchasers for value (which included mortgagees), unless registered under that act.

(2)
Present law.

By sect. 5 of the present act (see schedule), the above-mentioned provisions as to judgments contained in sect. 19 of the Judgments Act, 1838, in the Judgments Acts, 1839, 1840 and 1855, in the Law of Property Amendment Act, 1860, and in sects. 1, 2 and 3 of the Judgments Act, 1864, have been repealed. And by sects. 2 and 3 of the present act the provisions as to registration contained in sects. 5 and 6 of the Land Charges Act, 1888, have been given a wider operation. The material statutory provisions now in force as to the effect of judgments in relation to land are contained in (1) sects. 11 and 13 of the Judgments Act, 1838 (*ante*, pp. 487, 493); (2) sect. 4 of the Judgments Act, 1864 (*ante*, p. 505); (3) sects. 5 and 6 of the Land Charges Act, 1888 (*ante*, p. 509); and (4) the present act.

(3)
Present
methods of
enforcing

According to the present law, a judgment for payment of money can be enforced by the creditor against the land of the debtor in the following ways:—

(1) Out of the rents and profits; by seizure under a writ of elegit (sect. 11 of the Judgments Act, 1838, *ante*, p. 487); or by obtaining an order for a receiver (*Cadogan v. Lyric Theatre*, 1894, 3 Ch. 68; see note on Receivership orders under sect. 4 of the Judgments Act, 1864, *ante*, p. 506); or, if the judgment is for payment within a limited time, by a writ of sequestration (R. S. C., Ord. 43, r. 6; *Willcock v. Terrell*, 3 Ex. D. 323; *Re Rush*, 10 Eq. 442). To protect his title as against a subsequent purchaser for value, the creditor must register the writ or order under sects. 5 and 6 of the Land Charges Act, 1888. He must also, in the case of land in Yorkshire, register the writ or order under the Yorkshire Registries Act, 1884, ss. 4 and 14, in the county registry.

63 & 64 Vict.
c. 26, s. 2.

judgments
against land.

(2) When a writ or order for the purpose of enforcing the judgment has been obtained (and, *semble*, has been registered under the Land Charges Act, 1888) and the land has been "actually delivered in execution," but not before, the creditor may obtain a sale under sect. 4 of the Judgments Act, 1864 (*ante*, p. 505).

(3) When a writ or order for the purpose of enforcing the judgment has been obtained and registered under the Land Charges Act, 1888, but not before (sect. 2 of the Land Charges Act, 1900), the charge created by sect. 13 of the Judgments Act, 1838, will arise, and may be enforced as above mentioned (see *ante*, p. 495). For this purpose actual delivery in execution is no longer necessary.

(4) Where owing to a prior elegit (*Re Cowbridge R. Co.*, 5 Eq. 413; see *Guest v. Cowbridge R. Co.*, 6 Eq. 619), or to a prior legal mortgage (*Beckett v. Buckley*, 17 Eq. 435), the land cannot be delivered, a judgment creditor who has issued an elegit may bring an action for redemption to remove the legal difficulty (*Thornton v. Finch*, 4 Giff. 515; see *Neate v. Marlborough*, 3 My. & Cr. 416; *Godfrey v. Tucker*, 33 Beav. 280; *Barnes v. Thrupp*, 6 W. R. 48; 3 Jur. N. S. 1242), and thus enable himself subsequently either to foreclose (*Beckett v. Buckley*, 17 Eq. 435), or (after obtaining actual delivery in execution) to sell under sect. 4 of the Judgments Act, 1864 (*Ib.*; *Re Cowbridge R. Co.*, 5 Eq. 417). In the redemption action he might possibly obtain a sale under sect. 25 of the Conv. Act, 1881. As to tacking against a judgment creditor who is redeeming, see *Champneys v. Burland* (19 W. R. 148).

As to making judgment creditors of the mortgagor parties to a foreclosure action, see *Mildred v. Austin* (8 Eq. 220); *Re Bailey* (17 W. R. 393); *Cork v. Russell* (13 Eq. 210).

As to enforcing judgments generally, see R. S. C., Ord. 42.

(4)

By 33 Hen. 8, c. 39, and 13 Eliz. c. 4, certain liabilities in respect of Crown debts were imposed on the lands of Crown debtors.

A recognizance by a guardian is not a debt due to the Crown (*Ex p. Usher*, Who are 1 Rose, 366). The exact form of the bond under 33 Hen. 8, c. 39, was not material (*R. v. Ellis*, 4 Exch. 652). A bond entered into by the committee of a lunatic's estate has the same force as a bond under 33 Hen. 8, c. 39 (*R. v. Chambers*, 11 M. & W. 776; 2 Coop. temp. Cottenham, 69, n.).

Who are
accountants
to the Crown.
33 Hen. 8,
c. 39.

The statute 13 Eliz. c. 4, enumerates a great many officers of the Crown and other persons. Money "imprest for the use of the Crown" under that statute is money advanced to be employed for the use of the Crown (6 Price, 424). The following persons have been held accountants to the Crown under that statute:—A deputy commissary-general to the forces abroad (*R. v. Rawlings*, 12 Price, 834; *R. v. Fernandez*, *Ib.* 862). A commissioner directed by statute to pay money into the bank subject to the orders of the King (*Wilde v. Fort*, 4 Taunt. 334). An agent for a fire insurance office in respect of money received for duty (*R. v. Wrangham*, 1 Tyr. 383). A receiver of customs is not within the statute (6 Geo. 4, c. 105, s. 13; *Ib.* c. 106, s. 7). Nor is a collector of assessed taxes (*Casberd v. Ward*, 6 Price, 411). As to bonds by receivers of customs, see Customs Consolidation Act, 1876, ss. 165—167; and as to bonds by tax collectors, see Taxes Management Act, 1880, ss. 74—77, 118, 119. A clerk of the patents under 3 & 4 Will. 4, c. 84, was

13 Eliz. c. 4.

63 & 64 Vict. held accountable for moneys received by him (*A.-G. v. Edmunds*, 6 Eq. c. 26, s. 2. 381). Any person receiving money of the Crown becomes an immediate debtor to the Crown (*Re West London Bank*, 38 Ch. D. 367).

When lien of Crown attaches.

Before this act a bond under 33 Hen. 8, c. 39, bound all lands of the obligor over which he had a disposing power at the time he entered into the bond, even as against a subsequent purchaser for value (*Ellis v. R.*, 6 Exch. 921). As to its effect against estates tail, see *Anderson's case* (7 Rep. 21); *Cecil's case* (*Ib.* 19). The lien of the Crown under 13 Eliz. c. 4, attached from the time when the owner of the lands became an accountant, so that a sale after acceptance of office might be defeated by a subsequent debt to the Crown (*Nicholls v. Howe*, 2 Vern. 389; *R. v. Sarum*, Moore, 126; 25 Geo. 3, c. 35). And a purchaser, without notice, could not use an attendant term as a protection against the Crown (*R. v. Smith*, Sugd. V. & P. 673, 778, 1098, 11th ed.; *How v. Nichol*, Pr. Ch. 125; see *R. v. St. John*, 2 Price, 317; *R. v. Hollier*, 2 Price, 394); except where the term never was held in trust for the Crown debtor (*R. v. Lamb*, 13 Price, 649; *M'Clel*. 402).

In the case of debtors to the Crown by simple contract the lien of the Crown as against purchasers for value only attached from the time of the debt being put on record (*Casberd v. Ward*, 6 Price, 411). So also in the case of a bond not within 33 Hen. 8, c. 39 (*A.-G. v. Andrew*, Hard. 23).

What land may be taken under an extent.

The following among other interests in land may be taken under an extent:—Freeholds (*Hatton's case*, 10 Rep. 55); leaseholds (*Fleetwood's case*, 8 Rep. 171); rent-charges (*Lillingston's case*, 7 Rep. 37); an equity of redemption (*R. v. Coombes*, 1 Price, 207; *Fector v. Philpot*, 12 Price, 197); lands held on trust for the debtor (*A.-G. v. Sands*, Hard. 495; *Devonshire's case*, 11 Rep. 92; 13 Eliz. c. 4, s. 5); lands *bonâ fide* settled before the lien of the Crown attached, but with a power of revocation (*Coke's case*, Godb. 289). As to the liability of the heir of a Crown debtor, see *Dyer*, 67. Copyholds cannot be taken under an extent (*R. v. Budd*, Parker, 190); nor property which had been *bonâ fide* assigned to other creditors prior to the time when the debt to the Crown was incurred (*Spears v. Lord Advocate*, 6 Cl. & Fin. 180, 189; see *Scott v. Scholey*, 8 East, 467; *R. v. Sanderson*, 1 Wight, 51; *R. v. Lee*, 6 Price, 369). As to the priority of the Crown under an extent, see *A.-G. v. Leonard*, 38 Ch. D. 622.

As to how far possible Crown debts were an objection to title, see *Poole v. Shergold* (1 Cox, 160); *Wilde v. Forte* (4 Taunt. 334).

On the subject of Crown debts, see *West on Extents*, 8vo., 1817; *Manning's Practice of the Court of Exchequer*, 8vo., 1827; 5 *Jarm. Convey.* by Sweet, pp. 64 f, 79; *Butl. Co. Litt.* 209 a, 18th ed.; *Fisher's Digest*, tit. Extent.

Old mode of searching for Crown debts.

Before the Judgments Act, 1839, searches for Crown liabilities were made at the Exchequer Office, and amongst the bonds of the receiver-general at the Tax Office (2 Real Prop. Rep. 12). By the Judgments Act, 1839, s. 8, it was enacted as to Crown debts that no judgment, statute, recognizance, inquisition, obligation, or specialty, under 33 Hen. 8, c. 39, or acceptance of office, should affect land as to purchasers or mortgagees, unless registered in the Common Pleas. The act also contained provisions for re-registration in the case of ordinary judgments.

22 & 23 Vict. c. 35, s. 22.

With respect to Crown judgments, &c. obtained on or before 5th July, 1865, the provisions as to re-registration in the Judgments Act, 1839, as amended by the Judgments Act, 1855, were extended to every such judgment, statute, recognizance, inquisition, obligation, specialty or acceptance of office, as is by sect. 8 of the Judgments Act, 1839, required to be registered (*Law of Prop. Amendt. Act*, 1859, s. 22).

By 28 & 29 Vict. c. 104, ss. 48, 49, Crown judgments, &c. did not affect land as to purchasers or mortgagees, unless some writ or process of execution in pursuance of such judgment, &c. had been registered before conveyance and payment of the purchase-money.

Satisfaction of Crown debts.

23 & 24 Vict. c. 115, s. 1, provided for the entry of satisfaction of all bonds and other securities given to the Crown. As regards the evidence of release of land from Crown debts, special provision is made by the Judgments Act, 1839, ss. 10, 11, and 23 & 24 Vict. c. 115.

It will be observed that liabilities to the Crown are included in the provisions of sects. 2 and 3 of the present act. 63 & 64 Vict. c. 26, s. 2.

As regards the preference or priority of payment (in administration) of debts owing on judgments recovered against a deceased person, it was decided before the above-mentioned act, 4 & 5 Will. & M. c. 20, that payment by an executor of a simple contract debt before a judgment debt of which he had no notice, was a *devastavit* (*Littleton v. Hibbens*, Cro. Eliz. 793). By 4 & 5 Will. & M. c. 20, judgments not docketed were not to have any preference. By the Judgments Acts, 1838 and 1839, the docket was closed and registration substituted, but no provision was made as to the preference of judgment debts in administration. After those acts it was held that the old law was thereby revived, and that an administrator had committed a *devastavit* by paying a simple contract debt before a judgment debt, though he had no notice of the latter (*Fuller v. Redman* (No. 1), 26 Beav. 600). This decision led to the passing of sects. 3 and 4 of the Law of Property Amendment Act, 1860, which provided that without registration or re-registration no judgment should have any preference against heirs, executors, or administrators in their administration of estates. And under sect. 3 it was held that an unregistered judgment was not entitled to any priority over simple contract debts (*Van Gheluwe v. Nerinckx*, 21 Ch. D. 189; *Re Turner, Turner v. Waller*, 12 W. R. 337; 33 L. J. Ch. 232; *Kemp v. Waddingham*, L. R. 1 Q. B. 358; see *Evans v. Williams*, 2 Dr. & Sm. 224). Registration, however, was not necessary to give priority in the case of judgments against executors and administrators (*Jennings v. Rigby*, 33 Beav. 198; *Re Williams*, 15 Eq. 270).

By sub-sect. 3 of the present section no entry is to be made in the Register of Judgments kept under sect. 19 of the Judgments Act, 1838 (see R. S. C., Ord. 61, r. 1), except under an order of the court; and by sect. 5 of the present act, sects. 3 and 4 of the Law of Property Amendment Act, 1860, have been repealed. In the result, it would seem that the old law has been revived, and that payment by an executor or administrator out of legal assets of a simple contract debt before a judgment debt, even where he had no notice of the latter, may be a *devastavit* (see *Fuller v. Redman* (No. 1), 26 Beav. 600). Consider Interpretation Act, 1889, s. 38, sub-s. 2 (a); which, however, does not seem to apply in the present case.

3. Section six of the Land Charges Registration and Searches Act, 1888, shall apply to every writ and order affecting land issued or made by any court for the purpose of enforcing a judgment, whether obtained on behalf of the Crown or otherwise, and whether obtained before or after the commencement of this act, and to every delivery in execution or other proceeding taken in pursuance of any such writ or order, or in obedience thereto. Amendments of 51 & 52 Vict. c. 51.

4. From and after the passing of this act the Middlesex Registry Act, 1708, shall not apply to any instrument made after the passing of this act and capable of registration under this act or the Land Charges Registration and Searches Act, 1888. 7 Anne, c. 20, not to apply to certain charges.

By sect. 6 of the Land Registry (Middlesex Deeds) Act, 1891, it is provided that it shall not be necessary for the validity of any judgment, statute or recognizance that it should be registered under the Middlesex Registry Act, 1708.

5. As from the commencement of this act the enactments specified in the schedule to this act are hereby repealed to the extent mentioned in the third column of that schedule. Repeal.

63 & 64 Vict.
c. 26, s. 6.

6.—(1.) This act shall not extend to Scotland or Ireland.

Extent, com-
mencement,
short title,
and construc-
tion.

51 & 52 Vict.
c. 51.

(2.) This act shall, except as otherwise expressly provided, come into operation on the first day of July one thousand nine hundred and one.

(3.) This act may be cited as the Land Charges Act, 1900, and shall be construed as one with the Land Charges Registration and Searches Act, 1888.

SCHEDULE.

Section 5.

ENACTMENTS REPEALED.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
1 & 2 Vict. c. 110.	The Judgments Act, 1838	Section nineteen, and section twenty-one, from the words "Provided always" to "one shilling."
2 & 3 Vict. c. 11.	The Judgments Act, 1839	Sections two, three, five, six, eight, and nine, and section four, except so far as it applies to lis pendens.
3 & 4 Vict. c. 82.	The Judgments Act, 1840	Section two.
18 & 19 Vict. c. 15.	The Judgments Act, 1855	Section two, from "But no judgment" to the end of the section; section three, except so far as it relates to lis pendens; and sections four to eight.
23 & 24 Vict. c. 38.	The Law of Property Amendment Act, 1860.	Sections one to five.
27 & 28 Vict. c. 112.	The Judgments Act, 1864	Sections one, two, and three, and, in section four, the words "and whose writ or other process of execution shall be duly registered."
28 & 29 Vict. c. 104.	The Crown Suits, &c. Act, 1865.	Sections forty-eight and forty-nine.
51 & 52 Vict. c. 51.	The Land Charges Registration and Searches Act, 1888.	Proviso (a) of section six.

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I.—THE REAL PROPERTY ACT, 1845.

8 & 9 VICT. c. 106.

An Act to amend the Law of Real Property.

[4th August, 1845.]

[*Sect. 1 repealed so much of 7 & 8 Vict. c. 76, as abolished contingent remainders. As to these remainders, see now sect. 8, post, p. 525, and the Contingent Remainders Act, 1877, post, p. 525.*]

8 & 9 Vict.
c. 106.

2. After the said first day of October, one thousand eight hundred and forty-five, all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery.

The immediate freehold of corporeal tenements to lie in grant as well as in livery.

Corporeal hereditaments are said to lie in livery, incorporeal hereditaments are said to lie in grant (Co. Litt. 9 a). Incorporeal hereditaments (such as rents, advowsons, remainders, reversions) were not the subjects of a feoffment, for a feoffment operates on the possession which the owners of such estates had not to convey; hence incorporeal hereditaments were said to lie in *grant*, which was the mode of conveyance at the common law of those estates of which livery could not be given. The object proposed by this section was to impart to *corporeal* hereditaments, that is, to hereditaments which lie in this section. livery only, the capacity of being transferred by deed of grant.

Object of

Prior to 4 & 5 Vict. c. 21, the usual mode of conveying corporeal hereditaments was by lease for a year and re-lease, the lease being executed for the purpose of giving to the purchaser that possession without which the re-lease would have been ineffectual (Challis, R. P. 376). The lease was rendered unnecessary by 4 & 5 Vict. c. 21. And since the present statute a simple deed of grant has been adopted as the ordinary mode of conveying freehold estates in possession (Williams, R. P., 20th ed. 201).

4 & 5 Vict.
c. 21.

8 & 9 Vict.
c. 106, s. 2.

There has been discussion as to the bearing of this section on the technical doctrine of seisin, which distinguished between a seisin in deed and a seisin in law (see *ante*, p. 374; *Eager v. Furnival*, 17 Ch. D. 120). In connection with this doctrine (which now mainly applies to the question of curtesy and conveyance by infants under the custom of gavelkind, see Sweet, 12 Law Q. R. 246), some doubt has been expressed as to whether a conveyance by grant taking effect under the present section gives to the grantee seisin in deed of the land until he enters (Lightwood, Poss. Land, 35; Sweet, 51 S. J. 289). As to this point, it is suggested that (as regards the conveyance of the immediate freehold) the real object and operation of the present section was to assimilate corporeal to incorporeal hereditaments. And it may be pointed out that in the case of incorporeal hereditaments the distinction between seisin in deed and seisin in law applied (*ante*, p. 374); and seisin in deed of these hereditaments could not be obtained without acts of ownership equivalent to possession.

In a recent case, however, a person who had lent money on the security of customary freeholds conveyed to him in 1887 by a statutory mortgage, and who had never entered, was held by the C. A. to be "seised" within the meaning of a custom which arose prior to the Statute *Quia Emptores* (*Copestake v. Hoper*, 1908, 2 Ch. 10).

Immediate
freehold.

By the term *immediate freehold* is meant the first of all the estates of freehold; for example, when A. is tenant for life, remainder to B. for life, in tail or in fee, B. has an *estate of freehold*, but A. has the *immediate freehold* (1 Preston's Convey. 48).

The word "grant" is not required in a deed of grant (Conv. Act, 1881, s. 49, *post*).

The latter part of the section relating to stamp duties was repealed by 13 & 14 Vict. c. 97, s. 6, and is accordingly omitted.

Feoffments,
partitions,
exchanges,
leases, assign-
ments and
surrenders
required (sub-
ject to certain
exceptions)
to be by deed.

3. A feoffment, made after the said first day of October, one thousand eight hundred and forty-five, other than a feoffment made under a custom by an infant (*a*), shall be void at law, unless evidenced by deed, and a partition and an exchange (*b*) of any tenements or hereditaments not being copyhold, and a lease, required by law to be in writing (*c*), of any tenements or hereditaments, and an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments (*d*), and a surrender in writing (*e*) of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing, made after the said first day of October, one thousand eight hundred and forty-five, shall also be void at law, unless made by deed: provided always, that the said enactment so far as the same relates to a release (*f*) or a surrender shall not extend to Ireland.

(*a*) By the custom of gavelkind an infant on attaining the age of fifteen years may alien lands by feoffment, livery of seisin being made in person and not by attorney (Robinson on Gavelkind, 248—250, 3rd ed.; see *Re Maskell and Goldfinch*, 1895, 2 Ch. 525). As to the construction of the words "void at law" in the first branch of this section, see the note as to leases below, and the arg. in *Zimble v. Abraham*, 1903, 1 K. B. 579.

Partition.

(*b*) At common law coparceners might have made partition of things lying in livery or grant by parol without deed, and tenants in common might have made partition of things lying in livery by parol without deed, if they afterwards perfected the partition by livery of seisin (Litt. s. 250; Co. Litt. 169 a). So, too, joint tenants for years might have made partition by parol without deed (Co. Litt. 187 a). But joint tenants of freeholds, whether corporeal or

incorporeal, and tenants in common of incorporeal hereditaments, could not have made partition without deed (Co. Litt. 169 a). Since the Statute of Frauds (29 Car. 2, c. 3), a writing was in all cases necessary, but a deed was required only in cases in which it was necessary before that statute (1 Davidson Conv., 417, 418; 1 Byth. Conv. by Jarman, 193). As to the partitions of copyholds, see the Copyhold Act, 1894, s. 87; *Tope v. Marshead*, 6 Beav. 213; *Dillon v. Coppin*, 4 Beav. 217, n.; *Bolton v. Ward*, 4 Hare, 530.

8 & 9 Vict.
c. 106, s. 3.

An exchange since the Statute of Frauds (29 Car. 2, c. 3) must, if it relate to land for a larger interest than a term of three years, be in writing, and if the things whereof the exchange is made lie in grant, *i.e.*, if they consist of reversions, rents or other incorporeal hereditaments, or if they lie in several counties, it must be by deed (Co. Litt. 51 b).

(c) By the Statute of Frauds every lease of corporeal hereditaments for a term exceeding three years from the making thereof, and for a less term where the rent did not amount to two-thirds of the value, was required to be in writing (29 Car. 2, c. 3, ss. 1, 2). The result of the present section was that in all cases where writing had been previously required a lease was void at law unless made by deed. Even at law, however, the courts held (overruling *Stratton v. Pettit*, 16 C. B. 420) that an instrument void as a lease might be good as an agreement (*Bond v. Rosling*, 1 Best & Sm. 371; see *Rollason v. Leon*, 7 H. & N. 73; *Adams v. Hagger*, 4 Q. B. Div. 480); so that an action could be brought against the intended tenant either for not accepting a lease (*Ib.*), or for not complying with a stipulation contained in the agreement (*Martin v. Smith*, L. R. 9 Ex. 50; *Adams v. Clutterbuck*, 10 Q. B. D. 403); or against the intended landlord for having no title to grant a lease (*Stranks v. St. John*, L. R. 2 C. P. 376). And in equity specific performance could be obtained of an agreement which was void at law as a lease (*Parker v. Taswell*, 2 De G. & J. 559; see *Zimble v. Abrahams*, 1903, 1 K. B. 577, where specific performance was granted of a document void as a demise for life).

Leases.

Result of present section.

As regards the estate taken by a person entering under an instrument void under this act as a lease, it was settled at law (before the Jud. Act, 1873) that he held as tenant from year to year upon the terms of the instrument, so far as applicable to such a tenancy; the tenancy being determinable, during the term mentioned in the instrument, by the usual half-year's notice, but expiring without notice at the end of such term (*Tress v. Savage*, 4 El. & Bl. 36; see *Lee v. Smith*, 9 Exch. 662; *Wood v. Beard*, L. R. 2 Ex. D. 37). Since the Jud. Act, 1873, it has been held that a tenant holding under an agreement for a lease of which specific performance would be decreed, holds on the same terms and has the same rights and liabilities as if a lease had been granted (*Walsh v. Lonsdale*, 21 Ch. D. 9; *Swain v. Ayres*, 21 Q. B. Div. 289; *Lowther v. Heaver*, 41 Ch. Div. 264; *Manchester Co. v. Coombs*, 1901, 2 Ch. 617; see *Warren v. Murray*, 1894, 2 Q. B. 648). But in such a case, if the value of the property exceed 500*l.*, the county court, having no jurisdiction to order specific performance, cannot order payment of rent (*Foster v. Reeves*, 1892, 2 Q. B. 255).

Estate taken by person entering under agreement for lease.

This provision as to leases did not apply to agreements for the lease of tolls under the Turnpike Roads Act, 1822, s. 57 (*Shepherd v. Hodsman*, 18 Q. B. 316).

Incorporeal hereditaments.

A lease of incorporeal hereditaments must be under seal (*Gardiner v. Williamson*, 2 B. & Ad. 336; see *Bird v. Higginson*, 3 Ad. & El. 83; *Holford v. Pritchard*, 3 Exch. 793).

(d) The Statute of Frauds required that all assignments of leases be by deed or note in writing, signed by the party assigning or his agent (29 Car. 2, c. 3, s. 3).

Assignments.

Where a person holding for a term of less than a year let by parol for the remainder of his term, the parol lease was held not to be an assignment but to bind the parties, who intended to create the relation of landlord and tenant, and to pass the interest by lease (*Pollock v. Stacey*, 9 Q. B. 1035; see *Debenham v. Digby*, 21 W. R. 359).

8 & 9 Vict.
c. 106, s. 3.

Surrenders.

(e) The Statute of Frauds required that every surrender should be by deed or note in writing duly signed (29 Car. 2, c. 3, s. 3). This section refers to a surrender *in writing*, and does not include a surrender by operation of law. As to what is a surrender by operation of law, see *Lyon v. Read* (13 M. & W. 305, 306); *Kingston's case* (2 Smith, L. C. 917, 9th ed.); *Wallis v. Hands* (1893, 2 Ch. 75); *Knight v. Williams* (1901, 1 Ch. 257).

(f) The word "release" appears to be inserted by mistake instead of "lease." Every lease in Ireland required by law to be in writing must be by deed (*Gilman v. Crowley*, 7 I. C. L. R. (N. S.) 557).

Feoffments
not to operate
by wrong, nor
exchanges or
partitions to
imply any
condition, or
give and
grant any
covenant.

4. A feoffment, made after the said first day of October, one thousand eight hundred and forty-five, shall not have any tortious operation (g); and an exchange or a partition of any tenements or hereditaments, made by deed, executed after the said first day of October, one thousand eight hundred and forty-five, shall not imply any condition in law; and the word "give" or the word "grant," in a deed executed after the same day, shall not imply any covenant in law, in respect of any tenements or hereditaments (h), except so far as the word "give" or the word "grant" may, by force of any act of parliament, imply a covenant (i).

Tortious
operation of
feoffment.

(g) A feoffment had the effect of barring or destroying contingent remainders depending upon particular estates (*Archer's case*, 1 Rep. 66 b). A feoffment also destroyed powers appendant and powers in gross, but not powers collateral. A feoffment was the only conveyance by which a tenant for years, by elegit, statute merchant or staple, or a copyholder could create an estate of freehold by disseisin (Co Litt. 49; 2 Sand. on Uses, 14, 15). Since this act a feoffment in fee simple, made by a tenant for life, will merely convey his life interest, and will not be a cause of forfeiture; and a feoffment by a lunatic or idiot will be void and not merely voidable (*Shelford's Lunacy*, 335).

Covenant im-
plied by words
"grant,"
"give."

(h) As to the conditions implied on exchanges and partitions, see 4 Cruise, Dig. tit. 32, c. 6, 20. The operation of the words "grant" and "give" in creating an implied warranty of title in conveyances of estates in fee simple, in gifts in tail, in leases for life, and in leases for years, is discussed in Butler's note to Co. Litt. 384 a (see 4 Cruise, Dig. tit. 32, c. 24; and see 1 Davidson, Conv. 70, 103, 3rd ed.; *Doe v. Prince*, 20 L. J. C. P. 223).

Exception as
to acts of
Parliament.

In the conveyance of lands by the promoters of the undertaking under the L. C. C. Act, the word "grant" implies certain covenants by them for title, except so far as limited by express words (L. C. C. Act, 1845, s. 132). Similarly a conveyance by a joint stock company under 19 and 20 Vic. c. 47, s. 46. The words "grant, bargain, and sell," operated as covenants for title in deeds of bargain and sale of lands lying in the East and North Ridings of Yorkshire by stat. 6 Anne, c. 62, s. 30; 8 Geo. 2, c. 6, s. 35. Both the last-mentioned acts have been repealed by the Yorkshire Registries Act, 1884.

"demise."

As regards words other than "give" or "grant," the word "demise" in a lease, imports a covenant in law on the part of the lessor that he has a good title, and that the lessee shall quietly enjoy during the term (*Burnett v. Lynch*, 5 B. & C. 609; *Walker v. Bartlett*, 18 C. B. 845; *Mathew v. Blackmore*, 1 H. & N. 766). But there is no implied covenant for quiet enjoyment if there is an express covenant (*Line v. Stephenson*, 5 Bing. N. C. 183; *Merrill v. Frame*, 4 Taunt. 329; *Grosvenor v. Hamilton*, 1894, 2 Q. B. 840; and see *Hoare v. Chambers*, 11 Times L. R. 185). Again, where by writing not under seal A. agreed to "let" Blackacre to B. for a yearly tenancy, a contract for quiet enjoyment without interruption by A. or any one claiming under him was implied from the word "let" (*Markham v. Paget*, 1908, 1 Ch.

"let."

712; where the decisions are reviewed). And it seems that such a contract will be implied from the mere relation of landlord and tenant (*Budd Scott v. Daniell*, 1902, 2 K. B. 351). But in these cases the implied contract does not extend to a lawful interruption by a person claiming under title paramount (1908, 1 Ch. 718; *Jones v. Lavington*, 1903, 1 K. B. 253).

As to the covenants implied under sect. 7 of the Conveyancing Act, 1881, see that section set out, *post*.

5. Under an indenture, executed after the first day of October, one thousand eight hundred and forty-five, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant, respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture; also, a deed, executed after the said first day of October, one thousand eight hundred and forty-five, purporting to be an indenture, shall have the effect of an indenture, although not actually indented.

Strangers may take immediately under an indenture, and a deed purporting to be an indenture shall take effect as such.

Before this act a practical distinction between an indenture and a deed poll was, that no person could take an immediate estate or benefit under an indenture, unless he was named as a party to it; but any person could take an immediate estate or benefit under a deed poll, inasmuch as it is addressed to all the world (Co. Litt. 26 a, 231; Burton's Real Prop. 442, n.; 2 Prest. Conv. 394 *et seq.*; 1 David Conv. 324). This rule did not extend to remainders (Co. Litt. 231 a, 259 b), nor, it was said, to uses or the benefit of a trust (2 Prest. Conv. 394).

Another practical distinction between a deed poll and an indenture was, that a covenant entered into by a deed poll with any covenantee named in the deed was valid; but a covenant in an indenture entered into with a person not a party could not be sued on by that person (*Green v. Hoare*, Salk. 197; *Berkley v. Hardy*, 5 B. & C. 353; *Southampton v. Browne*, 6 B. & C. 718; see in the case of a composition deed, *Isaacs v. Green*, L. R. 2 Ex. 352, and cases there quoted). But a person not a party to a deed might covenant with one who was, and would be bound by executing the deed (*Salter v. Kidgley*, Carth. 76; 2 Prest. Conv. 415). The rule in *Berkley v. Hardy* (*sup.*) still holds good except so far as altered by the above section (*Forster v. Elvet*, 1908, 1 K. B. 639).

As regards the relation of the above section to covenants, it is doubtful whether its operation is confined to covenants running with the land (1908, 1 K. B. 639; *Dyson v. Forster*, 1909, A. C. 102). Compare sect. 11 of Conv. Act, 1881, and note thereto, p. 573, *post*. In dealing with a covenant made with owners in fee "their heirs and assigns and separately with the owners for the time being" of Blackacre, it was said by *Jessel*, M.R., that the above section did not enable the benefit of a covenant to be taken by a person not existing at the date of the deed (*Kelsey v. Dodd*, 52 L. J. Ch. 39). But where by a lease of coal to which the only parties were the lessor and lessee, the lessee covenanted with the lessor (who was not the owner of the surface) and as separate covenants with the owners or occupiers for the time being of the surface, to pay damage from working, it was said (1) that the covenant with the occupiers was bad (*Forster v. Elvet*, 1908, 1 K. B. 636); (2) that the covenant with the owners for the time being meant the owners at the date of the deed (*id.* 641), and (3) that under sect. 58, sub-s. 1 of the Conv. Act, 1881, *post*, the covenant was made with such owners their heirs and assigns (*ib.*). It was held accordingly that persons claiming under the owners of the surface at the date of the deed could sue on the covenant (*Forster v. Elvet*, 1908, 1 K. B. 629; *Dyson v. Forster*, 1909, A. C. 98).

6. After the first day of October, one thousand eight hundred and forty-five, a contingent, an executory, and a future interest, Contingent and other like interests, also

8 & 9 Vict.
c. 106, s. 6.
rights of
entry, made
alienable by
deed, saving
estates in tail;
and as regards
married
women en-
joining con-
formity to
3 & 4 Will. 4,
c. 74.

4 & 5 Will. 4,
c. 92.

and a possibility coupled with an interest, in any tenements or hereditaments (*k*) of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry (*l*), whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed; but no such disposition shall, by force only of this act, defeat or enlarge an estate tail, and every such disposition by a married woman shall be made conformably to the provisions, relative to dispositions by married women, of an act passed in the third and fourth years of the reign of his late Majesty King William the Fourth, intituled "An Act for the Abolition of Fines and Recoveries, and for the substitution of more simple Modes of Assurance" (*m*), or, in Ireland, of an act passed in the fourth and fifth years of the reign of his said late Majesty, intituled "An Act for the Abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance, in Ireland."

(*k*) The above section deals with the disposition of existing interests not with the creation of new estates (*Savill v. Bethell*, 1902, 2 Ch. 540). The alienation under the old law of the interests described in the section has been already considered (see *ante*, p. 280). As to the alienation of the interest of a yearly tenant, see *Alcock v. Moorhouse* (9 Q. B. Div. 371). As to alienation of supposed rights, see 32 Hen. 8, c. 9; *Doe v. Evans* (1 C. B. 717, and the cases there cited). A *spes successionis* cannot be disposed of under this section (*Re Ellenborough, Towry Law v. Burne*, 1903, 1 Ch. 699).

(*l*) It has been said that this means a right of entry in the nature of an estate or interest—that is, where a person by lapse of time has lost everything except his right of entry—but that the section does not include a right of entry for forfeiture (*Hunt v. Remnant*, 9 Exch. 640; *Hunt v. Bishop*, 8 Exch. 680; see *Cohen v. Tannar*, 1900, 2 Q. B. 609). The reason being that it was at the election of the person entitled to enter whether he would take advantage of the breach (*Jenkins v. Jones*, 9 Q. B. Div. 131). As to the transfer of rights of re-entry for forfeiture, see Conv. Act, 1881, s. 10, sub-s. 1, *post*.

Prior to this act, all dealings with a right of entry, except by release to the person in possession, were dealings with a pretended right within the meaning of 32 Hen. 8, c. 9, and so void and penal under that statute. Since the present act, if such a right is not fictitious in fact, it is not "pretenced" within that statute, and may be properly dealt with (*Jenkins v. Jones*, 9 Q. B. Div. 135). In order to recover the penalty under 32 Hen. 8, c. 9, it must be proved, not only that the title is fictitious, but that at the time of the dealing the defendant knew that it was so (*Kennedy v. Lyell*, 15 Q. B. D. 491).

(*m*) See *ante*, p. 317.

Capacity of
married
women to
disclaim
estates or
interests by
deed extended
to England.

7. After the first day of October, one thousand eight hundred and forty-five, an estate or interest in any tenements or hereditaments in England, of any tenure, may be disclaimed by a married woman by deed; and every such disclaimer shall be made conformably to the said provisions of the said Act for the abolition of Fines and Recoveries, and for the Substitution of more simple Modes of Assurance.

See *ante*, p. 317.

8. A contingent remainder, existing at any time after the thirty-first day of December, one thousand eight hundred and forty-four, shall be, and, if created before the passing of this act, shall be deemed to have been, capable of taking effect, notwithstanding the determination, by forfeiture, surrender or merger, of any preceding estate of freehold, in the same manner, in all respects, as if such determination had not happened.

8 & 9 Vict.
c. 106, s. 8.

Contingent remainders protected as from 31st December, 1844, against the premature failure of a preceding estate.

Destruction of contingent remainders.

This section of the act does not alter the rules of law as to the creation of contingent remainders (see 2 Bl. Comm. 164, 170; Watk. on Conv. tit. Remainder). In consequence of the rule that a remainder must vest in the grantee during the existence of the particular estate, or the very instant it determines, contingent remainders might be defeated by destroying or determining the particular estate before the contingency happened (1 Real Prop. Rep. 66, 135). Therefore, when A. was tenant for life, with contingent remainders over, A. might, by alienation, surrender, or other methods, have destroyed and determined his own life estate before any of those remainders vested; the consequence of which was, that he utterly defeated them all. In these cases, it was formerly necessary to have trustees appointed to preserve the contingent remainders; in whom there was vested an estate in remainder for the life of the tenant for life, to commence when his estate determined (2 Black. Com. 171). See *Egerton v. Massey* (3 C. B. N. S. 338) as to the destruction of a contingent remainder by merger. The above section supercedes the necessity of a limitation of estates to trustees to support contingent remainders.

The act only applies to the three cases of forfeiture, surrender or merger. If at the time when the particular estate would naturally have expired, the contingent remainder be not ready to come into immediate possession, it will still (subject to the Contingent Remainders Act, 1877) fail as before (Williams R. P., 18th ed. 347). For instances of such failure, see *Price v. Hall*, 5 Eq. 399; *Perceval v. P.*, 9 Eq. 386; *White v. Summers*, 1908, 2 Ch. 256. In the last case the court discussed the question how far the intention of the testator can affect the rule (governing cases to which the Cont. Rem. Act, 1877, below, does not apply) that no testamentary limitation capable of taking effect as a contingent remainder shall be held to be an executory devise (1908, 2 Ch. 262).

Contingent remainders of copyholds were never liable to destruction by the sudden termination of the particular estate on which they depend. But there is no distinction between freeholds and copyholds in those cases where the particular estate expires naturally and regularly before the happening of the contingency (Scriv. Cop. 60, 6th ed.). Quasi-contingent remainders in copyholds were protected from destruction by the estate of the lord of the manor (*Pickersgill v. Grey*, 30 Beav. 352).

By the Contingent Remainders Act, 1877, it is enacted that every contingent remainder created by any instrument executed after the 2nd of August, 1877, or by any will or codicil revived or republished by any will or codicil executed after that date, in tenements or hereditaments of any tenure, which would have been valid as a springing or shifting use or executory devise or other limitation had it not had a sufficient estate to support it as a contingent remainder, shall, in the event of the particular estate determining before the contingent remainder vests, be capable of taking effect in all respects as if the contingent remainder had originally been created as a springing or shifting use or executory devise or other executory limitation.

Equitable contingent remainders (e.g., arising by a limitation of an equity of redemption) were not subject to the old rule which made legal contingent remainders liable to be defeated by the failure of the particular estate

8 & 9 Vict.
c. 106, s. 8.

(*Astley v. Micklethwait*, 15 Ch. D. 59). In the case of a will coming into operation before the Contingent Remainders Act, 1877, the legal estate taken under a direction to pay debts prevented an equitable contingent remainder from failing (*Re Brooke, B. v. B.*, 1894, 1 Ch. 43). Where, after the act, an equitable contingent remainder became clothed with the legal estate, it was not defeated by the failure of the prior life interest (*Re Freme, Freme v. Logan*, 1891, 3 Ch. 167).

When the reversion on a lease is gone the next estate to be deemed the reversion.

9. When the reversion expectant on a lease, made either before or after the passing of this act, of any tenements or hereditaments, of any tenure, shall, after the said first day of October, one thousand eight hundred and forty-five, be surrendered or merge, the estate which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease.

Surrender of leasehold reversion.

Where A. leased to B., and B. sub-leased for a shorter term to C., and then surrendered to A., the result under the old law was that, the immediate reversion on C.'s sub-lease having been destroyed, C. could not be sued on his covenants, which were incident to that reversion (*Burton v. Barclay*, 7 Bing. 756). On the other hand, B.'s surrender did not affect C.'s right to hold under his sub-lease (*Walter v. Yalden*, 1902, 2 K. B. 310), or any right which C. might possess by covenant to compel B. to observe the covenants in the head lease (*Piggott v. Stratton*, 1 D. F. & J. 33).

A statutory remedy for this difficulty was in the first instance provided for those cases where the surrender was made with a view to a new lease. For by the Landlord and Tenant Act, 1730, s. 6 (which is still in operation), a lessee could surrender his lease for the purpose of taking a new lease without a surrender of any sub-leases. The same section preserved to the lessee, by virtue of the new lease, the same remedies against the sub-lessee, and to the original lessor the same remedies by distress and entry for rents reserved by the new lease (so far as not exceeding the rents reserved in the original lease) as if such original lease were still on foot. The intention of the section was to place all the parties in the same situation as if no surrender had taken place (*Doe v. Marchetti*, 1 B. & Ad. 721). The new lease, notwithstanding the outstanding sub-lease, takes effect in possession (*Re Ford*, 8 Eq. 309); and becomes in effect the reversion immediately expectant on the sub-lease (*Ecc. Commrs. v. Tremer*, 1893, 1 Ch. 174; *Cousins v. Phillips*, 3 H. & C. 892).

The effect of the R. P. Act, 1845, s. 9 (which section is retrospective, *Upton v. Townend*, 17 C. B. 542), is to extend the statutory remedy to all cases of surrender. Thus the disclaimer of a trustee in bankruptcy under the act of 1869 is a surrender within the above sect. 9 (*Smalley v. Hardinge*, 7 Q. B. Div. 524; see *Re Roberts, Ex p. Brook*, 10 Ch. Div. 110). As to the effect of a disclaimer under the act of 1883, see *Re Morgan* (22 Q. B. Div. 592); *Re Baker*, 1901, 2 K. B. 628; *Re Britton*, 61 L. T. 52.

Merger of leasehold reversion.

As regards merger, it was held under the old law that if a lessee granted a sub-lease, and then took a conveyance to himself of the fee whereby his former reversionary interest was merged, the covenants incident to such reversionary interest were extinguished (*Webb v. Russell*, 3 T. R. 393; *Thorn v. Woolcombe*, 3 B. & Ad. 586; compare the statement of the effect of the merger of a lease in the fee, a sub-lease remaining outstanding, *Capital and Counties Bank v. Rhodes*, 1903, 1 Ch. 647). This difficulty is dealt with by the above sect. 9, which was applied in *Craig v. Greer*, 1899, 1 I. R. 258. See also, on questions of merger arising since the Jud. Act,

1873, the note to sect. 39 of the Fines and Recoveries Act, 1833, *ante*, 8 & 9 Vict. p. 295. c. 106, s. 9.

The protection of sub-lessees on the forfeiture of a head lease is provided for by sect. 4 of the Conv. Act, 1892 (*post*).

10. This act shall not extend to Scotland.

Act not to extend to Scotland.

II.—THE SATISFIED TERMS ACT, 1845.

8 & 9 VICT. c. 112.

An Act to render the Assignment of Satisfied Terms unnecessary.
[8th August, 1845.]

WHEREAS the assignment of satisfied terms has been found to be attended with great difficulty, delay, and expense, and to operate in many cases to the prejudice of the persons justly entitled to the lands to which they relate: be it therefore enacted, that every satisfied term of years which, either by express declaration or by construction of law, shall upon the thirty-first day of December, one thousand eight hundred and forty-five, be attendant upon the inheritance or reversion of any lands (*n*), shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim, and demand as it would have afforded to him if it had continued to subsist, but had not been assigned or dealt with, after the said thirty-first day of December, one thousand eight hundred and forty-five, and shall for the purpose of such protection be considered in every court of law and of equity to be a subsisting term (*o*).

8 & 9 Vict. c. 112, s. 1.

On 31st December, 1845, satisfied terms of years attendant on inheritance, &c., of land, to cease, except, &c.

(*n*) The subject of attendant terms is fully explained in the Second Rep. Real Prop. Comm. pp. 7—14; and see Williams, Real Prop. 434, 14th ed.; Sugd. V. & P. 616 *et seq.*, 14th ed.; Davidson, Conv. Prec. 20, 15th ed. As to terms attendant by implication or construction of law, see Sugd. V. & P. 625; *Belaney v. Belaney* (2 Ch. 138).

A term does not become satisfied within this act except the beneficial interest in the whole charge secured by the term, and the beneficial interest in the whole estate, are united and merged in one person, or so long as there remains any useful purpose beneficial to the owner of the term, and consistent with the trust on which at the date of the transaction the term was held (*Anderson v. Pignet*, 8 Ch. 188, 189).

An agreement to assign an attendant term to a trustee for a mortgagee has been held to prevent the term ceasing as a satisfied term under this act (*Shaw v. Johnson*, 1 Dr. & Sm. 412); but not the mere delivery to the mortgagee of the deed of assignment to a trustee for the mortgagor (*R. Sleeman*, 4 Ir. Ch. Rep. 563; *Corry v. Cremorne*, 12 Ir. Ch. Rep. 136). A mortgage term was held not to cease under this section when the mortgage

8 & 9 Vict.
c. 112, s. 1.

The excep-
tion in the
section:
nature of the
protection.

was paid off by, and a trust of the term declared in favour of, a person who had not the inheritance, but was believed at the time to have (*Doe v. Jones*, 13 Q. B. 774; *Anderson v. Pignet*, 8 Ch. 189). Terms were held to have ceased under this act in *Doe v. Price* (16 M. & W. 609); *Doe v. Mouldsdale* (*Id.* 689).

(o) The object of the act appears to be to merge all attendant terms, but to preserve to the persons entitled the protection which a term would have afforded to them, where, upon the 31st December, 1845, it was attendant by express declaration. But even this is a limited protection; for it gives, not such protection as a further assignment of it for a purchaser would confer, but such protection as it would have afforded if it had continued to subsist but had not been assigned or dealt with after the 31st December, 1845. This protection will of course extend to a new purchaser, although the term assigned to attend was left undisturbed (*Sugd. V. & P.* 497, 14th ed.; *Freer v. Hesse*, 4 De G. M. & G. 495; see also *Sugd. V. & P.* 623, 624, 14th ed., as to the nature of the protection afforded by an attendant term).

The proper way of testing the right of a person to the protection of such a term is to consider whether, if the act had not been passed, equity would restrain him from setting up the term (*Cottrell v. Hughes*, 15 C. B. 532). So where C. being, under a deed of settlement, tenant for life, with remainder to such of his children as he should appoint, but covenanting that he was seised in fee, sold the estate in 1840 to the defendant, who had no notice of the settlement, and the residue of two terms attendant on the inheritance was assigned to a trustee for the defendant to attend the inheritance: the terms were a protection against the settlement (*Id.*). But where a term of 500 years, which was in fact satisfied and attendant on the inheritance, was assigned by the tenant for life under a settlement to a trustee with a declaration of trust for certain parties: such parties, having had notice that the term was satisfied, could not set up against the parties claiming under the settlement, the term which had been assigned by a person who had no right to deal with it except to the extent of his own interest (*Plant v. Taylor*, 7 H. & N. 211).

In *Bass v. Wellsted* (12 Jur. 347) a question was raised, but not decided, as to the protection against dower by a term since the above act.

Presuming
surrender of
terms.

A term assigned to attend the inheritance will not be presumed to have been surrendered, unless there has been a dealing with the estate in such a manner as reasonable men would not have dealt with it unless the term had been put an end to (*Garrard v. Tuck*, 8 C. B. 231). As to presuming the surrender of terms, see also *Cottrell v. Hughes*, 15 C. B. 532 (where the decision in *Doe v. Hilder* (2 B. & Ald. 782) was doubted); *Doe v. Plowman* (2 B. & Ald. 573); *Doe v. Langdon* (12 Q. B. 711); *Hele v. Beasley* (17 Beav. 28); *Sugd. V. & P.* Appendix 26, 11th ed.; *Dart, V. & P.* 363.

Satisfied
terms now
subsisting, &c.
to cease on
becoming at-
tendant upon
inheritance,
&c. of lands.

2. Every term of years now subsisting or hereafter to be created, becoming satisfied after the said thirty-first day of December, one thousand eight hundred and forty-five, and which, either by express declaration or by construction of law, shall after that day become attendant upon the inheritance or reversion of any lands, shall immediately upon the same becoming so attendant absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid.

See *Anderson v. Pignet* (8 Ch. 180), *ante*, note to the preceding section.

Construction
of act.

3. In the construction and for the purposes of this act, unless there be something in the subject or context repugnant to such

construction, the word "lands" shall extend to all freehold tenements and hereditaments, whether corporeal or incorporeal, and to all such customary land as will pass by deed, or deed and admittance, and not by surrender, or any undivided part or share thereof respectively; and every word importing the singular number only shall extend and be applied to several persons or things as well as one person or thing; and every word importing the masculine gender only shall extend and be applied to a female as well as a male.

8 & 9 Vict.
c. 112, s. 3.

4. This act shall not extend to Scotland.

Not to extend
to Scotland.

III.—LAW OF PROPERTY AMENDMENT ACT, 1859.

22 & 23 VICT. C. 35.

An Act to further amend the Law of Property and to relieve Trustees.
[13th August, 1859.]

§§ 1, 2. *Licences given to lessees*...529.

§ 3. *Apportionment of conditions of re-entry*...531.

§§ 10, 11. *Partial release of land from rent-charges and judgments*
...532.

§ 12. *Execution of powers*...533.

§ 13. *Sale of land and timber by trustees*...534.

§ 21. *Assignment of personalty*...535.

§ 24. *Fraudulent concealment of deeds by sellers of land*...535.

§ 25. *Interpretation*...535.

§§ 27, 28. *Liability of representatives in respect of leases and rent-charges*...536.

§ 29. *Distribution of assets by representatives after notice*...539.

As to the remaining sections :—

§§ 4 to 9 have been repealed by the *Conv. Act*, 1881; §§ 14 to 18 (*Sale of lands to pay debts, &c.*) are inserted, ante, p. 415; §§ 19, 20 (*Inheritance*), ante, p. 383; § 22 (*Crown debts*) is referred to, ante, p. 516; § 23 (*Trustees' receipts*) is inserted, ante, p. 421; § 26 (*Payment under powers of attorney*) has been replaced by § 23 of the *Trustee Act*, 1893 (*post*); § 30 (*Advice of Court*) has been repealed by the *Trustee Act*, 1893; § 31 (*Indemnity of Trustees*) has been replaced by § 24 of that act (*post*); § 32 (*Trustees' investments*) has been repealed by the *Trustee Investment Act*, 1899 (see now *Trustee Act*, 1893, §§ 1 to 9, *post*).

1. Where any licence to do any act which without such licence would create a forfeiture, or give a right to re-enter under a condition or power reserved in any lease heretofore granted or to be hereafter granted, shall at any time after the passing of this act be given to any lessee or his assigns, every

22 & 23 Vict.
c. 35, s. 1.

Restriction
on effect of
licence to
alien.

22 & 23 Vict.
c. 35, s. 1.

such licence shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, underlease, or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such licence), and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, underlease, or other matter not specifically authorized or made punishable by such licence, in the same manner as if no such licence had been given; and the condition or right of re-entry shall be and remain in all respects as if such licence had not been given, except in respect of the particular matter authorized to be done.

Covenants and conditions not to assign or underlet without licence.
Dumpor's case.

Before this act, when, under a condition restraining assignment without licence, a licence had been once given, the condition was determined (*Dumpor's case*, 4 Co. 119 b); and the law was the same with respect to a covenant to the like effect, although it was said that there seemed to be no reason why such a covenant or condition should not be held to run with the land, and be binding on such persons as might become assigns with the consent of the landlord (see *Weatherall v. Geering*, 12 Ves. 511; 3 Real Prop. Rep. 49).

So in the case of a lease to several lessees, upon condition that they or any of them should not assign without the lessor's licence, an alienation with licence by one of the lessees determined the condition as to all. And a condition not to alien the land or any part thereof without licence was determined as to the whole by the lessor's licence to alien part only (*Dumpor's case*, 4 Co. 119 b). The doctrine of *Dumpor's case* was disapproved, but never overruled (*Brummell v. Macpherson*, 14 Ves. 175; see *Dyer*, 152, pl. 7; see further the note to *Dumpor's case*, 1 Smith, L. C.; 1 Wms. Saund. 445 *et seq.* (ed. 1871); *Saunders v. Merryweather*, 13 W. R. 814). This doctrine appears on principle to have been equally applicable to all covenants and conditions by which the licence or consent of the lessor was made requisite for doing any particular act (see 3 Real Prop. Rep. 50; *Macher v. The Foundling Hospital*, 1 Ves. & B. 191). The doctrine had been restricted from applying to licences granted to tenants of Crown lands by the Crown Lands Act, 1845, s. 5.

The rule laid down in *Dumpor's case*, so far as relates to conditions contained in leases, has been done away with by sects. 1 and 2 of this act.

As to the restriction of waiver of breaches see the Law of Prop. Amdt. Act, 1860, s. 6, *post*, p. 540.

It is now ruled that as between landlord and tenant the burden of the lessee's covenant not to assign without licence runs with the land and binds assigns of the term. So held where the covenant was expressed to bind assigns (*McEacharn v. Colton*, 1902, A. C. 104). And it seems that the rule applies also where assigns are not named (see *Williams v. Earle*, L. R. 3 Q. B. 739; *Spencer's case*, 1st Resolution, 1 Sm. L. C.). The covenant applies to a re-assignment to the original lessee (*McEacharn v. Colton*, *sup.*).

Exactng fines for licences to assign is prohibited by sect. 3 of the Conv. Act, 1892 (*post*).

Restricted operation of

2. Where in any lease heretofore granted or to be hereafter granted there is or shall be a power or condition of re-entry

on assigning or underletting or doing any other specified act without licence, and a licence at any time after the passing of this act shall be given to one of several lessees or co-owners to assign or underlet his share or interest, or to do any other act prohibited to be done without licence, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such licence shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such licence.

22 & 23 Vict.
c. 35, s. 2.

partial
licences.

See the note to sect. 1, *ante*.

3. Where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him.

Apportion-
ment of con-
ditions of
re-entry in
certain cases.

The rule of law was, that conditions were entire and could not be apportioned by the act of the parties (Co. Litt. 215 a; *Dumpor's case*, 4 Rep. 119 b; see *Wetherall v. Geering*, 12 Ves. 511). Accordingly before this act the severance of the reversion by a voluntary act of the lessor (*e.g.* by an assignment of the reversion in part, in space, of the premises) destroyed the whole condition of re-entry for non-payment of rent (*Knight's case*, 5 Rep. 55 b). Where, however, the assignment was of part (in time) of the reversion of the whole (in space) of the premises, the assignee could avail himself of a condition of re-entry (*Wright v. Burroughes*, 3 C. B. 685). The present section relates to the above rule.

Apportion-
ment of con-
ditions of
re-entry.

The only condition dealt with by this section is the condition of re-entry for non-payment of rent. Where a condition of re-entry for breach of a repairing covenant was in question, the old law as to the effect of a severance of the reversion was discussed, and it was held that where the severance arose from the involuntary, and not the voluntary, act of the lessor, the condition of re-entry was still enforceable (*Piggott v. Middlesex*, 1909, 1 Ch. 134).

This section prevents the destruction of a condition of re-entry by the severance of the reversion in cases where the rent is legally apportioned. Upon the question of apportionment of rent the following distinctions have been laid down:—Rent may be apportioned in the following amongst other ways. By law, as upon the death intestate of an owner of freeholds and leaseholds comprised in one lease. Or by act of the parties, as (1) upon a grant or devise of the reversion in part of the land (*West v.*

Apportion-
ment of rent.

22 & 23 Vict. c. 35, s. 3. *Lascelles*, Cro. Eliz. 851; but in such cases, before payment can be enforced, the apportioned amount must be fixed, either by the consent of the lessee or by a jury, *Bliss v. Collins*, 5 B. & Ald. 876; *Swansea v. Thomas*, 10 Q. B. D. 51; or (2) upon grant or devise of part of the rent (*Bliss v. Collins*, 5 B. & Ald. 882; *Ards v. Watkin*, Cro. Eliz. 637, 651); or (3) upon a surrender to the lessor of part of the land (Co. Litt. 148; see *Baynton v. Morgan*, 22 Q. B. Div. 74); or (4) upon an eviction of the lessee from part of the land by title paramount to the lessor (*Neal v. Mackenzie*, 1 M. & W. 747; see *Doe v. Meyler*, 2 Maul. & S. 276; *Stevenson v. Lambard*, 2 East, 575; *Tomlinson v. Day*, 2 Brod. and B. 680; Co. Litt. 148 b). If, however, the lease be had as to part of the land by act of the lessor, there will be no apportionment, and no rent will be payable in respect of any of the land (*Neal v. Mackenzie*, 1 M. & W. 747). Statutory provisions have been made for the apportionment of rent where land is taken for certain public purposes (see the Lands Clauses Consn. Act, 1845, s. 119; the School Sites Act, 1849; Church Building Act, 1854). As to the apportionment of rent service, see further, Foa., 4th ed., 125. And as to the apportionment of rent-charges, see the note to sect. 10, *infra*.

Statutory provisions for apportionment of rent.

The subject of the apportionment of conditions where the reversion is severed is further provided for in the case of leases since 1881 by sects. 10 and 12 of the Conv. Act, 1881, *post*.

Release of part of land charged not to be an extinguishment.

10. The release from a rent-charge of part of the hereditaments charged therewith shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the hereditaments released without prejudice, nevertheless, to the rights of all persons interested in the hereditaments remaining unreleased, and not concurring in or confirming the release.

Release of rent-charges.

Before this act a person having a rent-charge, by releasing his right in part of the land charged, extinguished the whole rent (18 Vin. Abr. 504). On a release, since this act, of part of the land subject to a rent-charge, without the concurrence of the persons interested in the remaining part, such remaining part will be subject only to a proportionate part of the whole rent-charge (*Booth v. Smith*, 14 Q. B. D. 318). But where the persons so interested concurred, the remaining part of the land was subject to the whole rent-charge (*Price v. John*, 1905, 1 Ch. 744). In the last case, on the construction of the deed (which was one of grant and release), no part of the rent-charge passed under the "all estate" clause (*Id.*). The construction of a release (for the purpose of her husband's mortgage) by a married woman of her rent-charge, was dealt with in *Re Betton*, 12 Eq. 553. A person having a rent-charge may release part of it to the tenant of the land, and reserve part (Co. Litt. 148 a; 3 Vin. Abr. 10, 11).

Extinguishment of rent-charges.

If a man, having a rent-charge issuing out of lands, purchases any part of them, the rent-charge is extinct in the whole (Litt. s. 222; Co. Litt. 147 b; 1 Roll. Abr. 234; see Gilb. on Rents, 152); unless the grantor, by his deed reciting such purchase, grants that he may distrain for such rent-charge in the residue of the land, for this amounts to a new grant (Co. Litt. 147 b). A rent-charge is extinguished by a devise to the grantee of part of the land out of which the rent-charge issues, notwithstanding the devise is expressly made over and above the rent-charge (*Dennet v. Pass*, 1 Bing. N. C. 388); although it is otherwise where part of the lands out of which the rent issues descends on the grantee (1 Roll. Abr. 236, pl. 5).

Eviction by title paramount.

If part of the land out of which a rent-charge is reserved is evicted by a title paramount, the rent will be apportioned (*Hartley v. Maddocks*, 1899, 2 Ch. 199). If a suit is due in respect of land which descends to parceners, and they make partition, and one is distrained for the whole, she may compel

the others to contribution. The same doctrine will apply to co-feeoffees of the land, or of different parts of the land (Stat. Marlbridge, c. 9 ; 2 Coke, Inst. 119 ; see Co. Litt. 146, 148, 149 ; Com. Dig. Suspension, E. G. ; Bac. Abr. Rent, M. 1, 2 ; *Averall v. Wade*, Lloyd & G. temp. Sugd. 252).

As to the apportionment of a rent-charge charged on lands devised to trustees, see *Mills v. Cobb* (L. R. 2 C. P. 95). Where a testator charged freeholds and leaseholds with rent-charges, these properties were held liable to contribute to the rent-charges in proportion to their respective annual values at the testator's death (*Young v. Hassard*, 1 Jo. & Lat. 466 ; see *Fielding v. Preston*, 1 D. G. & Jo. 438). On the other hand, two freehold properties, one mineral and the other agricultural, which by settlement were charged with a rent-charge, were held liable to contribute thereto in proportion to the actual income *de anno in annum*, and not in proportion to the capitalized value (*Ley v. L.*, 6 Eq. 174). For conditions of sale apportioning a rent-charge, where the property charged is sold in lots, see 1 Prideaux, Conv. 71, 13th ed. ; and see the Conditions, 1 Key & Elph., 8th ed., 339.

As to the meaning of "rent-charge" and the property out of which a rent-charge can issue, see *ante*, pp. 118, 120.

11. The release from a judgment of part of any hereditaments charged therewith shall not affect the validity of the judgment as to the hereditaments remaining unreleased, or as to any other property not specifically released, without prejudice, nevertheless, to the rights of all persons interested in the hereditaments or property remaining unreleased, and not concurring in or confirming the release.

Release of part of land charged not to affect judgment.

Under the old law the release from a judgment of part of the land charged therewith discharged the whole (see *Handcock v. Handcock*, 1 Ir. Ch. R. 444). Where a tenant by elegit took a conveyance of part of the lands extended, in satisfaction of part of his debt, his tenancy by elegit on the rest was extinguished (*Hele v. Bexley*, 17 Beav. 14). See also as a release from a judgment, *Moscrop v. Sandeman* (9 Jur. N. S. 1146). A provision similar to the above section was applied to Ireland by 11 & 12 Vict. c. 48, s. 72.

12. A deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity : provided always, that this provision shall not operate to defeat any direction in the instrument creating the power that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument, and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend.

Mode of execution of powers.

22 & 23 Vict. c. 36, s. 10.

22 & 23 Vict.
c. 35, s. 12.

Wright v.
Wakeford.

Preston's Act.

Appoint-
ments by will.

At common law signing is not essential to the validity of a deed, though sealing is. And, accordingly, the common form of attestation to a deed used to be "sealed and delivered by the party in the presence of us." It was decided, however, in *Wright v. Wakeford* (17 Ves. 454; 4 Taunt. 213), where a power was required to be executed with a consent testified by writing under hand and seal attested by two or more credible witnesses, and the attestation clause did not express that the witnesses attested the signing as well as the sealing and delivery of the deed; that the power was not well executed. *Preston's Act* (54 Geo. 3, c. 168) was passed to cure the defect thus arising as to all instruments intended to exercise powers and executed before the 30th July, 1814. The above section was passed to provide a further remedy. See, further, Sugden, Powers, 234 *et seq.*, 8th ed.; Farwell, 2nd ed. 134.

By Wills Act, 1837, s. 10 (*ante*, p. 453, where see note), an appointment by will is to be executed like other wills, and to be valid although other required solemnities are not observed.

Sale under
power not to
be avoided by
reason of
mistaken
payment to
tenant for
life.

13. Where under a power of sale a *bonâ fide* sale shall be made of an estate with the timber thereon, or any other articles attached thereto, and the tenant for life or any other party to the transaction shall by mistake be allowed to receive for his own benefit a portion of the purchase-money as the value of the timber or other articles, it shall be lawful for the Court of Chancery, upon any bill or claim or application in a summary way, as the case may require or permit, to declare that upon payment by the purchaser, or the claimant under him, of the full value of the timber and articles at the time of sale, with such interest thereon as the court shall direct, and the settlement of the said principal moneys and interest, under the direction of the court, upon such parties as in the opinion of the court shall be entitled thereto, the said sale ought to be established; and upon such payment and settlement being made accordingly the court may declare that the said sale is valid, and thereupon the legal estate shall vest and go in like manner as if the power had been duly executed, and the costs of the said application as between solicitor and client shall be paid by the purchaser or the claimant under him.

Before this act, trustees having a power of sale only could not sell the estate separate from the timber standing upon it, though the tenant for life was without impeachment of waste, and might have cut the timber previously to the sale (*Cholmeley v. Paxton*, 3 Bing. 207; 5 Bing. 48; S. C. nom. *Cockerell v. Cholmeley*, 10 B. & C. 564; 3 Russ. 565; 1 Russ. & M. 418; 1 Cl. & Fin. 60). See *Re Llewellyn*, *Llewellyn v. Williams* (37 Ch. D. 317), where the price of uncut timber sold (with the land) by a tenant for life not impeachable for waste was treated as capital money under the S. L. Act, 1882. And compare sect. 35 of that act (*post*), dealing with the power of a tenant for life impeachable for waste to cut and sell timber.

Sales of timber apart from land can be authorized under sect. 16 of the S. E. Act, 1877 (*post*).

As to sales of land and minerals separately, see sect. 44 of the Trustee Act, 1893 (*post*), and *Re Rutland*, *Rutland v. Bristol*, 1900, 2 Ch. 206, where *Cockerell v. Cholmeley* (*sup.*) is discussed.

[Sects. 14—18 and sect. 23 will be found *ante*, p. 415, *et seq.* Sects. 19 and 20 *ante*, p. 383].

21. Any person shall have power to assign personal property now by law assignable, including chattels real, directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another.

22 & 23 Vict.
c. 35, s. 21.

Assignment
to self and
others.

See note to sect. 50 of the Conv. Act, 1881, *post*, p. 603.

24. Any seller or mortgagor of land, or of any chattels, real or personal, or choses in action, conveyed or assigned to a purchaser [*or* mortgagee], or the solicitor or agent of any such seller or mortgagor, who shall, after the passing of this act, conceal any settlement, deed, will, or other instrument material to the title or any incumbrance from the purchaser [*or* mortgagee], or falsify any pedigree upon which the title does or may depend, in order to induce him to accept the title offered or produced to him, with intent in any of such cases to defraud, shall be guilty of a misdemeanour, and being found guilty shall be liable, at the discretion of the court, to suffer such punishment by fine or imprisonment for any time not exceeding two years, with or without hard labour, or by both as the court shall award, and shall also be liable to an action for damages at the suit of the purchaser or mortgagee, or those claiming under the purchaser or mortgagee, for any loss sustained by them or either or any of them in consequence of the settlement, deed, will, or other instruments or incumbrance so concealed, or of any claim made by any person under such pedigree, but whose right was concealed by the falsification of such pedigree; and in estimating such damages, where the estate shall be recovered from such purchaser or mortgagee, or from those claiming under the purchaser or mortgagee, regard shall be had to any expenditure by them or either or any of them in improvements on the land; but no prosecution for any offence included in this section against any seller or mortgagor, or any solicitor or agent, shall be commenced without the sanction of her Majesty's attorney-general, or in case that office be vacant of her Majesty's solicitor-general; and no such sanction shall be given without such previous notice of the application for leave to prosecute to the person intended to be prosecuted as the attorney-general or the solicitor-general (as the case may be) shall direct.

Punishment
of vendor, &c.
for fraudulent
concealment
of deeds, &c.,
or falsifying
pedigree.

This section of the act shall be read and construed as if the words "or mortgagee" had followed the word "purchaser" in every place where the latter word is introduced in this section (Law of Property Amendment Act, 1860, s. 8). Where no title is to be shown before a stipulated date, the section does not apply to the concealment of any earlier matter (*Smith v. Robinson*, 13 Ch. D. 148).

25. In the construction of the previous provisions in this act the term "land" shall be taken to include all tenements and hereditaments, and any part or share of or estate or interest in any tenements or hereditaments, of what tenure or kind soever; and

Interpreta-
tion of terms.

22 & 23 Vict.
c. 35, s. 25.

The term "mortgage" shall be taken to include every instrument by virtue whereof land is in any manner conveyed, assigned, pledged, or charged as a security for the repayment of money or money's worth lent, and to be re-conveyed, re-assigned, or released on satisfaction of the debt; and

The term "mortgagor" shall be taken to include every person by whom any such conveyance, assignment, pledge or charge as aforesaid shall be made; and

The term "mortgagee" shall be taken to include every person to whom or in whose favour any such conveyance, assignment, pledge, or charge as aforesaid is made or transferred:

The term "judgment" shall be taken to include registered decrees, orders of courts of equity and bankruptcy, and other orders having the operation of judgments.

See Judgments Act, 1838, s. 18, *ante*, p. 502.

As to liability
of executor or
administrator
in respect of
rents, cove-
nants or
agreements.

27. Where an executor or administrator, liable as such to the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed.

Liability of
representa-
tives in re-
spect of leases
of deceased.

Where the representative of a lessee has not entered, he can only be sued as representative (*Rendall v. Andrae*, 61 L. J. Q. B. 630; *Whitehead v. Palmer*, 1908, 1 K. B. 157). Where the representative has entered, he may be sued either as representative or as assign of the lease (*Re Bowes*,

Strathmore v. Vane, 37 Ch. D. 131). If the representative be sued as such, and he puts in a proper plea, he is only liable to the extent of the assets of the deceased (*Ib.*). If he be sued as assign, he is liable *de bonis propriis* (Wms. Exors. 10th ed. 1391). His liability, however, as regards rent may be limited to the letting value of the holding (*Rendall v. Andrae*, 61 L. J. Q. B. 633; *Re Bowes*, *Strathmore v. Vane*, *sup.*; *Whitehead v. Palmer*, *sup.*); but as regards a covenant to repair cannot be so limited (*Rendall v. Andrae*, *sup.*). See further, as to the liability of the representative of a lessee, the notes to *Jevens v. Harridge* and *Dean of Bristol v. Guyse*, 1 Wms. Saund. 1, 124.

The above section deals with the liability of the representative "as such" in respect of the leases of the deceased. Where the assets of the testator are administered out of court, the representative acting in the manner pointed out in the above section does not remain liable in respect of subsequent claims under the leases. The lease must be assigned to "a purchaser" (*Re Nixon, Gray v. Bell*, 1904, 1 Ch. 644). Where it is assigned to a legatee the executor is not protected (*Dodson v. Sammell*, 1 Drew. & Sm. 579; compare *Smith v. Smith*, *ib.* 387; and see *Byrne v. Brown*, 22 Q. B. Div. 657, where executors assigned a lease for a nominal consideration). The section applies in the case of leases granted or assigned to the deceased before the passing of the act (*Ib.*; *Re Green*, 2 D. F. & J. 121); and also in the case of a fee farm grant (*Millar v. Sinclair*, 1903, 1 I. R. 150).

Although the representative does not remain liable, the right of the lessor to follow assets is not prejudiced. As to the right to follow assets, see Wms. Exors., 10th ed., 700, 1631; and as to compelling a legatee to refund, see *Ib.* 1188. See also *Re Mouatt, Kingston Co. v. Mouatt*, 1899, 1 Ch. 831. The right to follow where real assets had been aliened was dealt with in *Spackman v. Timbrell*, 8 Sim. 253 (*ante*, p. 396), and *Kinderley v. Jervis*, 22 Beav. 1 (*ante*, p. 404); see *Re Cary and Lott*, 1901, 2 Ch. 470. The same right where personal assets had been aliened was dealt with in *Dilkes v. Broadmead*, 2 D. F. & J. 566; in which case a purchaser for value without notice acquired a good title as against the creditors of the deceased to identified personal assets. The power of an executor, who is also residuary legatee, to alien personal assets to a purchaser for value without notice, is discussed in *Graham v. Drummond*, 1896, 1 Ch. 968; *Bombay Bank v. Suleman*, 24 Times L. R. 840. As to a purchaser with notice, see *Re Troughton, Rent Co. v. Troughton*, 1894, W. N. 154.

Apart from the above section it is settled that where the assets are administered in court, and the representative keeps back nothing which ought to be disclosed to the court, an order directing the administration and application of the assets is of itself a complete and perfect indemnity to the representative (*Dodson v. Sammell*, 1 Drew. & Sm. 577); who will be protected from any future proceedings (*Bennett v. Lytton*, 2 J. & H. 157; *Waller v. Barrett*, 24 Beav. 419; *Dean v. Allen*, 20 Beav. 4; *Smith v. Smith*, 1 Drew. & Sm. 387). It was formerly the practice of the court to order part of the assets to be retained as an indemnity fund in respect of the liability under the leases of the deceased (see the forms, Seton, 5th ed. 1281; omitted in 6th ed., see p. 1525). The retainer was only ordered where there was privity of estate between the executors and the lessors (*Re Nixon, Gray v. Bell*, 1904, 1 Ch. 64). Later it was decided that a landlord had no independent equity to require such a fund to be retained (*King v. Malcott*, 9 Ha. 692). And having regard to this decision, and to the rule that the order of the court indemnifies the representative, it was said to be unnecessary to carry over a fund (*Dodson v. Sammell*, 1 Drew. & Sm. 579; see the decisions reviewed *Re King, Mellor v. South Australian Co.*, 1907, 1 Ch. 77). A fund will not be carried over where there is no privity of estate between the representative and the lessor (*Re Nixon, Gray v. Bell*, *sup.*); at least in cases where there is no personal liability on the part of the representative to meet claims out of his own money (1907, 1 Ch. 80). An indemnity fund formerly set apart in respect of leaseholds was paid out without the consent of the ground landlord (*Ib.*; *Sowdon v. Marriott*, 21 W. R. 808; *contra*, *Bunting v. Marriott*, 9 W. R. 264). So where all a testator's leases had been sold or surrendered (*Reilly v. Reilly*, 34 Beav. 406).

22 & 23 Vict.
c. 35, s. 27.

Operation of
section.

Administra-
tion out of
court.

Right to
follow assets.

Administra-
tion in court.

Indemnity
fund.

22 & 23 Vict. c. 38, s. 27. As to the liability of a representative in respect of the leases of the deceased, see generally, Wms. Exors., 10th ed., 1385, *et seq.* And as to his pleading the Stat. Lim. to a claim for improper distribution of assets, see *Lacons v. Warmoll*, quoted under sect. 29, *post*.

As to liability of executor, &c. in respect of rents, &c. in conveyances on rent-charge. 28. In like manner, where any executor or administrator, liable as such to the rent, covenants or agreements contained in any conveyance on chief rent or rent-charge (whether any such rent be by limitation of use, grant or reservation), or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance, or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said conveyance or agreement for a conveyance; and the executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance, or agreement for conveyance; but nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed.

Liability of representatives in respect of rent-charges. Where a rent-charge is secured by covenant, the representative is liable as such to its payment. Where there is no covenant there as regards arrears which have accrued during the life of the deceased the representative may be liable (see *Leving's case*, quoted in *Thomas v. Sylvester*, L. R. 8 Q. B. 370). But as regards instalments accruing after the death, the representative does not seem to be liable, except he becomes *terre tenant* for a freehold interest; in which case his liability would be for the full amount of the rent-charge irrespective of his receipt of rents and profits (*Pertwee v. Townsend*, 1896, 2 Q. B. 129; see *ante*, p. 120).

Operation of section. As regards the operation of the above section, a fee farm grant is within it (*Millar v. Sinclair*, 1903, 1 I. R. 150). Further, it seems clear that so far as the freeholds of a deceased person are concerned, an administrator could never before the Land Transfer Act, 1897, have sold them; and apparently could never have obtained the benefit of this section. An executor, where the will contained a charge of debts, might in some cases have sold (see *ante*, pp. 418, 420 *et seq.*). But the proceeds of the sale did not become part

of the residuary personal estate of the deceased which alone could be distributed under the section. 22 & 23 Vict.
c. 35, s. 28.

Now, by the Land Transfer Act, 1897, sect. 2, sub-sect. 2, executors and administrators have power to sell the freeholds of a deceased person. And it seems that the last-mentioned act may have enlarged the operation of the above section.

29. Where an executor or administrator shall have given such or the like notices as in the opinion of the court in which such executor or administrator is sought to be charged would have been given by the Court of Chancery in an administration suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices or the last of the said notices for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets or a part thereof, as the case may be; but nothing in the present act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively.

As to distribution of the assets of testator or intestate after notice given by executor or administrator.

A prudent and reasonable executor or administrator ought to advertise for creditors as soon as possible after the death, and his conduct in this respect will be had regard to on an application for relief under sect. 3 (*post*) of the Judicial Trustee Act, 1896 (*Re Kay, Mosley v. Kay*, 1897, 2 Ch. 522). If any difficulty arises, he can also apply by summons for an order determining the questions (R. S. C. Ord. 55, r. 3); or for an order for administration (r. 4); which, however, the judge is not bound to order (r. 10).

Proceedings by an executor or administrator.

The practice as to notices given by the Chancery Division in administration actions is laid down in R. S. C. Ord. 55, rr. 45—47. In administration actions, it is unnecessary to repeat notices which have been already issued under this section (*Cuthbert v. Wharmby*, 1869, W. N. 12). In an action seeking to make an executor liable who has issued notices, the court of first instance is by this section clothed with the duty of forming its own opinion as to the sufficiency of the notices: and *qu.* whether an appeal will lie (see *Re Bracken, Doughty v. Townson*, 43 Ch. Div. 1). Where executors had issued notices, but had not inserted any notice in the Gazette or a London paper, they were insufficient (*Wood v. Weightman*, 13 Eq. 434). But there is no absolute rule as to the insertion in a London paper, or as to the length of the notice; the court will regard the circumstances of each case (*Re Bracken, Doughty v. Townson, sup.*).

Notices.

An executor who distributes assets, after taking the steps pointed out by sect. 29, is in the same position as if the estate had been administered under the court; as to which see note to sect. 27, *ante*, p. 537 (*Olegg v. Rowland*, 3 Eq. 368; *Re Frewen, Frewen v. Frewen*, 60 L. T. 953, which see as to notice to the executor; *Hunter v. Young*, 4 Ex. Div. 256, in which last case the executor was held not a necessary party to an action by a creditor to compel a legatee to refund; and see *Re Bowden, Andrew v. Cooper*, 45 Ch. D. 447). The section is not confined to claims by creditors, but

Protection afforded to an executor.

22 & 23 Vict. c. 35, s. 29. protected an administratrix from a claim by next of kin (*Newton v. Sherry*, 1 C. P. Div. 246).

As to the bearing of this section on the position of a personal representative conveying the real estate of a person dying after 1897, see *Re Cary and Lott*, 1901, 2 Ch. 463, quoted *ante*, p. 428.

The mere sending in a claim in answer to advertisements does not (for the purpose of the Stat. Limitations) keep the creditor's right alive (*Re Stephens, Warburton v. Stephens*, 43 Ch. D. 44).

Liability on shares.

Executors who have distributed assets under this section will be protected as regards those assets from liability on shares held by their testator (*Russell's case*, 15 S. J. 790; see *Cole's case*, 15 S. J. 711); but not where they had notice of the liquidator's claim (*Markwell's case*, 21 W. R. 135; see *Re Troughton, Rent Co. v. Troughton*, 1894, W. N. 154). They may, however, be placed on the list of contributories, on the ground that further assets may come to their hands (*Russell's case, sup.*). As to the possible extent of a deceased shareholder's liability, see *Baird's case*, 5 Ch. 725. An executor who paid a legacy without providing for a contingent liability on shares was made liable (*Taylor v. Taylor*, 10 Eq. 477); but was entitled to make legatees refund (*Jervis v. Wolferstan*, 18 Eq. 18; *Whittaker v. Kershaw*, 45 Ch. Div. 320). In early cases a fund was set aside in an administration action to meet possible calls (*Re Muggeridge, Muggeridge v. Sharp*, 10 Eq. 443); but not in the case of shares in a chartered banking company (*Re Griffiths, Tate v. Rolls*, 1880, W. N. 159). It has been recently laid down that a fund will not be retained in court for the protection of a contingent future creditor, or for the protection of the executor. The executor is sufficiently protected by the order of the court, which should, however, be one for administration (*Re King, Mellor v. South Australian Co.*, 1907, 1 Ch. 72).

Representative pleading the Statute of Limitations.

Where six years have elapsed since assets have been paid over to beneficiaries and the representative is subsequently sought to be made liable by a creditor, it seems that he may plead sect. 8 of the Trustee Act, 1888, whether in form the action be on devastavit, or for administration (*Lacons v. Warmoll*, 1907, 2 K. B. 364; see, however, as to an administration action, 1907, 2 K. B. 367).

Act not to extend to Scotland.

33. This act shall not extend to Scotland.

IV.—LAW OF PROPERTY AMENDMENT ACT, 1860.

23 & 24 VICT. C. 38, SS. 6, 7, 15.

§ 6. *Waiver of covenants, &c.*...540.

§ 7. *Scintilla juris*...541.

§ 15. *Extent of act*...541.

As to the remaining sections:—

§§ 1—5 (*Registration of judgments*) have been repealed by the *Land Charges Act*, 1900; § 8 is referred to *ante*, p. 535; § 9 has been repealed by the *Trustee Act*, 1893; § 10 empowered the making of orders as to the investment of cash in court (see now *R. S. C. Ord.* 22, r. 17); §§ 11 and 12 (*Trustees' investments*) have been repealed (actually or in effect) by the *Trustee Investment Act*, 1889 (see now *Trustee Act*, 1893, ss. 1—9, *post*); § 13 (*Limitation of claims to estates of intestates*) is inserted *ante*, p. 195; § 14 (*Accounts of debts*) has been repealed by the *Statute Law Revision Act*, 1883, and the *Chancery (Ireland) Act*, 1867.

23 & 24 Vict. c. 38, s. 6.

6. Where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs,

executors, administrators or assigns, shall be proved to have taken place after the passing of this act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear.

23 & 24 Vict.
c. 38, s. 6.

Restriction
of effect of
waiver.

As to waiver of forfeiture, see the notes to *Duppa v. Mayo* (1 Wms. Saund. 443 *et seq.*, ed. 1871).

7. Where by any instrument any hereditaments have been or shall be limited to uses, all uses thereunder, whether expressed or implied by law, and whether immediate or future, or contingent or executory, or to be declared under any power therein contained, shall take effect when and as they arise by force of and by relation to the estate and seisin originally vested in the person seised to the uses, and the continued existence in him or elsewhere of any seisin to uses or scintilla juris shall not be deemed necessary for the support of or to give effect to future or contingent or executory uses, nor shall any such seisin to uses or scintilla juris be deemed to be suspended, or to remain or to subsist in him or elsewhere.

Provision for
cases of
future and
contingent
uses.

As to the doctrine of scintilla juris, see *Peacock v. Eastland*, 10 Eq. 20; Tudor, L. C. C. 298; Sugden, Powers, 18 *et seq.*, 8th ed.

15. This act is not to extend to Scotland, nor are any of the clauses, except clause six and the subsequent clauses, to extend to Ireland.

Act not to
extend to
Scotland, &c.

V.—LORD CRANWORTH'S ACT AS TO TRUSTEES AND MORTGAGEES.

23 & 24 VICT. C. 145.

An Act to give to Trustees, Mortgagees and others certain Powers now commonly inserted in Settlements, Mortgages, and Wills.

[28th August, 1860.]

WHEREAS it is expedient that certain powers and provisions which it is now usual to insert in settlements, mortgages, wills, and other instruments should be made incident to the estates of the persons interested, so as to dispense with the necessity of inserting the same in terms in every such instrument: be it enacted as follows:

23 & 24 Vict.
c. 145.

23 & 24 Vict.
c. 145, s. 1.

PART I.

Powers of Trustees for Sale, &c., and Trustees of renewable Leasholds.

Trustees empowered to sell may sell in lots, and either by auction or private contract.

1. In all cases where by any will, deed, or other instrument of settlement it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale, either generally or in any particular event, over any hereditaments named or referred to in or from time to time subject to the uses or trusts of such will, deed, or other instrument, it shall be lawful for such trustees or other persons, whether such hereditaments be vested in them or not, to exercise such power of sale by selling such hereditaments, either together or in lots, and either by auction or private contract, and either at one time or at several times, and (in case the power shall expressly authorize an exchange) to exchange any hereditaments which for the time being shall be subject to the uses or trusts aforesaid for any other hereditaments in England or Wales or in Ireland (as the case may be), and upon such exchange to give or receive any money for equality of exchange.

Parts I. and II. of this act have been respectively repealed by S. L. Act, 1882, s. 64, and Conv. Act, 1881, s. 71 (post, p. 613), but in neither case does the repeal affect "the operation, effect, or consequence" of any instrument executed before the commencement of the repealing act (see Re Solomon and Meagher, 40 Ch. D. 508). The subject-matter of sects. 1 and 2, and also of Part II. of the present act, have respectively been further dealt with by sect. 13 of the Trustee Act, 1893 (post), and sect. 19 et seq. of the Conv. Act, 1881 (post, p. 582); but the last-mentioned provisions are not retrospective. Sect. 9 of the present act contains power to raise by mortgage money required for equality of exchange, and for renewing leases. The subject-matter of sects. 8 and 9, so far as regards renewable leases, is dealt with in sect. 19 of the Trustee Act, 1893 (post); which provisions are retrospective. Under the above circumstances sects. 8 and 9 have been omitted; but with this exception, Parts I. and II. of the present act have been retained.

Sale may be made under special conditions, and trustees may buy in, &c.

2. It shall be lawful for the persons making any such sale or exchange to insert any such special or other stipulations, either as to title or evidence of title, or otherwise, in any conditions of sale, or contract for sale or exchange, as they shall think fit, and also to buy in the hereditaments or any part thereof at any sale by auction, and to rescind or vary any contract for sale or exchange, and to resell the hereditaments which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby, and no purchaser under any such sale shall be bound to inquire whether the person making the same may or may not have in contemplation any particular re-investment of the purchase-money in the purchase of any other hereditaments or otherwise.

3. For the purpose of completing any such sale or exchange as aforesaid, the persons empowered to sell or exchange as aforesaid shall have full power to convey or otherwise dispose of the hereditaments in question, either by way of revocation and appointment of the use, or otherwise, as may be necessary.

23 & 24 Vict.
c. 145, s. 3.

Trustees
exercising
power of sale,
&c. em-
powered to
convey.

4. The money so received upon any such sale or for equality of exchange as aforesaid shall be laid out in the manner indicated in that behalf in the will, deed or instrument containing the power of sale or exchange, or if no such indication be therein contained as to all or any part of such money, then the same shall with all convenient speed be laid out in the purchase of other hereditaments in fee simple in possession to be situate in England or Wales or in Ireland (as the case may be), or of lands of a leasehold or copyhold or customary tenure which, in the opinion of the persons making the purchase, are convenient to be held therewith or with any other hereditaments for the time being, subject to the subsisting uses or trusts of the same will, deed or other instrument of settlement in which the power of sale or exchange was contained; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be freeholds of inheritance shall be settled and assured to the uses, upon and for the trusts, intents and purposes, and with, under and subject to the powers, provisoes and declarations, to which the hereditaments sold or given in exchange were or would have been subject, or as near thereto as the deaths of parties and other intervening accidents will admit of, but not so as to increase or multiply charges; and all such hereditaments so to be purchased or taken in exchange as aforesaid as shall be of leasehold or copyhold or customary tenure shall be settled and assured upon and for such trusts, intents and purposes, and with, under and subject to such powers, provisoes and declarations, as shall as nearly as may be correspond with and be similar to the aforesaid uses, trusts, intents and purposes, powers, provisoes, and declarations, but not so as to increase or multiply charges, and so that if any of the hereditaments so to be purchased shall be held by lease for years the same shall not vest absolutely in any tenant in tail by purchase who shall not attain the age of twenty-one years; and any such purchase as aforesaid may be made subject to any special conditions as to title or otherwise: provided that no leasehold tenement shall be purchased under the powers hereinbefore contained which is held for a less period than sixty years.

Moneys
arising from
sales, &c. to
be laid out in
other lands;

As to the effect of the above section on a devise of land by a testator entitled absolutely to money liable to be laid out in land, see *Re Cleveland*, 1893, 3 Ch. 244.

5. Provided nevertheless that it shall be lawful for the persons exercising any such power as aforesaid, if they shall think fit, to apply any money to be received upon any sale or for

or in pay-
ment of in-
cumbrances.

23 & 24 Vict.
c. 145, s. 5.

equality of exchange as aforesaid, or any part thereof, in lieu of purchasing lands therewith, in or towards paying off or discharging any mortgage or other charge or incumbrance which shall or may affect all or any of the hereditaments which shall then be subject to the same uses or trusts as those to which the hereditaments sold or given in exchange were or was subject.

Money arising from sales, &c. not to be laid out, nor lands exchanged, elsewhere than in the country in which lands sold or exchanged is situated.

6. No money arising from any such sale or exchange of lands or hereditaments in England or Wales shall be laid out in the purchase of lands or hereditaments situate elsewhere than in England or Wales, and no land situate in England or Wales shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in England or Wales; and no money arising from any such sale or exchange of lands in Ireland shall be laid out in the purchase of lands or hereditaments situate elsewhere than in Ireland, and no lands or hereditaments situate in Ireland shall, under any such power as aforesaid, be exchanged for any lands or hereditaments situate elsewhere than in Ireland.

Until purchase of lands, &c. money to be invested at interest.

7. Until the money to be received upon any sale or for equality of exchange as aforesaid shall be disposed of in the manner herein mentioned, the same shall be invested at interest for the benefit of the same parties who would be entitled to the hereditaments to be purchased therewith as aforesaid, and the rents and profits thereof, in case such purchase and settlement as aforesaid were then actually made.

As to sects. 8 and 9, see note, *ante*, p. 542.

No sale, &c. to be made without consent of tenant for life, &c.

10. No such sale or exchange as aforesaid, and no purchase of hereditaments out of money received on any such sale or exchange as aforesaid, shall be made without the consent of the person appointed to consent by the will, deed, or other instrument, or if no such person be appointed, then of the person entitled in possession to the receipt of the rents and profits of such hereditaments, if there be such a person under no disability; but this clause shall not be taken to require the consent of any person where it appears from the will, deed or other instrument, to have been intended that such sale, exchange or purchase, should be made by the person or persons making the same without the consent of any other person.

PART II.

Powers of Mortgagees (p).

Powers incident to mortgages.

11. Where any principal money is secured or charged by deed on any hereditaments of any tenure, or on any interest therein, the person to whom such money shall for the time being be payable, his executors, administrators and assigns,

shall, at any time after the expiration of one year from the time when such principal money shall have become payable, according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have the following powers, to the same extent (but no more) as if they had been in terms conferred by the person creating the charge; namely,

- 1st. A power to sell or concur with any other person in selling the whole or any part of the property by public auction or private contract, subject to any reasonable conditions he may think fit to make, and to rescind or vary contracts for sale, or buy in and re-sell the property from time to time, in like manner: To sell.
- 2nd. A power to insure and keep insured from loss or damage by fire the whole or any part of the property (whether affixed to the freehold or not) which is in its nature insurable, and to add the premiums paid for any such insurance to the principal money secured at the same rate of interest: To insure.
- 3rd. A power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of the property in manner hereinafter mentioned. To appoint receiver.

(p) In the case of a mortgage before 1881, these powers may be exercised since 1881 (*Re Solomon and Meagher*, 40 Ch. D. 508).

12. Receipts for purchase-money given by the person or persons exercising the power of sale hereby conferred shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money. Receipts for purchase-money sufficient discharges.

13. No such sale as aforesaid shall be made until after six months' notice in writing given to the person or one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of such property; but when a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that no such notice as aforesaid had been given: but any person damnified by any such unauthorized exercise of such power shall have his remedy in damages against the person selling. Notice to be given before sale; but purchaser relieved from inquiry as to circumstances of sale.

14. The money arising by any sale effected as aforesaid shall be applied by the person receiving the same as follows: first, in payment of all the expenses incident to the sale or incurred in any attempted sale; secondly, in discharge of all interest and

23 & 24 Vict.
c. 145, s. 14.

costs then due in respect of the charge in consequence whereof the sale was made; and, thirdly, in discharge of all the principal moneys then due in respect of such charge; and the residue of such money shall be paid to the person entitled to the property subject to the charge, his heirs, executors, administrators, or assigns, as the case may be.

Conveyance
to the purchaser.

15. The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein, which the person who created the charge had power to dispose of, except that in the case of copyhold hereditaments the beneficial interest only shall be conveyed to and vested in the purchaser by such deed.

An equitable mortgage, by deed, of freeholds can, under this section, convey the legal estate in the fee (*Re Solomon and Meagher*, 40 Ch. D. 508). And where leaseholds are mortgaged by demise, the mortgagee can, under this section, convey to a purchaser the reversion left in the mortgagor (*Hiatt v. Hillman*, 19 W. R. 694; compare *Re Hodson and Howes*, 35 Ch. Div. 668, a case under the Conv. Act, 1881).

As to the effect of this section where the mortgagor has registered with an indefeasible title under the Land Registry Act, 1862, see *Re Richardson* (12 Eq. 398; 13 Eq. 142).

Owner of
charge may
call for title
deeds and
conveyance of
legal estate.

16. At any time after the power of sale hereby conferred shall have become exercisable, the person entitled to exercise the same shall be entitled to demand and recover, from the person entitled to the property subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed, surrendered or assigned to and were then vested in him for all the estate and interest which the person creating the charge had power to dispose of, and where the legal estate shall be outstanding in a trustee the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made.

Appointment
of receiver.

17. Any person entitled to appoint or obtain the appointment of a receiver as aforesaid may from time to time, if any person or persons has or have been named in the deed of charge for that purpose, appoint such person or any one of such persons to be receiver, or if no person be so named, then may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person or persons to appoint a fit and proper person as receiver, and if no such appointment is made within ten days after such

requisition, they may in writing appoint any person he may think fit. **23 & 24 Vict. c. 145, s. 18.**

18. Every receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge, who shall be solely responsible for his acts or defaults, unless otherwise provided for in the charge. Receiver deemed to be the agent of the mortgagor.

19. Every receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents, issues and profits of the property, of which he is appointed receiver by action, suit, distress or otherwise, in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of. Powers of receiver.

20. Every receiver appointed as aforesaid may be removed by the like authority or on the like requisition as before provided with respect to the original appointment of a receiver, and new receivers may be appointed from time to time. Receiver may be removed.

21. Every receiver appointed as aforesaid shall be entitled to retain out of any money received by him, in lieu of all costs, charges and expenses whatsoever, such a commission, not exceeding five per centum on the gross amount of all money received, as shall be specified in his appointment, and if no amount shall be so specified, then five per centum on such gross amount. Receiver to receive a commission not exceeding five per cent.

22. Every receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge, insure* and keep insured from loss or damage by fire, out of the money received by him, the whole or any part of the property included in the charge (whether affixed to the freehold or not) which is in its nature insurable. Receiver to insure, if required.

23. Every receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of all taxes, rates and assessments whatsoever, and in payment of his commission as aforesaid, and of the premiums on the insurances, if any, and in the next place in payment of all the interest accruing due in respect of any principal money then charged on the property over which he is receiver, or on any part thereof, and, subject as aforesaid, shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge, his executors, administrators or assigns. Application of moneys received by him.

24. The powers and provisions contained in this part of this This part to relate to

23 & 24 Vict.
c. 145, s. 24.

act relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt.

charges by
way of mort-
gage only.

[*Part III. of the present act (sects. 25 to 30), which contained provisions as to the investment of trust funds and the appointment and powers of trustees and executors, has been repealed by sect. 71 of the Conv. Act, 1881; but new provisions dealing respectively with the same subject-matter as the repealed sections will be found in the Trustee Act, 1893, ss. 1, 10, 20, 21, and in sect. 43 of the Conv. Act, 1881 (post). The new provisions are in every case retrospective, and may be cumulative (see Re Lloyd, 1888, W. N. 20). Part III. of the present act has accordingly been omitted.*]

PART IV.

General Provisions.

Tenants for
life, &c. may
execute
powers, not-
withstanding
incum-
brances.

31. For the purposes of this act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and income of land or personal property, although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise howsoever to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid, unless they shall concur therein.

PART IV. of the present act has been repealed by sect. 64 of the S. L. A. 1881, but has been retained in connection with Parts I. and II. (see note *ante*, p. 542).

Powers, &c.
hereby given
may be
negated by
express de-
claration.

32. None of the powers or incidents hereby conferred or annexed to particular offices, estates, or circumstances, shall take effect or be exerciseable if it is declared in the deed, will, or other instrument creating such offices, estates, or circumstances that they shall not take effect; and where there is no such declaration, then if any variations or limitations of any of the powers or incidents hereby conferred or annexed are contained in such deed, will, or other instrument, such powers or incidents shall be exerciseable or shall take effect only subject to such variations or limitations.

No persons
other than
those entitled
under the
settlement,
&c. to be
affected.

33. Nothing in this act contained shall be deemed to empower any trustees or other persons to deal with or affect the estates or rights of any persons soever, except to the extent to which they might have dealt with or affected the estates or rights of such persons if the deed, will, or other instrument under which such trustees or other persons are empowered to act had contained express powers for such trustees or other persons so to deal with or affect such estates or rights.

Commence-
ment of act.

34. The provisions contained in this act shall, except as hereinbefore otherwise provided, extend only to persons entitled or

acting under a deed, will, codicil, or other instrument executed after the passing of this act, or under a will or codicil confirmed or revived by a codicil executed after that date. 23 & 24 Vict.
c. 145, s. 34.

35. This act shall not extend to Scotland.

Extent of act.

VI.—THE VENDOR AND PURCHASER ACT, 1874.

37 & 38 VICT. c. 78, ss. 1—2, 8—10.

An act to amend the Law of Vendor and Purchaser and further to simplify Title to Land.

[7th August, 1874.]

Whereas it is expedient to facilitate the transfer of land by means of certain amendments in the law of vendor and purchaser. Be it enacted, &c. 37 & 38 Vict.
c. 78, s. 1.

1. In the completion of any contract of sale of land made after the thirty-first day of December one thousand eight hundred and seventy-four, and subject to any stipulation to the contrary in the contract, forty years shall be substituted as the period of commencement of title which a purchaser may require in place of sixty years, the present period of such commencement; nevertheless earlier title than forty years may be required in cases similar to those in which earlier title than sixty years may now be required. Forty years substituted for sixty years as the root of title.

“Land” includes messuages, tenements and hereditaments, houses and buildings of any tenure (Interpretation Act, 1889, sect. 3). See the other interpretations, *ante*, pp. 113, 262, 369, 380, and also in the Conv. Act, 1881, sect. 2; Settled Land Act, sect. 2; Trustee Act, 1893, sect. 50 (*post*).

In the case of a sale of leaseholds the deed creating the term, even where dated more than forty years before contract, must be abstracted and produced; but dealings prior to the necessary commencement of title need not be abstracted, unless under special circumstances (*Williams v. Spargo*, 1893, W. N. 100; see *Re Stamford and Knight*, 1900, 1 Ch. 287). If the title is a possessory one, forty years' possession must be proved (*Jacobs v. Revell*, 1900, 2 Ch. 858). If a purchaser under a squatter's possessory title chooses to accept less than a forty years' title, he is fixed with constructive notice of all such equities affecting the land (*e.g.* under restrictive covenants) as he would have discovered by reasonable inquiries under a title for the full period (*Re Nisbet & Potts*, 1906, 1 Ch. 386; see *Re Cow & Neve*, 1891, 2 Ch. 109; *Re Judge & Sheridan*, 96 L. T. 451).

2. In the completion of any such contract as aforesaid, and subject to any stipulation to the contrary in the contract, the obligations and rights of vendor and purchaser shall be regulated by the following rules; that is to say, Rules for regulating obligations and rights of vendor and purchaser.

First. Under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold;

37 & 38 Vict.
c. 78, s. 2.

Second. Recitals, statements, and descriptions of facts, matters, and parties contained in deeds, instruments, acts of Parliament, or statutory declarations, twenty years old at the date of the contract, shall, unless and except so far as they shall be proved to be inaccurate, be taken to be sufficient evidence of the truth of such facts, matters, and descriptions;

Third. The inability of the vendor to furnish the purchaser with a legal covenant to produce and furnish copies of documents of title shall not be an objection to title in case the purchaser will, on the completion of the contract, have an equitable right to the production of such documents;

Fourth. Such covenants for production as the purchaser can and shall require shall be furnished at his expense, and the vendor shall bear the expense of perusal and execution on behalf of and by himself, and on behalf of and by necessary parties other than the purchaser;

Fifth. Where the vendor retains any part of an estate to which any documents of title relate he shall be entitled to retain such documents.

The first rule controls the right of a litigant in an action for specific performance to production of deeds, where there is merely a general denial of the title of the other party; but the rule does not prevent the title being shown to be bad *aliunde* (*Jones v. Watts*, 43 Ch. Div. 574). An agreement to grant a right of way for a term is within the rule (*S. C.*). The rule does not prevent a lessee being affected with the constructive notice of his lessor's title (*Patman v. Harland*, 17 Ch. D. 353). The rule was excluded where intended lessor expressly agreed to deliver an abstract of his title to grant the lease (*Re Pursell and Deakin*, 1893, W. N. 152). In connection with this rule, see Conv. Act, 1881, s. 3 (1), *post*, p. 559, and s. 13 (1), *post*, p. 574.

Under the second rule, a recital in a deed more than twenty years old that the vendor was seised in fee simple prevented a purchaser from demanding any abstract of prior title (*Bolton v. School Board for London*, 7 Ch. D. 766; but see *Re Wallis and Grout*, 1906, 2 Ch. 206). A recital that a sale was made in pursuance of a trust for sale precluded a requisition as to whether it was a valid exercise of that trust (*Re Marsh and Granville*, 24 Ch. D. 11).

As to the third rule, see note to Conv. Act, 1881, sect. 3, sub-sect. 6, *post*, p. 561.

The fifth rule refers only to a retainer of land, and accordingly where a mortgage comprised land and policies, and the mortgagee sold the land and retained the policies, the purchaser was entitled to have the mortgage deed (*Re Williams and Newcastle*, 1897, 2 Ch. 144). But where the vendor retained a servient tenement over which an easement had formerly existed, the vendor was entitled to retain documents showing the title to, and the extinguishment of, the easement (*Re Lehmann and Walker*, 1906, 2 Ch. 640).

Trustees may sell or buy subject to this section (Trustee Act, 1893, s. 15, *post*). As to covenants for production, see Conv. Act, 1881, s. 9, *post*.

[Sects. 3 and 6 have been repealed by the Trustee Act, 1893, and replaced respectively by sects. 15 and 16 of that Act (*post*). Sect. 4 has been repealed by sect. 30, sub-sect. 2 of the Conv. Act, 1881 (*post*). Sect. 5 has, as to England, been in effect repealed by sect. 48 of the L. T. Act, 1875, and sect. 30, sub-sect. 2 of the Conv. Act, 1881, and has, as to Ireland, been repealed by sect. 73 of the Conv. Act, 1881. Sect. 7 has been repealed as to England by the L. T. Act, 1875, sect. 129, and as to Ireland, by the Conv. Act, 1881, sect. 73; see *Robinson v. Trevor*, 12 Q. B. D. 423.]

8. Where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir-at-law.

37 & 38 Vict.
c. 78, s. 8.

Non-registration of will in Middlesex, &c. cured in certain cases.

Wills must be registered in Middlesex within six months from the death (7 Anne, c. 20, ss. 1 and 8; see the Land Registry (Middlesex Deed) Act, 1891; *Re Cooper, Cooper v. Vesey*, 20 Ch. Div. 611). As to Yorkshire, see now the Yorkshire Regis. Act, 1884, ss. 4 and 14; and before that act, 8 Geo. II. c. 6, and 6 Anne, c. 35; *Chadwick v. Turner*, 1 Ch. 310.

9. A vendor or purchaser of real or leasehold estate in England, or their representatives respectively, may at any time or times and from time to time apply in a summary way to a judge of the Court of Chancery in England in chambers, in respect of any requisitions or objections, or any claim for compensation, or any other question arising out of or connected with the contract, (not being a question affecting the existence or validity of the contract,) and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

Vendor or purchaser may obtain decision of judge in chambers as to requisitions or objections, or compensation, &c.

A vendor or purchaser of real or leasehold estate in Ireland, or their representatives respectively, may in like manner and for the same purpose apply to a judge of the Court of Chancery in Ireland, and the judge shall make such order upon the application as to him shall appear just, and shall order how and by whom all or any of the costs of and incident to the application shall be borne and paid.

In an action for specific performance of a contract as to real estate an ordinary form of relief is as follows:—The court (1) makes a declaration establishing the contract; (2) directs a reference as to title; and (3) gives directions consequent on the result of the reference (*Seton*, 6th ed. 2206, 2226, 2239). Cases under this section.

Questions between lessor and lessee arising on a contract to grant a lease have been treated as falling within this section (*Re Lander and Bagley*, 1892, 3 Ch. 41; see *Re Anderton and Milner*, 45 Ch. D. 476; *Re Stephenson and Cox*, 36 S. J. 287). A question not within the section as to a voluntary gift was determined under it on counsel admitting a contract for nominal consideration (*Re Salisbury*, 23 W. R. 824). So where rights other than those arising under the contract had to be considered the case was by consent dealt with as if an action had been brought (*Re Cosh*, 1897, 1 Ch. 12). Questions as to the amount of vendor's costs on a sale should not be raised under the section, the solicitor not being a party (*Re Webster and Jones*, 1902, 2 Ch. 551).

According to the words of this section the parties cannot, upon an application under it, question either the existence or the validity of the contract, *e.g.*, on the ground of fraud (*Re Hargreaves and Thompson*, 32 Ch. Div. 459; see *Re Davis and Cavey*, 40 Ch. D. 608; *Re Sandbach and Edmondson*, 1891, 1 Ch. 102). But it is only the existence and validity of the contract, in its inception, which cannot be questioned; and therefore questions as to rescission can be dealt with (*Re Jackson and Woodburn*, 37

37 & 38 Vict.
c. 78, s. 9.

Kind of
questions
raisable
under this
section.

Ch. D. 47). Questions of construction arising on the contract as it stands should be decided, although grounds may exist for an action for rescission (*Re Hughes and Ashley*, 1900, 2 Ch. 595; *Re Wallis and Barnard*, 1899, 2 Ch. 515; see *Re Lander and Bagley*, 1892, 3 Ch. 50, where a question of construction was decided, the result of the decision being to show that there was a valid subsisting agreement).

An application under this section should not in general be treated as if an action had been brought (*Re Hargreaves and Thompson*, 32 Ch. D. 456; compare *Re Cosh*, 1897, 1 Ch. 11, where by consent an application was so treated). In one case a vendor, who had succeeded on a strict legal question raised by the purchaser's summons, subsequently failed in his action for specific performance, the court refusing in its discretion to grant the equitable remedy (*Scott v. Alvarez*, 1895, 2 Ch. 603). But whatever could be done in chambers upon reference as to title where the contract had been established in an action can be done on a summons under this section (*Re Burroughs, Lynn and Sexton*, 5 Ch. Div. 604). And accordingly the same kind of evidence can be used (*Ib.*). The section, however, was not intended to enable the court to try in this way disputed questions of fact (*Ib.* 603; *Re Popple and Barratt*, 25 W. R. 248; *Re Gray and the Metropolitan R. Co.*, 44 L. T. 567); or questions of fraud (*Re Delany and Deigan*, 1905, 1 I. R. 602); but was intended to enable either vendor or purchaser to obtain a decision upon some isolated point (*Re Hargreaves and Thompson*, 32 Ch. Div. 459; *Re Wallis and Barnard*, 1899, 2 Ch. 515); e.g., any short point of law or construction arising upon the abstract or upon the purchaser's requisitions (*Re Popple and Barratt, sup.*).

Where a vendor's title depends on the construction of a difficult document, he should get that question determined by originating summons. And if he insists on proceeding by summons under the present section, the court may declare the title too doubtful to force on the purchaser (*Re Nichols and Von Joel*, 1910, 1 Ch. 43). Such a declaration has under this section been frequently made by the court when deciding a question in favour of the vendor (*Re Hollis Hospital and Hague*, 1899, 2 Ch. 555; *Re Thackwray and Young*, 40 Ch. D. 34; *Re Marshall and Salt*, 1900, 2 Ch. 202; see *Re New Land, &c.*, and *Gray*, 1892, 2 Ch. 138; *Re Wallis and Barnard*, 1899, 2 Ch. 521; *Mogridge v. Clapp*, 1892, 3 Ch. 396; *Re Handman and Wilcox*, 1902, 1 Ch. 599; *Re Douglas and Powell*, 1902, 2 Ch. 296). The court has authority not only to decide the questions asked, but also to make an order which will be just, as the natural consequence of the decision (*Re Hargreaves and Thompson*, 32 Ch. Div. 457). As to the kind of orders that will be made, see cases quoted p. 555, *post*.

Questions in
respect of
requisitions
and objec-
tions.

Under this section the court has dealt with the following (among other) questions in respect of requisitions and objections, e.g., Whether a requisition as to the completeness of the abstract should be answered (*Re Ford and Hill*, 10 Ch. Div. 365); what documents should be comprised in the abstract (*Re Stamford Co. and Knight*, 1900, 1 Ch. 287); whether vendor's refusal to answer requisitions was unreasonable (*Re Glenton and Saunders*, 53 L. T. 434).

Also whether an annual payment sold was properly described as "a rent-charge" and was charged on water rates (*Re Gerard and Beecham*, 1894, 3 Ch. 295); whether land was "adjoining" to an existing churchyard (*Re Bateman and Parker*, 1899, 1 Ch. 599); whether land sold as "building land" was part of a disused burial ground (*Re Ponsford and Newport Board*, 1894, 1 Ch. 454; *Re Eccl. Commrs. and New City, &c. Co.*, 1895, 1 Ch. 702).

Also whether succession duty was payable (*Re Cooper and Allen*, 4 Ch. D. 802; *Re Warner*, 17 Ch. D. 711); and by whom (*Re Kidd and Gibbon*, 1893, 1 Ch. 695); whether a purchaser was entitled to have a deed stamped (*Whiting to Loomes*, 17 to Ch. Div. 10); who should pay for registry searches (*Re Murray and Heggarty*, 15 L. R. Ir. 510); for searches for documents (*Re Stuart and Olivant*, 1896, 2 Ch. 328; *Re Duthy and Jesson*, 1898, 1 Ch. 419); for production of documents (*Re Willett*

and *Argenti*, 60 L. T. 735); for procuring concurrence of mortgagees (*Re Sander and Walford*, 1900, W. N. 183); or for certificates or abstracts of deeds (*Re Moody and Yates*, 30 Ch. Div. 344; *Re Johnson and Tustin*, *Ib.* 42).

37 & 38 Vict.
c. 78, s. 9.

Also whether the vendor was bound to apply for the discharge of incumbrances under sect. 5 of the Conv. Act, 1881 (*Re G. N. R. Co. and Sanderson*, 25 Ch. D. 788); whether a purchaser was entitled to evidence that a debenture charge had not attached (*Re Horne and Hellard*, 29 Ch. D. 736); what was sufficient evidence of performance of covenants (*Ringer to Thompson*, 45 L. T. 580); or that no common rights existed (*Re Bridges and McRae*, 30 W. R. 539); whether there was a presumption of enfranchisement of copyholds (*Re Lidiard*, 42 Ch. D. 254); what fine was payable on a sale of copyholds under the S. L. A., 1882 (*Re Naylor and Spendla*, 34 Ch. D. 217).

Also whether notice of a trust entitled the purchaser to require the trust title to be proved (*Re Harman and Uxbridge Co.*, 24 Ch. D. 720; *Re Blaiberg and Abrahams*, 1899, 2 Ch. 340); whether trustees had been properly appointed (*Re Walker and Hughes*, 24 Ch. D. 698; *Re Glenny and Hartley*, 25 Ch. D. 611; *Re Coates to Parsons*, 34 Ch. D. 370); or had effectually disclaimed (*Re Lord and Fullerton*, 1896, 1 Ch. 228).

Also whether a lease has been properly granted (*Hallett to Martin*, 24 Ch. D. 624); whether a trust for sale of leaseholds authorized under-leases (*Re Judd and Poland*, 1906, 1 Ch. 684); whether a power of sale and exchange authorized a partition (*Re Frith and Osborne*, 3 Ch. D. 618); whether powers of sale were exercisable when given by mortgages (*Re Rumney and Smith*, 1897, 2 Ch. 351; *Re Irish Society and O'Keefe*, 7 L. R. Ir. 136); or by wills (*Re Sudeley and Baines*, 1894, 1 Ch. 334; *Re Dyson and Fowke*, 1896, 2 Ch. 720; *Re Tweedie and Miles*, 27 Ch. D. 315); or by Law of Prop. Amend. Act, 1859 (*Re Adams and Perry*, 1899, 1 Ch. 554; *Re Barrow in Furness*, 1903, 1 Ch. 339).

Also whether a mortgaged estate passed under a devise (*Re Packman and Moss*, 1 Ch. D. 214); questions on the construction of wills (*Re Brown and Sibly*, 3 Ch. D. 156; *Re Coleman and Jarrom*, 4 Ch. D. 165; *Re White and Hindle*, 7 Ch. D. 201; *Re Hutchinson and Tenant*, 8 Ch. D. 540; *Re Sturge and G. W. Ry. Co.*, 19 Ch. D. 444).

Also whether a post-nuptial settlement was valid (*Re Foster and Lister*, 6 Ch. D. 87); whether a title under a voluntary settlement was good in the case of a settlor's subsequent bankruptcy (*Re Carter and Kenderdine*, 1897, 1 Ch. 776); whether a bankrupt could dispose of after-acquired freeholds (*Re New Land Association and Gray*, 1892, 2 Ch. 138), or leaseholds (*Re Clayton and Barclay*, 1895, 2 Ch. 212); whether an adjudication in bankruptcy required registration in Middlesex (*Re Calcott and Elvin*, 1898, 2 Ch. 460); whether the trustee of a bankrupt could exercise a power of appointment (*Nichols to Nixey*, 29 Ch. D. 1005).

Also questions under the Companies Act, 1862 (*Re Bowling and Welby*, 1895, 1 Ch. 663); under the Fines and Recoveries Act, 1833 (*Re Dudson*, 8 Ch. D. 628); under the S. L. Acts (*Re Earle and Webster*, 24 Ch. D. 144; *Re Hale and Smyth*, 55 L. T. 151; *Re Strafford and Maples*, 1896, 1 Ch. 235; *Re Pocock and Pranker*, *ib.* 302; *Re Marlborough and Queen Anne's Bounty*, 1897, 1 Ch. 712; *Re Fisher and Grazebrook*, 1898, 2 Ch. 660; *Re Mundy and Roper*, 1899, 1 Ch. 275; *Re Newell and Nevill*, 1900, 1 Ch. 90); under the Conv. Act, 1881 (*Re Higgins and Percival*, 59 L. T. 213); or under the Land Transfer Act, 1897 (*Re Pawley and London, &c. Bank*, 1900, 1 Ch. 58; *Re Cary and Lott*, 1901, 2 Ch. 463; *Re Cohen's Executors and London C.C.*, 1902, 1 Ch. 187).

Also whether the rule against perpetuities applied to common law conditions (*Re Hollis Hospital and Hague*, 1899, 2 Ch. 540).

Also whether the concurrence was necessary: of the Charity Commissioners (*Re Royal Society and Thompson*, 17 Ch. D. 407; *Finnis to Forbes*, 24 Ch. D. 591; *Re Corporation of Clergy Sons and Skinner*, 1893, 1 Ch. 178; *Re Mason's Orphanage and L. and N. W. Ry.*, 1896, 1 Ch. 54, 596);

37 & 38 Vict. c. 78, s. 9. or of incumbrancers and trustee in bankruptcy of life tenant (*Re Beddingfield and Herring*, 1893, 2 Ch. 332); or of *cestui que trusts* (*Re Cooke*, 4 Ch. D. 454); or of the husband of a married woman (*Re Thompson and Curzon*, 29 Ch. D. 177).

Also whether the receipt of a married woman for legacy discharged property (*Re Coward and Adam*, 20 Eq. 179); whether the joint receipt of different mortgagees was a good receipt (*Re Parker and Beech*, 56 L. T. 95); whether trustees must receive money personally (*Re Bellamy*, 24 Ch. D. 387; *Re Flower*, 27 Ch. D. 592).

Also whether a good title could be made by the following persons:—An infant selling gavelkind lands (*Re Maskell and Goldfinch*, 1895, 2 Ch. 525); an heir (*Re Morton and Hallett*, 15 Ch. Div. 143); a devisee (*Osborne to Rowlett*, 13 Ch. D. 774); an executor selling freeholds (*Re Tanqueray-Willawme*, 20 Ch. Div. 465), or leaseholds (*Re Whistler*, 35 Ch. D. 561; *Re Venn and Furze*, 1894, 2 Ch. 101); an administrator (*Re Clay and Tetley*, 16 Ch. Div. 3; *Re Adams and Kensington*, 27 Ch. D. 394); trustees (*Re Wright and Marshall*, 28 Ch. D. 93); *Patten to Edmonton*, 48 L. T. 870: as to which case see *Power v. Banks*, 1901, 2 Ch. 496; *Re Arbib and Class*, 1891, 1 Ch. 601; *Re Jenkins and Randall*, 1903, 2 Ch. 362); a compounding debtor (*Re Kearley and Clayton*, 7 Ch. D. 615); the survivor of two trustees of a bankrupt (*Re Waddell*, 2 Ch. D. 172); or of two liquidators of a company (*Re Metropolitan Bank and Jones*, *ib.* 366).

Claims for compensation.

The court has also decided claims for compensation: *e.g.*, whether compensation was payable before completion (*Aspinalls to Powell*, 60 L. T. 595; *Re Herbolt and Chaytor*, 57 L. J. Ch. 421; *Re Orange and Wright*, 52 L. T. 606), or after completion (*Re Turner and Skelton*, 13 Ch. D. 130; *Re Leyland and Taylor*, 1900, 2 Ch. 625). As to reference to chambers, see *Aspinalls to Powell* (60 L. T. 595).

Other questions: *e.g.* as to completion.

The court has also decided other questions: *e.g.* what should be the form of conveyance (*Re Pigott and G. W. R. Co.*, 18 Ch. D. 146); whether particular covenants should be inserted (*Re Agg-Gardner*, 25 Ch. D. 600; *Re Monckton and Gilzean*, 27 Ch. D. 555; *Re Gray and Metropolitan R. Co.* 44 L. T. 567; *Re Sawyer and Baring*, 51 L. T. 356; *Re Mordy and Cowman*, *ib.* 721; *Re Lander and Bagley*, 1892, 3 Ch. 41; *Re Birmingham, &c. Co. and Allday*, 1893, 1 Ch. 342; *Re Wallis and Barnard*, 1899, 2 Ch. 515; *Re Hughes and Ashley*, 1900, 2 Ch. 595); who had the right to deeds (*Re Doherty*, 15 L. R. Ir. 247; *Re Williams and Newcastle*, 1897, 2 Ch. 144); whether a purchaser was entitled to damages for non-repair paid to the vendor by a former tenant (*Re Edie and Brown*, 58 L. T. 307); whether a vendor having sold by auction building land subject to restriction could afterwards sell unsold lots not so subject (*Re Birmingham Land Co. and Allday*, 1893, 1 Ch. 342).

As to contracts.

The court has also decided whether a right of way was included in the contract (*Re Lavery and Kirk*, 33 S. J. 127; *Re Hughes and Ashley*, 1900, 2 Ch. 525); the effect of a plan annexed to particulars as regards a right of way (*Re Lindsay and Forde*, 72 L. T. 832); what was the effect of conditions restricting title and objections thereto (*Re National Provincial Bank and Marsh*, 1895, 1 Ch. 190; *Re Scott and Alvarez*, 1895, 1 Ch. 596; 1895, 2 Ch. 603; *Re Cox and Neve*, 1891, 2 Ch. 109; *Re Davys and Saurin*, 17 L. R. Ir. 334); the effect of a condition on the costs of pending litigation (*Re Spindler and Mear*, 1901, 1 Ch. 908); whether a purchaser was bound by a condition of sale alleged to be misleading (*Re Marsh and Granville*, 24 Ch. Div. 11; *Re Sandbach and Edmondson*, 1891, 1 Ch. 99); to what a condition as to misdescription applied (*Re Beufus and Masters*, 39 Ch. Div. 110); whether under the conditions the vendor had the right to rescind (*Re Jackson and Oakshott*, 14 Ch. D. 851; *Re G. N. R. Co. and Sanderson*, 25 Ch. D. 788; *Re Monckton and Gilzean*, 27 Ch. D. 555; *Re Dames and Wood*, 29 Ch. D. 626; *Re Jackson and Woodburn*, 37 Ch. D. 44; *Re Arbib and Class*, 1891, 1 Ch. 601; *Re Deighton and Harris*, 1898, 1 Ch. 458; *Re Jackson and Haden*, 1906, 1 Ch. 412); or the purchaser to repudiate the contract (*Re Gloag and Miller*, 23 Ch. D. 320), *e.g.* on the

ground of onerous covenants (*Re White and Smith*, 1896, 1 Ch. 637; *Re Haedicke and Lipski*, 1901, 2 Ch. 666; as to which, see *Molyneux v. Hawtrey*, 1903, 2 K. B. 487); what price was payable under the contract (*Re Popple and Barratt*, 25 W. R. 248); whether any, and what, interest was payable (*Re Pigott and G. W. R. Co.*, 18 Ch. D. 146; *Riley to Streetfield*, 34 Ch. D. 386; *Re Golds and Norton*, 52 L. T. 321; *Re Helling and Merton*, 1893, 3 Ch. 269; *Re London and Tubbs*, 1894, 2 Ch. 524; *Re Wilsons and Stevens*, 1894, 3 Ch. 546; *Re Strafford and Maples*, 1896, 1 Ch. 235; *Re Woods and Lewis*, 1898, 2 Ch. 211); and the court has ordered the return of interest paid under protest (*Re Young and Harston*, 31 Ch. Div. 168).

The section provides that the judge shall make such order as to him shall appear just; accordingly the court has upon a purchaser's summons ordered section: for a return of the deposit with interest (*Re Cosh and Metropolitan District R. Co.*, 13 Ch. D. 607; *Re Hargreaves and Thompson*, 32 Ch. Div. 454; *Re Smith and Stott*, 48 L. T. 512; *Re Haedicke and Lipski*, 1901, 2 Ch. 666; see, however, *Re Davis and Cavey*, 40 Ch. D. 608, where a return was claimed on the ground of misrepresentation in particulars); and has, in addition, ordered payment by the vendor of the purchaser's cost of investigating the title (*Re Higgins and Hitchman*, 21 Ch. D. 95; *Re Ebsworth and Tidy*, 42 Ch. 53; *Re Bryant and Barningham*, 44 Ch. Div. 218; *Re Hare and O'Moore*, 1901, 1 Ch. 93); and such costs may be charged on the title; vendor's interest on the property (*Re Yielding and Westbrook*, 31 Ch. D. 344). Similarly, on a vendor's summons, the court has ordered rescission. and a return of the deposit (*Re Higgins and Percival*, 59 L. T. 213; *Re Walker and Oakshott*, 1901, 2 Ch. 383); and see the conditional order for return of deposit in *Re Beyfus and Masters*, 39 Ch. D. 112.

Damages for delay in completion cannot be recovered under this section. (*Re Wilson and Stevens*, 1894, 3 Ch. 546).

Orders have frequently been made under the acts declaring that the Form of vendor has or has not shown a good title (Seton, 6th ed. 2264 *et seq.*; but order. see *Re Wallis and Barnard*, 1899, 2 Ch. 520). The order may direct a reference to chambers as to the form of the conveyance (*Re Monckton and Gilzean*, 27 Ch. D. 564), or as to the amount of compensation (*Aspinalls to Powell*, 60 L. T. 595).

In actions for specific performance the general rule is that the parties to the contract, or their representatives, are the necessary and sufficient parties to the action (Fry, 3rd ed. 73, 83). On a summons under this section the only persons between whom the court can decide anything are, it has been said, the vendor and the purchaser (*Re Naylor and Spendla*, 34 Ch. Div. 220; *Re Bartlett and Berry*, 76 L. T. 751); but other parties (*e.g.* a lord of the manor) may come in and be bound (*Ib.*). Questions as to the amount of vendor's costs on a sale should not be raised under the act, the solicitor not being a party (*Re Webster and Jones*, 1902, 2 Ch. 551). The court may direct other parties to be served; see *Re Tippet and Newbould*, 37 Ch. Div. 446, a case in which the summons was subsequently by amendment made an originating summons on a question of construction. No decision will bind any party not before the court; *e.g.* the Crown in respect of duty (*Re Cooper and Allen*, 4 Ch. D. 827; nor will it prevent subsequent litigation against the same purchaser in respect of the same title (*Osborne to Rowlett*, 13 Ch. 781).

A summons may be adjourned into court without discussion (*Re Jackson and Woodburn*, 37 Ch. Div. 47; see, however, *Re Coleman and Jarrom*, 4 Ch. D. 168), or for further argument. An adjournment may be ordered either at the request of one of the parties (*Re Warner*, 17 Ch. D. 712), or at the discretion of the judge (*Re Cooper and Allen*, 4 Ch. D. 805); and the adjournment may be on part only of the summons (*Re Tippet and Newbould*, 37 Ch. D. 445). The judgment may be given in court if the purchaser desires it (*Re Coleman and Jarrom*, 4 Ch. D. 168). In a proper case the summons may be stayed as frivolous or vexatious (*Re Bartlett and Berry*, 76 L. T. 751).

37 & 38 Vict.
c. 78, s. 9.

as to costs of
investigating

Parties.

Hearing of
summons.

37 & 38 Vict.
c. 78, s. 9.

Appeals.

For the practice as to appeals from orders made in chambers under this act, see Annual Practice, note to sect. 50 of Jud. Act, 1873, and to sect. 1 of the Jud. Act, 1894. The time within which an appeal can be brought is fourteen days (*Re Blyth and Young*, 13 Ch. D. 416; *Re Ricketts and Avent*, 1890, W. N. 16). As to the time from which this period is calculated, see R. S. C. Ord. 58, r. 15. When an order dismissing an application contains a declaration as such, or as an expression of opinion so as to bind the rights of the parties, it is not a simple refusal of the application within that rule (*Re Clay and Tetley*, 16 Ch. Div. 3).

Review.

As to reviewing a decision under this section, see *Re Scott and Alvarez*, 1895, 1 Ch. 596.

Costs.

As a general rule the costs will follow the event (*Re Davis and Cavey*, 40 Ch. D. 609; *Re Starr-Bowkett Society and Sibun*, 42 Ch. D. 386; *Re Johnson and Tustin*, 30 Ch. Div. 49). If the question submitted is whether a good title can be made, and the title, even though not one which a conveyancer would recommend a purchaser to accept, is yet held good, the purchaser should pay the costs (*Osborne to Rowlett*, 13 Ch. D. 798; *Re Tanqueray-Willlaume*, 20 Ch. Div. 483). But no order was made as to costs where the difficulty arose from conflicting decisions (*Osborne to Rowlett*, 13 Ch. D. 774), or from the language of the contract (*Re Baker and Salmon*, 1907, 1 Ch. 244), or where there was a fair point for discussion (*Re Coward and Adams*, 20 Eq. 179; *Re Cosh and Metropolitan R. Co.*, 13 Ch. D. 613; *Finch v. Jukes*, 1877, W. N. 211; see *Re G. N. R. Co. and Sanderson*, 25 Ch. D. 788). The vendor was ordered to pay costs where he rescinded after summons issued (*Re Spindler and Mear*, 1901, 1 Ch. 908). Costs given against the vendor may be charged on his interest in the property (*Re Yielding and Westbrook*, 31 Ch. D. 345; *Re Higgins and Percival*, 59 L. T. 214).

Enforcement
of order.

Where a respondent has not complied with an order made under this section, a further application should be made in chambers to enforce the order (*Thompson v. Ringer*, 44 L. T. 507); where *Bacon, V.-C.*, dismissed a subsequent action for specific performance on the ground that this had not been done.

10. This act shall not apply to Scotland, and may be cited as the Vendor and Purchaser Act, 1874.

VII.—THE CONVEYANCING ACTS, 1881, 1882, 1892.

THE CONVEYANCING AND LAW OF PROPERTY ACT, 1881.

44 & 45 VICT. c. 41.

An Act for simplifying and improving the practice of Conveyancing; and for vesting in Trustees, Mortgagees, and others various powers commonly conferred by provisions inserted in Settlements, Mortgages, Wills, and other Instruments; and for amending in various particulars the Law of Property; and for other purposes. [22nd August, 1881.]

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44 & 45 Vict.
c. 41, s. 1.

I.—PRELIMINARY.

1.—(1.) This act may be cited as the Conveyancing and Law Short title; of Property Act, 1881.

(2.) This act shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-one.

(3.) This act does not extend to Scotland.

commence-
ment;
extent.

The words printed in italics in the following sections, 2, 14, 25, 30, 48, 68, 69, 70, 71, 72, and schedules 1 and 2 have been repealed by the S. L. R. Acts, 1894 and 1898.

2. In this act—

(i.) Property, unless a contrary intention appears, includes real and personal property, and any estate or interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest:

Interpreta-
tion of
property,
land, &c.

(ii.) Land, unless a contrary intention appears, includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings, also an undivided share in land:

(iii.) In relation to land, income includes rents and profits, and possession includes receipt of income:

(iv.) Manor includes lordship, and reputed manor or lordship:

(v.) Conveyance, unless a contrary intention appears, includes assignment, appointment, lease, settlement, and other assurance, and covenant to surrender, made by deed, on a sale, mortgage, demise, or settlement of any property, or on any other dealing with or for any property; and convey, unless a contrary intention appears, has a meaning corresponding with that of conveyance:

(vi.) Mortgage includes any charge on any property for securing money or money's worth (*a*); and mortgage money means money, or money's worth, secured by a mortgage; and mortgagor includes any person from time to time deriving title under the original mortgagor (*b*), or entitled to redeem a mortgage, according to his estate, interest, or right, in the mortgaged property; and mortgagee includes any person from time

44 & 45 Vict.
c. 41, s. 2.

to time deriving title under the original mortgagee; and mortgagee in possession is, for the purposes of this act, a mortgagee who, in right of the mortgage, has entered into and is in possession of the mortgaged property:

(vii.) Incumbrance includes a mortgage in fee, or for a less estate, and a trust for securing money, and a lien, and a charge of a portion, annuity, or other capital or annual sum; and incumbrancer has a meaning corresponding with that of incumbrance, and includes every person entitled to the benefit of an incumbrance, or to require payment or discharge thereof:

(viii.) Purchaser, unless a contrary intention appears, includes a lessee or mortgagee (*c*) and an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for any property; and purchase, unless a contrary intention appears, has a meaning corresponding with that of purchaser; but sale means only a sale properly so called:

(ix.) Rent includes yearly or other rent, toll, duty, royalty, or other reservation, by the acre, the ton, or otherwise; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift: (*d*)

(x.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings; and a building lease is a lease for building purposes or purposes connected therewith:

(xi.) A mining lease is a lease for mining purposes, that is, the searching for, winning, working, getting, making merchantable, carrying away, or disposing of mines and minerals, or purposes connected therewith, and includes a grant or licence for mining purposes:

(xii.) Will includes codicil:

(xiii.) Instrument includes deed, will, inclosure award, and Act of Parliament:

(xiv.) Securities include stocks, funds, and shares: (*e*)

(xv.) Bankruptcy includes liquidation by arrangement, and any other act or proceeding in law having, under any act for the time being in force, effects or results similar to those of bankruptcy; and bankrupt has a meaning corresponding with that of bankruptcy: (*f*)

(xvi.) Writing includes print; and words referring to any instrument, copy, extract, abstract, or other document include any such instrument, copy, extract, abstract, or other document being in writing or in print, or partly in writing and partly in print:

(xvii.) Person includes a corporation:

(xviii.) Her Majesty's High Court "*of Justice*" is referred to as the court.

(a) *E.g.*, the lien of a company on the shares of a shareholder (*Everitt v. Automatic Weighing Machine Co.*, 1892, 3 Ch. 506).

(b) *E.g.*, a second mortgagee (*Teevan v. Smith*, 20 Ch. Div. 730).

(c) *E.g.*, an equitable mortgage (*Lloyds Bank v. Bullock*, 1896, 2 Ch. 44 & 45 Vict. 197). c. 41, s. 2.

(d) As to a "fine," see note to sec. 3 of the Conv. Act, 1892, *post*, p. 627.

(e) As to the primary and secondary meanings of "securities," see *Re Rayner, R. v. R.* 1904, 1 Ch. 177; *Re Gent and Eason*, 1905, 1 Ch. 386.

(f) "Bankruptcy" includes liquidation in the case of a company (*Horsey Estate, Ltd. v. Steiger*, 1899, 2 Q. B. 79).

II.—SALES AND OTHER TRANSACTIONS.

Contracts for Sale.

3.—(1.) Under a contract to sell and assign a term of years derived out of a leasehold interest in land, the intended assign shall not have the right to call for the title to the leasehold reversion (*d*). Application of stated conditions of sale to all purchases.

(2.) Where land of copyhold or customary tenure has been converted into freehold by enfranchisement, then, under a contract to sell and convey the freehold, the purchaser shall not have the right to call for the title to make the enfranchisement (*e*).

(3.) A purchaser of any property shall not require the production, or any abstract or copy, of any deed, will, or other document, dated or made before the time prescribed by law, or stipulated, for commencement of the title, even though the same creates a power subsequently exercised by an instrument abstracted in the abstract furnished to the purchaser; nor shall he require any information, or make any requisition, objection, or inquiry, with respect to any such deed, will, or document, or the title prior to that time, notwithstanding that any such deed, will, or other document, or that prior title, is recited, covenanted to be produced, or noticed; and he shall assume, unless the contrary appears, that the recitals, contained in the abstracted instruments, of any deed, will, or other document, forming part of that prior title, are correct, and give all the material contents of the deed, will, or other document so recited, and that every document so recited was duly executed by all necessary parties, and perfected, if and as required, by fine, recovery, acknowledgment, enrolment, or otherwise (*f*).

(4.) Where land sold is held by lease (not including under-lease), the purchaser shall assume, unless the contrary appears, that the lease was duly granted; and, on production of the receipt for the last payment due for rent under the lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the lease have been duly performed and observed up to the date of actual completion of the purchase (*g*).

(5.) Where land sold is held by under-lease, the purchaser shall assume, unless the contrary appears, that the under-lease and every superior lease were duly granted; and, on production

44 & 45 Vict.
c. 41, s. 3.

of the receipt for the last payment due for rent under the under-lease before the date of actual completion of the purchase, he shall assume, unless the contrary appears, that all the covenants and provisions of the under-lease have been duly performed and observed up to the date of actual completion of the purchase, and further that all rent due under every superior lease, and all the covenants and provisions of every superior lease, have been paid and duly performed and observed up to that date (*h*).

(6.) On a sale of any property, the expenses of the production and inspection of all acts of Parliament, inclosure awards, records, proceedings of courts, court rolls, deeds, wills, probates, letters of administration, and other documents, not in the vendor's possession, and the expenses of all journeys incidental to such production or inspection, and the expenses of searching for, procuring, making, verifying, and producing all certificates, declarations, evidences, and information not in the vendor's possession, and all attested, stamped, office, or other copies or abstracts of, or extracts from, any acts of Parliament or other documents aforesaid, not in the vendor's possession, if any such production, inspection, journey, search, procuring, making, or verifying is required by a purchaser, either for verification of the abstract, or for any other purpose, shall be borne by the purchaser who requires the same; and where the vendor retains possession of any document, the expenses of making any copy thereof, attested, or unattested, which a purchaser requires to be delivered to him, shall be borne by that purchaser (*i*).

(7.) On a sale of any property in lots, a purchaser of two or more lots, held wholly or partly under the same title, shall not have a right to more than one abstract of the common title, except at his own expense.

(8.) This section applies only to titles and purchasers on sales properly so called, notwithstanding any interpretation in this act.

(9.) This section applies only if and as far as a contrary intention is not expressed in the contract of sale, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(10.) This section applies only to sales made after the commencement of this act.

(11.) Nothing in this section shall be construed as binding a purchaser to complete his purchase in any case where, on a contract made independently of this section, and containing stipulations similar to the provisions of this section, or any of them, specific performance of the contract would not be enforced against him by the court.

Sub-s. 1.

(*d*) The "leasehold reversion" referred to in this sub-section is the reversion to that leasehold interest out of which the term of years is derived (*Gosling v. Woolf*, 1893, 1 Q. B. 39). See, in connection with this section, V. & P. Act, 1874, s. 2, rule. 1 (*ante*, p. 550), and sect. 13 (*post*, p. 574).

(e) On an enfranchisement, it was said that the copyholder is not entitled to an acknowledgment of the right to production of the documents of title of the manor (*Re Agg-Gardner*, 25 Ch. D. 600). 44 & 45 Vict. c. 41, s. 3.

(f) This sub-section was not intended to repeal the doctrines or qualify the principles on which before the act the courts granted or refused specific performance (*Nottingham Co. v. Butler*, 15 Q. B. D. 272). Accordingly, it does not preclude a purchaser who has discovered *aliunde* a defect prior to the stipulated commencement of title, and which was known to the vendor, from refusing to complete, *S. C.*, 16 Q. B. Div. 778; and see *Waddell v. Wolfe*, L. R. 9 Q. B. 515; *Smith v. Robinson*, 13 Ch. D. 148. For the effect of a condition against objecting to prior title, see *Re National Bank and Marsh*, 1895, 1 Ch. 190; *Re Turpin and Akern*, 1905, 1 I. R. 85. Sub-s. 2. Sub-s. 3.

(g) This sub-section applies only to a payment of money, and not to a rent of a peppercorn, or in kind (*Re Moody and Yates*, 30 Ch. Div. 344). As to the effect of breaches after contract and before completion, see *Laurie v. Lees* (14 Ch. Div. 249; 7 App. Cas. 19). No assumption as to performance of covenants was required from a purchaser who made "the contrary" appear by adducing evidence of non-performance (*Re Hightett and Bird*, 1903, 1 Ch. 287). See as to this decision, *Re Allen and Driscoll*, 1904, 2 Ch. 231). Sub-s. 4.

(h) The production of a receipt signed by the ground landlord is not sufficient within this sub-section (*Re Higgins and Percival*, 59 L. T. 213). Sub-s. 5.

(i) This sub-section does not interfere with the duty of the vendor to deliver a proper abstract of title, and only deals with the expenses of requisitions made on the footing of such an abstract (*Re Johnson and Tustin*, 30 Ch. Div. 42). Every document which forms a link in the vendor's title must be abstracted in chief at the vendor's expense (*Re Stamford Banking Co. and Knight*, 1900, 1 Ch. 287); but on a sale of a lease more than forty years old it was sufficient that a "link" more than forty years old appeared by way of recital (*Williams v. Spargo*, 1893, W. N. 100; see sub-sect. 3). Where there is a covenant to finish, to the satisfaction of a surveyor, a house contracted to be sold, the surveyor's certificate forms part of the vendor's title, and must be procured at his expense (*Re Moody and Yates*, 30 Ch. Div. 344). But when a proper abstract has been delivered, this sub-section applies to the production of all documents properly comprised therein (*Re Edsworth and Tidy*, 42 Ch. D. 34). The purchaser bore the cost of production of deeds in the hands of a mortgagee (*Re Willett and Argenti*, 60 L. T. 735); and the cost of statutory declarations made by the vendor (*Re Edwards and Rudkin*, 58 L. T. 789); and the cost of searching for an underlease which was the root of the vendor's title (*Re Stuart and Olivant and Seadon*, 1896, 2 Ch. 328). But the vendor must bear the cost of obtaining documents of title required to be handed over on completion (*Re Duthy and Jesson*, 1898, 1 Ch. 419), and of obtaining secondary evidence of documents, which cannot be handed over, *e.g.* a Scottish will (*Halkett v. Dudley*, 1907, 1 Ch. 604; see as to a vendor furnishing secondary evidence, *Re Halifax Bank and Wood*, 15 Times L. R. 106). It has been held in Ireland that in the absence of stipulation the vendor bears the cost of registry researches (*Re Murray and Heggarty*, 15 L. R. Ir. 510). Sub-s. 6.

4.—(1.) Where at the death of any person there is subsisting a contract enforceable against his heir or devisee, for the sale of the fee simple or other freehold interest, descendible to his heirs general, in any land, his personal representatives shall, by virtue of this act, have power to convey the land for all the estate and interest vested in him at his death, in any manner proper for giving effect to the contract. Completion of contract after death.

(2.) A conveyance made under this section shall not affect the beneficial rights of any person claiming under any testamentary disposition or as heir or next of kin of a testator or intestate.

44 & 45 Vict.
c. 41, s. 4.

(3.) This section applies only in cases of death after the commencement of this act.

See sect. 30, *post*, p. 592, and the cases quoted under sect. 50 of the Trustee Act, 1893 (*post*).

Discharge of Incumbrances on Sale.

Provision by
court for in-
cumbrances,
and sale freed
therefrom.

5.—(1.) Where land subject to any incumbrance, whether immediately payable or not, is sold by the court, or out of court, the court may, if it thinks fit, on the application of any party to the sale, direct or allow payment into court, in case of an annual sum charged on the land, or of a capital sum charged on a determinable interest in the land, of such amount as, when invested in government securities, the court considers will be sufficient, by means of the dividends thereof, to keep down or otherwise provide for that charge, and in any other case of capital money charged on the land, of the amount sufficient to meet the incumbrance and any interest due thereon; but in either case there shall also be paid into court such additional amount as the court considers will be sufficient to meet the contingency of further costs, expenses, and interest, and any other contingency, except depreciation of investments, not exceeding one-tenth part of the original amount to be paid in, unless the court for special reason thinks fit to require a larger additional amount.

(2.) Thereupon, the court may, if it thinks fit, and either after or without any notice to the incumbrancer, as the court thinks fit, declare the land to be freed from the incumbrance, and make any order for conveyance, or vesting order, proper for giving effect to the sale, and give directions for the retention and investment of the money in court.

(3.) After notice served on the persons interested in or entitled to the money or fund in court, the court may direct payment or transfer thereof, to the persons entitled to receive or give a discharge for the same, and generally may give directions respecting the application or distribution of the capital or income thereof.

(4.) This section applies to sales not completed at the commencement of this act, and to sales thereafter made.

The court has refused to compel a vendor to free land from a rent-charge under this section, where this would be a great hardship (*Re G. N. R. Co. and Sanderson*, 25 Ch. D. 788). It is doubtful if this section applies to statutory rent-charges (*Ib.*). On a sale by a mortgagor part of the purchase-money was paid into court under this section, and the property vested in the purchaser (*Milford Haven Co. v. Mowatt*, 28 Ch. D. 402). An order was made under this section where the land was charged with legacies (*Archdale v. Anderson*, 21 L. R. Ir. 527). The court has decided interests *in futuro* in order to ascertain what sum should be set aside (*Re Freme*, 1895, 2 Ch. 256, 778). For form of order on sale by the court, see *Dickin v. Dickin* (30 W. R. 887); *Patching v. Bull* (46 L. T. 227; 30 W. R. 244); Seton, 6th ed. 1914.

General Words.

44 & 45 Vict.
c. 41, s. 6.

6.—(1.) A conveyance of land shall be deemed to include and shall by virtue of this act operate to convey, with the land, all buildings, erections, fixtures, commons, hedges, ditches, fences, ways, waters, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to the land or any part thereof.

General words in conveyances of land, buildings, or manor.

(2.) A conveyance of land, having houses or other buildings thereon, shall be deemed to include and shall by virtue of this act operate to convey, with the land, houses, or other buildings, all outhouses, erections, fixtures, cellars, areas, courts, courtyards, cisterns, sewers, gutters, drains, ways, passages, lights, watercourses, liberties, privileges, easements, rights, and advantages whatsoever, appertaining or reputed to appertain to the land, houses, or other buildings conveyed, or any of them, or any part thereof, or at the time of conveyance demised, occupied, or enjoyed with, or reputed or known as part or parcel of or appurtenant to, the land, houses, or other buildings conveyed, or any of them, or any part thereof (*k*).

(3.) A conveyance of a manor shall be deemed to include and shall by virtue of this act operate to convey, with the manor, all pastures, feedings, wastes, warrens, commons, mines, minerals, quarries, furzes, trees, woods, underwoods, coppices, and the ground and soil thereof, fishings, fisheries, fowlings, courts leet, courts baron, and other courts, view of frankpledge and all that to view of frankpledge doth belong, mills, mulctures, customs, tolls, duties, reliefs, heriots, fines, sums of money, amerciaments, waifs, estrays, chief-rents, quit-rents, rentscharge, rents seek, rents of assize, fee farm rents, services, royalties, jurisdictions, franchises, liberties, privileges, easements, profits, advantages, rights, emoluments, and hereditaments whatsoever, to the manor appertaining or reputed to appertain, or at the time of conveyance demised, occupied, or enjoyed with the same, or reputed or known as part, parcel, or member thereof.

(4.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance and to the provisions therein contained (*l*).

(5.) This section shall not be construed as giving to any person a better title to any property, right, or thing in this section mentioned than the title which the conveyance gives to him to the land or manor expressed to be conveyed, or as conveying to him any property, right, or thing in this section mentioned, further or otherwise than as the same could have been conveyed to him by the conveying parties.

44 & 45 Vict.
c. 41, s. 6.

(6.) This section applies only to conveyances made after the commencement of this act (*m*).

(*k*) Rights claimed under this section arise by virtue of a grant which is not implied but express (*Broomfield v. Williams*, 1897, 1 Ch. 608, 610; *Quicke v. Chapman*, 1903, 1 Ch. 670; see *L. N. W. R. v. Boulton*, 62 L. T. 398). The section does not operate so as to pass under a conveyance an easement which the grantor had no power to grant in express words (*Quicke v. Chapman*, 1903, 1 Ch. 659).

The words "enjoyed with" pass easements not existing as of right at the time of the conveyance, but enjoyed *de facto* (*Re Peck and London School Board*, 1893, 2 Ch. 319), e.g. a way enjoyed by permission (*International Co. v. Hobbs*, 1903, 2 Ch. 165). See cases as to right of way, *ante*, p. 66. To be "enjoyed" within this section an easement must be enjoyed under circumstances which would lead to an expectation that the enjoyment will be continued (*Birmingham Banking Co. v. Ross*, 38 Ch. Div. 307; *Burrows v. Lang*, 1901, 2 Ch. 506; *Godwin v. Schweppes*, 1902, 1 Ch. 933). The right to use a tramway was held to pass as a "right" enjoyed with the land conveyed (*Brazier v. Glasspool*, 1901, W. N. 237).

Prima facie the grant of land with a house on it gives under this section a full right to light to all windows, and the grantor cannot build so as to obstruct them. The onus is on the grantor to show any limitation of the right (*Broomfield v. Williams*, 1897, 1 Ch. 602; *Pollard v. Gare*, 1901, 1 Ch. 834; see *Quicke v. Chapman*, 1903, 1 Ch. 659). This sub-section was held to give a right to light on a sale by a mortgagee under his power of sale (*Born v. Turner*, 1900, 2 Ch. 211).

Contrary
intention.

(*l*) The express grant of "appurtenances" would seem to amount to a contrary intention so far as regards anything not strictly appurtenant (*Birmingham Banking Co. v. Ross*, 38 Ch. Div. 308; see *Beddington v. Atlee*, 35 Ch. D. 331). Under a contract to sell hereditaments "with appurtenances," the purchaser will only be entitled to a conveyance in accordance with the contract; and if the conveyance is drawn in such a form as that the section would apply, the vendor is entitled to have a limitation inserted to prevent the section giving to the purchaser more than he is entitled to (*Re Peck and London School Board*, 1893, 2 Ch. 315; see *Re Hughes and Ashley*, 1900, 2 Ch. 595). The reference in the conveyance and plan to adjoining land as "building land" will not show a contrary intention excluding the grant of rights of light (*Broomfield v. Williams*, 1897, 1 Ch. 602).

(*m*) Sub-sects. 1—3 only apply to conveyances since the act. As to the construction of similar words in conveyances before the act, see the cases quoted *ante*, p. 66. See also the cases as to implied grants of easements, quoted *ante*, pp. 66, 81, 103.

Covenants for Title.

Covenants for
title to be
implied.

7.—(1.) In a conveyance there shall, in the several cases in this section mentioned, be deemed to be included, and there shall in those several cases, by virtue of this act, be implied, a covenant to the effect in this section stated, by the person or by each person who conveys, as far as regards the subject-matter or share of subject-matter expressed to be conveyed by him, with the person, if one, to whom the conveyance is made, or with the persons jointly, if more than one, to whom the conveyance is made as joint tenants, or with each of the persons, if more than one, to whom the conveyance is made as tenants in common, that is to say:

(A.) In a conveyance for valuable consideration, other than a mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

44 & 45 Vict.
c. 41, s. 7.

That, notwithstanding anything by the person who so conveys or any one through whom he derives title, otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed, subject as, if so expressed, and in the manner in which, it is expressed to be conveyed, and that, notwithstanding anything as aforesaid, that subject-matter shall remain to and be quietly entered upon, received, and held, occupied, enjoyed, and taken, by the person to whom the conveyance is expressed to be made, and any person deriving title under him, and the benefit thereof shall be received and taken accordingly, without any lawful interruption or disturbance by the person who so conveys or any person conveying by his direction, or rightfully claiming or to claim by, through, under, or in trust for the person who so conveys, or any person conveying by his direction, or by, through, or under any one not being a person claiming in respect of an estate or interest subject whereto the conveyance is expressly made, through whom the person who so conveys derives title, otherwise than by purchase for value; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all such estates, incumbrances, claims, and demands other than those subject to which the conveyance is expressly made, as either before or after the date of the conveyance have been or shall be made, occasioned, or suffered by that person or by any person conveying by his direction, or by any person rightfully claiming by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value; and further, that the person who so conveys, and any person conveying by his direction, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, other than an estate or interest subject whereto the conveyance is expressly made, by, through, under, or in trust for the person who so conveys, or by, through, or under any person conveying by his direction, or by, through, or under any one through whom the person who so conveys derives title, otherwise than by purchase for value, will, from time to time and at all times after the date of the conveyance, on the request and at the cost of any person to whom the conveyance is expressed to be

On conveyance for value by beneficial owner.

The right to convey.

Quiet enjoyment.

Freedom from incumbrance.

Further assurance.

44 & 45 Vict.
c. 41, s. 7.

made, or of any person deriving title under him, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required :

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage) :

On convey-
ance of lease-
holds for
value, by
beneficial
owner.

(B.) In a conveyance of leasehold property for valuable consideration, other than a mortgage, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely) :

Validity of
lease.

That, notwithstanding anything by the person who so conveys, or any one through whom he derives title otherwise than by purchase for value, made, done, executed, or omitted, or knowingly suffered, the lease or grant creating the term or estate for which the land is conveyed is, at the time of conveyance, a good, valid, and effectual lease or grant of the property conveyed, and is in full force, unforfeited, unsundered, and in nowise become void or voidable, and that, notwithstanding anything as aforesaid, all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance :

(in which covenant a purchase for value shall not be deemed to include a conveyance in consideration of marriage) :

On mortgage,
by beneficial
owner.

(C.) In a conveyance by way of mortgage, the following covenant by a person who conveys and is expressed to convey as beneficial owner (namely) :

Right to
convey.

Quiet enjoy-
ment.

That the person who so conveys, has, with the concurrence of every other person, if any, conveying by his direction, full power to convey the subject-matter expressed to be conveyed by him, subject as, if so expressed, and in the manner in which it is expressed to be conveyed ; and also that, if default is made in payment of the money intended to be secured by the conveyance, or any interest thereon, or any part of that money or interest, contrary to any provision in the conveyance, it shall be lawful for the person to whom the conveyance is expressed to be made, and the persons deriving title under him, to enter into and upon, or receive, and henceforth quietly hold, occupy, and enjoy or take and have, the subject-matter expressed to be conveyed, or any part thereof, without any lawful interruption or disturbance by the person who so conveys, or any person conveying by his direction, or any other person not being a person claiming in respect of an estate or interest subject whereto

the conveyance is expressly made; and that, freed and discharged from, or otherwise by the person who so conveys sufficiently indemnified against, all estates, incumbrances, claims, and demands whatever, other than those subject whereto the conveyance is expressly made, and further, that the person who so conveys and every person conveying by his direction, and every person deriving title under any of them, and every other person having or rightfully claiming any estate or interest in the subject-matter of conveyance, or any part thereof, other than an estate or interest subject whereto the conveyance is expressly made, will from time to time and at all times, on the request of any person to whom the conveyance is expressed to be made, or of any person deriving title under him, but, as long as any right of redemption exists under the conveyance, at the cost of the person so conveying, or of those deriving title under him, and afterwards at the cost of the person making the request, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of conveyance and every part thereof to the person to whom the conveyance is made, and to those deriving title under him, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by him or them or any of them shall be reasonably required :

44 & 45 Vict.
c. 41, s. 7.

Freedom
from incum-
brance.

Further
assurance.

(D.) In a conveyance by way of mortgage of leasehold property, the following further covenant by a person who conveys and is expressed to convey as beneficial owner (namely):

On mortgage
of leaseholds,
by beneficial
owner.

That the lease or grant creating the term or estate for which the land is held is, at the time of conveyance, a good, valid, and effectual lease or grant of the land conveyed and is in full force, unforfeited, and unsurrendered and in nowise become void or voidable, and that all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, have been paid, observed, and performed up to the time of conveyance; and also that the person so conveying, or the persons deriving title under him, will at all times, as long as any money remains on the security of the conveyance, pay, observe, and perform, or cause to be paid, observed, and performed all the rents reserved by, and all the covenants, conditions, and agreements contained in, the lease or grant, and on the part of the lessee or grantee and the persons deriving title under him to be paid, observed, and performed, and will keep the person to whom the conveyance is made, and those deriving title under him, indemnified against all actions, proceeding, costs, charges, damages, claims and demands, if any, to be incurred or sustained by him or them by reason of

Validity of
lease.

Payment of
rent and per-
formance of
covenants.

44 & 45 Vict.
c. 41, s. 7.

the non-payment of such rent or the non-observance or non-performance of such covenants, conditions, and agreements, or any of them :

On settle-
ment.

(E.) In a conveyance by way of settlement, the following covenant by a person who conveys and is expressed to convey as settlor (namely) :

For further
assurance,
limited.

That the person so conveying, and every person deriving title under him by deed or act or operation of law in his lifetime subsequent to that conveyance, or by testamentary disposition or devolution in law, on his death, will, from time to time, and at all times, after the date of that conveyance, at the request and cost of any person deriving title thereunder, execute and do all such lawful assurances and things for further or more perfectly assuring the subject-matter of the conveyance to the persons to whom the conveyance is made and those deriving title under them, subject as, if so expressed, and in the manner in which the conveyance is expressed to be made, as by them or any of them shall be reasonably required :

On convey-
ance by
trustee or
mortgagee.

(F.) In any conveyance, the following covenant by every person who conveys and is expressed to convey as trustee or mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the court, which covenant shall be deemed to extend to every such person's own acts only (namely) :

Against in-
cumbrances.

That the person so conveying has not executed or done, or knowingly suffered, or been party or privy to, any deed or thing, whereby or by means whereof the subject-matter of the conveyance, or any part thereof, is or may be impeached, charged, affected, or incumbered in title, estate, or otherwise, or whereby or by means whereof the person who so conveys is in anywise hindered from conveying the subject-matter of the conveyance, or any part thereof, in the manner in which it is expressed to be conveyed.

(2.) Where in a conveyance it is expressed that by direction of a person expressed to direct as beneficial owner another person conveys, then, within this section, the person giving the direction, whether he conveys and is expressed to convey as beneficial owner or not, shall be deemed to convey and to be expressed to convey as beneficial owner the subject-matter so conveyed by his direction ; and a covenant on his part shall be implied accordingly.

(3.) Where a wife conveys and is expressed to convey as beneficial owner, and the husband also conveys and is expressed to convey as beneficial owner, then, within this section, the wife shall be deemed to convey and to be expressed to convey by direction of the husband, as beneficial owner ; and, in addition to the covenant implied on the part of the wife, there shall also be implied, first, a covenant on the part of the husband as the person giving that direction, and secondly, a covenant on the

part of the husband in the same terms as the covenant implied on the part of the wife. 44 & 45 Vict.
c. 41, s. 7.

(4.) Where in a conveyance a person conveying is not expressed to convey as beneficial owner, or as settlor, or as trustee, or as mortgagee, or as personal representative of a deceased person, or as committee of a lunatic so found by inquisition, or under an order of the court, or by direction of a person as beneficial owner, no covenant on the part of the person conveying shall be, by virtue of this section, implied in the conveyance.

(5.) In this section a conveyance includes a deed conferring the right to admittance to copyhold or customary land, but does not include a demise by way of lease at a rent, or any customary assurance, other than a deed, conferring the right to admittance to copyhold or customary land.

(6.) The benefit of a covenant implied as aforesaid shall be annexed and incident to, and shall go with, the estate or interest of the implied covenantee, and shall be capable of being enforced by every person in whom that estate or interest is, for the whole or any part thereof, from time to time vested.

(7.) A covenant implied as aforesaid may be varied or extended by deed, and, as so varied or extended, shall, as far as may be, operate in the like manner, and with all the like incidents, effects, and consequences, as if such variations or extensions were directed in this section to be implied.

(8.) This section applies only to conveyances made after the commencement of this act.

It has been said that the covenants included by virtue of this section are express, not implied, covenants (*L. N. & W. R. Co. v. Boulton*, 62 L. T. 398). The four covenants set out in sub-sect. 1 (A.) are not separate covenants, but parts of one entire covenant controlled throughout by the opening words, "notwithstanding anything, &c." (*David v. Sabin*, 1893, 1 Ch. 531). A. granted a lease to B. for ninety-nine years, and B. afterwards granted sub-leases by way of mortgage. B. subsequently surrendered the term to A. without disclosing the sub-leases. Afterwards A. for value conveyed the fee simple "as beneficial owner" to B., who subsequently conveyed to C. In an action by C. against A. for breach of his implied covenants for right to convey quiet enjoyment and freedom from incumbrances, A. was held liable (*David v. Sabin*, 1893, 1 Ch. 523). Damages were granted for breach of a covenant implied by virtue of this section (*May v. Platt*, 1900, 1 Ch. 616; *Turner v. Moon*, 1901, 2 Ch. 825; *G. W. R. v. Fisher*, 1905, 1 Ch. 316).

The committee of a lunatic may be authorised to convey "as beneficial owner" (*Re Ray*, 1896, 1 Ch. 468). It seems that where a tenant for life selling under the S. L. Acts conveys "as beneficial owner," this section applies (*Ib.* 474, 475).

The contribution to the expense of paving a new street, apportioned under sect. 77 of the Metropolitan Management Act, 1862, is not a charge on the land, and therefore not an incumbrance within this section (*Egg v. Blayney*, 21 Q. B. D. 107). As to paving expenses under the Public Health Act, 1875, see *Re Bettesworth and Richer*, 37 Ch. D. 535; *Hornsey Local Board v. Monarch &c. Society*, 24 Q. B. Div. 1; *Re Allen and Driscoll*, 1904, 2 Ch. 226). The words "beneficial owner" in a bill of sale introduce the covenants in clause C., and make the bill void under the Bills of Sale Act, 1882, s. 9 (*Ex p. Stanford*, *Re Barber*, 17 Q. B. D. 259).

44 & 45 Vict.
c. 41, s. 8.

Execution of Purchase Deed.

Rights of
purchaser as
to execution.

8.—(1.) On a sale, the purchaser shall not be entitled to require that the conveyance to him be executed in his presence, or in that of his solicitor, as such; but shall be entitled to have, at his own cost, the execution of the conveyance attested by some person appointed by him, who may, if he thinks fit, be his solicitor.

(2.) This section applies only to sales made after the commencement of this act.

See *Viney v. Chaplin*, 2 De G. & J. 468; *Re Bellamy and Metropolitan Board*, 24 Ch. Div. 398.

Production and Safe Custody of Title Deeds.

Acknowledg-
ment of right
to production,
and under-
taking for
safe custody
of documents.

9.—(1.) Where a person retains possession of documents, and gives to another an acknowledgment in writing of the right of that other to production of those documents, and to delivery of copies thereof (in this section called an acknowledgment), that acknowledgment shall have effect as in this section provided.

(2.) An acknowledgment shall bind the documents to which it relates in the possession or under the control of the person who retains them, and in the possession or under the control of every other person having possession or control thereof from time to time, but shall bind each individual possessor or person as long only as he has possession or control thereof; and every person so having possession or control from time to time shall be bound specifically to perform the obligations imposed under this section by an acknowledgment, unless prevented from so doing by fire or other inevitable accident.

(3.) The obligations imposed under this section by an acknowledgment are to be performed from time to time at the request in writing of the person to whom an acknowledgment is given, or of any person, not being a lessee at a rent, having or claiming any estate, interest, or right through or under that person, or otherwise becoming through or under that person interested in or affected by the terms of any document to which the acknowledgment relates.

(4.) The obligations imposed under this section by an acknowledgment are—

(i.) An obligation to produce the documents or any of them at all reasonable times for the purpose of inspection, and of comparison with abstracts or copies thereof, by the person entitled to request production or by any one by him authorised in writing; and

(ii.) An obligation to produce the documents or any of them at any trial, hearing, or examination in any court, or in the execution of any commission, or elsewhere in

the United Kingdom, on any occasion on which production may properly be required, for proving or supporting the title or claim of the person entitled to request production, or for any other purpose relative to that title or claim; and

44 & 45 Vict.
c. 41, s. 9.

- (iii.) An obligation to deliver to the person entitled to request the same true copies or extracts, attested or unattested, of or from the documents or any of them.

(5.) All costs and expenses of or incidental to the specific performance of any obligation imposed under this section by an acknowledgment shall be paid by the person requesting performance.

(6.) An acknowledgment shall not confer any right to damages for loss or destruction of, or injury to, the documents to which it relates, from whatever cause arising.

(7.) Any person claiming to be entitled to the benefit of an acknowledgment may apply to the court for an order directing the production of the documents to which it relates, or any of them, or the delivery of copies of or extracts from those documents or any of them to him, or some person on his behalf; and the court may, if it thinks fit, order production, or production and delivery, accordingly, and may give directions respecting the time, place, terms, and mode of production or delivery, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(8.) An acknowledgment shall by virtue of this act satisfy any liability to give a covenant for production and delivery of copies of or extracts from documents.

(9.) Where a person obtains possession of documents and gives to another an undertaking in writing for safe custody thereof that undertaking shall impose on the person giving it, and on every person having possession or control of the documents from time to time, but on each individual possessor or person as long only as he has possession or control thereof, an obligation to keep the documents safe, whole, uncanceled, and undefaced, unless prevented from so doing by fire or other inevitable accident.

(10.) Any person claiming to be entitled to the benefit of such an undertaking may apply to the court to assess damages for any loss, destruction of, or injury to the documents or any of them, and the court may, if it thinks fit, direct an inquiry respecting the amount of damages, and order payment thereof by the person liable, and may make such order as it thinks fit respecting the costs of the application, or any other matter connected with the application.

(11.) An undertaking for safe custody of documents shall by virtue of this act satisfy any liability to give a covenant for safe custody of documents.

(12.) The rights conferred by an acknowledgment or an undertaking under this section shall be in addition to all such

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c. 41, s. 9.

other rights relative to the production, or inspection, or the obtaining of copies of documents as are not, by virtue of this act, satisfied by the giving of the acknowledgment or undertaking, and shall have effect subject to the terms of the acknowledgment or undertaking, and to any provisions therein contained.

(13.) This section applies only if and as far as a contrary intention is not expressed in the acknowledgment or undertaking.

(14.) This section applies only to an acknowledgment or undertaking given, or a liability respecting documents incurred, after the commencement of this act.

III.—LEASES.

Rent and benefit of lessee's covenants to run with reversion.

10.—(1.) Rent reserved by a lease, and the benefit of every covenant or provision therein contained, having reference to the subject-matter thereof, and on the lessee's part to be observed or performed, and every condition of re-entry and other condition therein contained, shall be annexed and incident to and shall go with the reversionary estate in the land, or in any part thereof, immediately expectant on the term granted by the lease, notwithstanding severance of that reversionary estate, and shall be capable of being recovered, received, enforced, and taken advantage of by the person from time to time entitled, subject to the term, to the income of the whole or any part, as the case may require, of the land leased.

(2.) This section applies only to leases made after the commencement of this act.

The present section, coupled with sect. 12, relate to the transfer (where the reversion is dealt with) of the benefit of conditions, and of the lessee's covenants.

Earlier law as to transfer of benefit of conditions.

The transfer of the benefit of conditions had been previously dealt with by sect. 1 of 32 Hen. 8, c. 34, which gave to assigns of the reversion the same advantages by re-entry against the lessees and their assigns as the lessors had. It had been further dealt with by sect. 3 of the Law of Property Amendment Act, 1859 (*ante*, p. 531, where see note); which last-mentioned section, however, only applied to conditions of re-entry for non-payment of rent where the rent had been legally apportioned.

Of benefit of lessee's covenants.

The transfer of the benefit of the lessee's covenants had also been previously dealt with by sect. 1 of 32 Hen. 8, c. 34, which gave to assigns of the reversion the same advantages by action against lessees and their assigns as the lessors had. The result of the last-mentioned section was that, notwithstanding the destruction of the condition of re-entry, the lessor or his assignee (see *Hastings v. N. E. R. Co.*, 1898, 2 Ch. 674; *Rogers v. Hosegood*, 1900, 2 Ch. 395; *Scaltock v. Harston*, 1 C. P. D. 106; *Hooper v. Clark*, L. R. 2 Q. B. 200) could either distrain for the rent (*Neal v. Mackenzie*, 1 M. & W. 758; see *Jacob v. Kirk*, 2 M. & Rob. 221), or sue on a covenant in the lease to pay rent (*Twynam v. Pickard*, 2 B. & Ald. 105; see *Shepp. T.* 176); whether the action was founded on privity of estate or of contract only (*Swansea v. Thomas*, 10 Q. B. D. 48).

Meaning of "lease."

With respect to the meaning of the word "lease" in sects. 10, 11 and 12, a tenancy agreement has been held to be a "lease" within sect. 10 (*Rickett*

v. *Green*, 1910, 1 K. B. 259; see *Walsh v. Lonsdale*, 21 Ch. Div. 9). See, 44 & 45 Vict. however, *Charrington v. Camp*, 1902, 1 Ch. 389; *Manchester v. Coombs*, c. 41, s. 10. 1901, 2 Ch. 619. It may be pointed out that the word "lease" in sect. 14 was held not to include an agreement for a lease (*Swain v. Ayres*, 21 Q. B. D. 289); and see sect. 18, sub-sect. 17, *post*.! The Act 32 Hen. 8, c. 34, only applied to leases by deed (*Manchester v. Coombs*, 1901, 2 Ch. 613).

With respect to the class of covenants to which sect. 10 refers, see the note Covenants to sect. 11, *post*. It is not necessary, having regard to sect. 10, that these referred to in covenants should be originally entered into with the owner of the legal section. reversion. Thus where a lease was granted by a mortgagor under sect. 18 (*post*, p. 579) and the covenants were made with the mortgagor alone, the mortgagee (who had the legal reversion—*Robbins v. Whyte*, 1906, 1 K. B. 125) was entitled under this section to the benefit of the lessee's covenants on giving notice (*Municipal Society v. Smith*, 22 Q. B. D. 70). The concluding words of sect. 10 extend, it will be observed, the benefit of these covenants to persons beneficially entitled to the income. Having regard to these words, a mortgagor in possession where the mortgagee had given no notice of intention to take possession, was held entitled to sue on a covenant (*Turner v. Walsh*, 1909, 2 K. B. 484).

The assignee of a reversion cannot in respect of a breach committed before the assignment enforce either a covenant (*Martyn v. Williams*, 1 H. & N. 817) or a condition of re-entry (*Cohen v. Tannar*, 1900, 2 Q. B. 609).

With respect to the meaning of the words "severance of that reversionary estate"; distinguish between severance in point of space, and severance in point of time. See note to sect. 3 of the Law of Property Amendment Act, 1859, *ante*, p. 531, and compare the language of sects. 10 and 12. As regards severance, or possible severance, in point of space, it was held independently of this section that where the reversion on a lease became vested in several tenants in common, one of them could, without joining the others, sue on a covenant which bound the successive assigns of the term (*Roberts v. Holland*, 1893, 1 Q. B. 665). But in the case of a condition of re-entry for breach of covenant, one of several coparceners to whom the reversion descended could not alone maintain ejectment for a breach (*Doe v. Lewis*, 5 Ad. & El. 277).

11.—(1.) The obligation of a covenant entered into by a lessor with reference to the subject-matter of the lease shall, if and as far as the lessor has power to bind the reversionary estate immediately expectant on the term granted by the lease, be annexed and incident to and shall go with that reversionary estate, or the several parts thereof, notwithstanding severance of that reversionary estate, and may be taken advantage of and enforced by the person in whom the term is from time to time vested by conveyance, devolution in law, or otherwise; and, if and as far as the lessor has power to bind the person from time to time entitled to that reversionary estate, the obligation aforesaid may be taken advantage of and enforced against any person so entitled.

(2.) This section applies only to leases made after the commencement of this act.

The present section relates to the transfer (where the reversion is dealt with) of the burden of a lessor's covenants. Provision as to this had been previously made by 32 Hen. 8, c. 34, s. 2, which gave lessees the like remedy in respect of covenants against grantees of the reversion as they had against the lessor. The present section in no way alters the old law as to the class of covenants the burden of which will bind the assigns of the reversion (*Davis v. Town Properties*, 1903, 1 Ch. 805). The act 32 Hen. 8, c. 34,

Obligation of lessor's covenants to run with reversion.

Covenants referred to in the section.

44 & 45 Vict.
c. 41, s. 11.

applied to covenants which touched or concerned the thing demised but not to collateral covenants (*Vernon v. Smith*, 5 B. & Ald. 11). In view of the words "with reference to the subject matter of the lease," the present section appears to have the same application (see *Woodall v. Clifton*, arg., 1905, 2 Ch. 270). It does not apply to a covenant which is personal or collateral (*Davis v. Town Properties*, 1903, 1 Ch. 797; compare *Dewar v. Goodman*, 1909, A. C. 72). See note to sect. 5 of the R. P. Act, 1845, *ante*, p. 523.

Renewal
covenants.

As regards covenants to renew leases it has been held in Ireland that such a covenant entered into by A., holding a limited interest in land, does not bind the land beyond that interest; and if A.'s assign acquires the inheritance, it is not bound by the covenant (*Brereton v. Tuohy*, 8 Ir. C. L. R. 190; *Kent v. Stoney*, 9 Ir. Ch. R. 249; *Coe v. Pascoe*, 1899, 1 I. R. 125). And this has been followed in England (*Muller v. Trafford*, 1901, 1 Ch. 54; see *Woodall v. Clifton*, 1905, 2 Ch. 264).

Liability of
lessor after
assignment of
reversion.

As regards the personal liability of a lessor upon express covenants which, where the reversion is assigned, bind the successive owners of the reversion, it has been held that this personal liability is not extinguished by the assignment (*Stuart v. Joy*, 1904, 1 K. B. 368). For a case where an attempt to enforce this personal liability failed by reason of the nature of alleged breach, see *Williams v. Gabriel*, 1906, 1 K. B. 155.

Apportion-
ment of con-
ditions on
severance, &c.

12.—(1.) Notwithstanding the severance by conveyance, surrender, or otherwise, of the reversionary estate in any land comprised in a lease, and notwithstanding the avoidance or cesser in any other manner of the term granted by a lease as to part only of the land comprised therein, every condition or right of re-entry, and every other condition, contained in the lease, shall be apportioned, and shall remain annexed to the severed parts of the reversionary estate as severed, and shall be in force with respect to the term whereon each severed part is reversionary, or the term in any land which has not been surrendered, or as to which the term has not been avoided or has not otherwise ceased, in like manner as if the land comprised in each severed part, or the land as to which the term remains subsisting, as the case may be, had alone originally been comprised in the lease.

(2.) This section applies only to leases made after the commencement of this act.

See note to sect. 10.

On sub-
demise, title
to leasehold
reversion not
to be required.

13.—(1.) On a contract to grant a lease for a term of years to be derived out of a leasehold interest, with a leasehold reversion, the intended lessee shall not have the right to call for the title to that reversion.

(2.) This section applies only if and as far as a contrary intention is not expressed in the contract, and shall have effect subject to the terms of the contract and to the provisions therein contained.

(3.) This section applies only to contracts made after the commencement of this act.

The reversion the title to which cannot be called for is the leasehold reversion to the lease out of which the sub-lease is to be granted (*Gosling v. Woolf*, 1893, 1 Q. B. 39).

This section does not absolve an intending lessor from the duty of telling his intended lessee of any defect of title (*Cresswell v. Davidson*, 56 L. T. 812).

See in connection with this section, V. & P. Act, 1874, s. 2, r. 1 (*ante*, p. 44 & 45 Viet. 550); sect. 3, sub-sect. 1, of the present act, *ante*, p. 559; and sect. 4 of c. 41, s. 13. Conv. Act, 1882, *post*, p. 623.

Forfeiture.

14.—(1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach (*o*).

Restrictions on and relief against forfeiture of leases.

(2.) Where a lessor is proceeding, by action or otherwise, to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief; and the court may grant or refuse relief, as the court, having regard to the proceedings and conduct of the parties under the foregoing provisions of this section, and to all the other circumstances, thinks fit; and in case of relief may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty, or otherwise, including the granting of an injunction to restrain any like breach in the future, as the court, in the circumstances of each case, thinks fit (*p*).

(3.) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee-farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators, and assigns of a lessee, also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators, and assigns of a lessor, also a grantor as aforesaid, and his heirs and assigns (*q*).

(4.) This section applies although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any act of parliament.

(5.) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(6.) This section does not extend—

(i.) To a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of

44 & 45 Vict.
c. 41, s. 14.

the land leased (*r*); or to a condition for forfeiture on the bankruptcy of the lessee (*s*), or on the taking in execution of the lessee's interest; or

- (ii.) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof.

(7.) *The enactments described in Part I. of the second schedule to this act are hereby repealed.*

(8.) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

(9.) This section applies to leases made either before or after the commencement of this act, and shall have effect notwithstanding any stipulation to the contrary.

(o) Before this act it was held, in the case of an agreement to grant a lease subject to usual covenants, that the proviso for re-entry in the lease should only extend to the non-payment of rent (*Hodgkinson v. Crowe*, 10 Ch. 622); and this section has made no difference (*Re Anderton and Milner*, 45 Ch. D. 476).

Sub-sect. (1). This section does not take away the lessor's right of re-entry, but merely affords the lessee a *locus poenitentiae* (*Cresswell v. Davidson*, 56 L. T. 811). It has been said that a notice under this section is a condition precedent to the bringing of an action of ejectment (*North London Co. v. Jacques*, 49 L. T. 659; 32 W. R. 283; *Horsey v. Steiger*, 1899, 2 Q. B. 92; see *Scott v. Brown*, 51 L. T. 746); but not, it seems, of an action for a receiver (*Charrington v. Camp*, 1902, 1 Ch. 386; see *Leney v. Callingham*, 1908, 1 K. B. 79). A notice is also a necessary preliminary to re-entry without action, *e.g.*, by obtaining peaceable possession (*Re Riggs*, 1901, 2 K. B. 20; compare *Howard v. Fanshawe*, 1895, 2 Ch. 581). The form of the notice should comply with the particulars mentioned in sub-sect. (1) (*North London Co. v. Jacques*, *sup.*; see *Jacques v. Harrison*, 12 Q. B. D. 136; *Greenfield v. Hanson*, 30 S. J. 650; *Cronin v. Rogers*, 1 Cab. & Ell. 348). The tenant should have full notice of the breach (*Penton v. Barnett*, 1898, 1 Q. B. 281; *Horsey v. Steiger*, 1899, 2 Q. B. 91). And a notice was held bad where it referred to the wrong covenant (*Jacob v. Down*, 1900, 2 Ch. 156; *Guillemand v. Silverthorne*, 99 L. T. 584); also where it was not sufficiently specific (*Fletcher v. Nokes*, 1897, 1 Ch. 271); also where, there being several alleged breaches, the notice did not give sufficient particulars of one of the breaches, although it did of the others (*Re Serle, Gregory v. Serle*, 1898, 1 Ch. 652). But it is not necessary for the lessor to indicate the particular thing which he requires the lessee to do (*Piggott v. Middlesex*, 1909, 1 Ch. 147). In a case where several breaches were alleged, the notice was not invalid because it turned out the lessor could not rely on some of the breaches (*Pannel v. City of London Co.*, 1900, 1 Ch. 496). And where the notice referred to a continuing breach which was afterwards waived by a claim for rent up to a date later than the notice, a second notice in respect of the subsequent breach was not necessary (*Penton v. Barnett*, 1898, 1 Q. B. 276). Where notice had previously been given under a covenant to repair within three months after notice, a second notice under this sub-section was valid (*Cove v. Smith*, 2 Times L. R. 778). In a case where compensation is not desired, it is not necessary that the notice should require compensation (*Lock v. Pearce*, 1893, 2 Ch. 271). The compensation is, it seems, to be measured by the same rule as damages in an action for breach (*Skinners' Co. v. Knight*, 1891, 2 Q. B. 545). The question what is a reasonable time must go to a jury (*Ib.*; see *Horsey v. Steiger*, 1899, 2 Q. B. 79). It was held that costs incurred by a lessor in employing solicitors and surveyors were not recoverable by him as compensation under sub-sect. (1) (*Skinners' Co. v. Knight*, *sup.*); but

payment by the lessee of such costs might be made a condition of relief under sub-sect. (2) (*Bridge v. Quick*, 61 L. J. Q. B. 375). See now Conv. Act, 1892, s. 2, sub-s. (1), *post*, p. 626. 44 & 45 Vict. c. 41, s. 14.

As to service of the notice, see sect. 67, *post*, p. 611, and cases there quoted.

(p) Sub-sect. (2) extends to breaches committed before the act (*Quilter v. Mapleson*, 9 Q. B. D. 672). It does not apply to cases where, after giving a proper notice, the landlord has already entered (*Ib.* 675; *Rogers v. Rice*, 1892, 2 Ch. 170; *Lock v. Pearce*, 1893, 2 Ch. 274; *Jacques v. Harrison*, 12 Q. B. D. 136, 165; *Scott v. Brown*, 51 L. T. 746). Sub-sect. (2) gives jurisdiction to refuse relief against re-entry which is claimed on the ground of the absence of the notice mentioned in sub-sect. (1) (*Scott v. Brown*, 51 L. T. 746; see *Ruttledge v. Whelan*, 10 L. R. Ir. 263). As to its application to a breach of covenant by a previous holder of an under-lessee's interest, see *Fleetwood v. Hull* (23 Q. B. D. 35). And as to the conditions on which relief will be granted, see *Quilter v. Mapleson* (9 Q. B. D. 672); *North London Land Co. v. Jacques* (49 L. T. 659; 32 W. R. 283); *Bond v. Freke* (1884, W. N. 47); *Mitchison v. Thomson* (1 Cab. & Ell. 72). A lessee who subsequently refused to perform some of these conditions could not be compelled to do so, but was held to have abandoned the order (*Talbot v. Blindell*, 1908, 2 K. B. 114). If in a case of forfeiture relief is granted, the forfeiture is deemed never to have taken place, and the original lease continues for all purposes (*Dendy v. Evans*, 1909, 2 K. B. 902; 1910, 1 K. B. 269).

The lessee's application under sub-sect. (2) cannot be made by originating summons (*Lock v. Pearce*, 1893, 2 Ch. 271).

(q) Enforceable agreements for leases or under-leases are within this section (Conv. Act, 1892, s. 5, *post*, p. 618). See before that act *Swaine v. Ayres* (21 Q. B. D. 289); *Ayling v. Mercer* (1885, W. N. 166); *Strong v. Stringer* (61 L. T. 470). So also a lease by estoppel (*Keith v. Gancia*, 1904, 1 Ch. 783, 791). But not a tenancy at will (*Coatsworth v. Johnson*, 55 L. J. Q. B. 220). As to a tenancy agreement, see *Charrington v. Camp*, 1902, 1 Ch. 386. The word "lessee" includes an assignee of a lease (*Cronin v. Rogers*, 1 Cab. & Ell. 348).

Sect. 14 does not apply as between a ground landlord and an under-lessee (*Cresswell v. Davidson*, 56 L. T. 811; *Burt v. Gray*, 1891, 2 Q. B. 98). Having regard to these decisions, sect. 4 of the Conv. Act, 1892 (which see, *post*, p. 628), was passed (*Nind v. Nineteenth Century Society*, 1894, 2 Q. B. 231).

(r) A condition against disposing of the land leased within this sub-section must be a condition which on its face is against disposing of the land leased. The words accordingly did not include a condition against executing an assignment for the benefit of creditors (*Gentle v. Faulkner*, 1900, 2 Q. B. 267).

Having regard to this sub-section, cases of "assignment, underletting, parting with the possession or disposing," &c., are left to be dealt with according to the ordinary law (*Barrow v. Isaacs*, 1891, 1 Q. B. 430). Under such ordinary law it has been held that forgetfulness is no ground for relieving in respect of a breach of a covenant against underletting (*Barrow v. Isaacs*, *sup.*; *Eastern Telegraph Co. v. Dent*, 1899, 1 Q. B. 835). As to what amounts to a breach of a covenant against assigning, see Woodfall, 16th ed. pp. 269, 699; Foa, 4th ed. 276; *Gentle v. Faulkner*, *sup.*; *Re Riggs, Ex p. Lovell*, 1901, 2 K. B. 16. As to exacting a fine for licence to assign where a lease contains a covenant of this nature, see Conv. Act, 1892, s. 3, *post*, p. 627.

(s) In the case of a forfeiture for bankruptcy, this sub-section only applies after a year from the bankruptcy where no sale has taken place (Conv. Act, (ii) 1892, s. 2, sub-s. (2), *post*, p. 626). Having regard to the definition of bankruptcy contained in sect. 2, sub-sect. (xv.) (*ante*, p. 558), the liquidation of a company was held within the word "bankruptcy" in the present sub-section (*Horsey v. Steiger*, 1899, 2 Q. B. 91). A condition in a lease for forfeiture

44 & 45 Vict. c. 41, s. 14. on liquidation has been held broken by liquidation for the purpose of reconstruction (*Horsey v. Steiger, sup.*; *Fryer v. Ewart*, 1902, A. C. 187; see *Ex p. Gould, Re Walker*, 13 Q. B. D. 454).

Sub-sect. (8). Formerly a tenant might at an indefinite time after he was ejected have been relieved in Chancery against the mere non-payment of rent (*Bowser v. Colby*, 1 Hare, 125); and the grant of a new lease would have been ordered (*Taylor v. Knight*, 4 Vin. Abr. ch. pl. 31). By the Common Law Proc. Act, 1852, s. 210 (substantially re-enacting 4 Geo. 2, c. 28 s. 11), relief can only be given if the tenant comes within six months after execution executed. Sect. 211 makes relief in equity conditional on certain payments of rent and costs (see *Bowser v. Colby*, 1 Hare, 125), and by sect. 212 the tenant may stay ejectment on payment of rent and costs. It is also provided that upon equity granting relief the tenant shall hold according to the old lease without any new lease. By the C. L. P. Act, 1860, s. 1, power was given to the Common Law Courts to give relief in a summary way, as in the Court of Chancery, upon the same terms and with the same results.

Where proceedings for relief were commenced within six months of the landlord's resumption of possession, relief was granted to the tenant, notwithstanding that such resumption was peaceable (*Howard v. Fanshawe*, 1895, 2 Ch. 581). In the last case the original lease was held to continue under sect. 212 of the C. L. P. Act, 1852 (*Ib.*). Relief was refused after ejectment when asked by a mortgagee by subdemise in the absence of the lessee (*Hare v. Elmes*, 1893, 1 Q. B. 604; see *Newbolt v. Bingham*, 72 L. T. 852); but was granted where sufficient reason was shown for not making the lessee party (*Humphreys v. Morten*, 1905, 1 Ch. 739). As to the costs payable on relief being granted, see *Humphreys v. Morten, sup.*

IV.—MORTGAGES.

Obligation on mortgagee to transfer instead of re-conveying. 15.—(1.) Where a mortgagor is entitled to redeem, he shall, by virtue of this act, have power to require the mortgagee, instead of re-conveying, and on the terms on which he would be bound to re-convey, to assign the mortgage debt and convey the mortgaged property to any third person, as the mortgagor directs; and the mortgagee shall, by virtue of this act, be bound to assign and convey accordingly.

(2.) This section does not apply in the case of a mortgagee being or having been in possession.

(3.) This section applies to mortgages made either before or after the commencement of this act, and shall have effect notwithstanding any stipulation to the contrary.

Where there were first and second mortgages, it was held, under this section, that the mortgagor could not require the first mortgagee to assign, without the consent of the second mortgagee (*Teevan v. Smith*, 20 Ch. Div. 724). After this decision, the 12th section of the Conv. Act, 1882 (*post*, p. 625), was passed.

The word "terms" in this section does not refer merely to the amount of principal, interest, and costs, but includes any other term, such as a trust. So a mortgagor who is a trustee cannot claim a simple transfer (*Alderson v. Elgey*, 26 Ch. D. 567). As to who are entitled to redeem, see *Coote on Mortgages*, 7th ed. 713, *Seton*, 6th ed. p. 1935. This section was held applicable to the lien of a company on the shares of a shareholder (*Everitt v. Automatic Weighing Machine Co.*, 1892, 3 Ch. 506).

Power for mortgagor to inspect title deeds. 16.—(1.) A mortgagor, as long as his right to redeem subsists, shall, by virtue of this act, be entitled from time to time,

at reasonable times, on his request, and at his own cost, and on payment of the mortgagee's costs and expenses in this behalf, to inspect and make copies or abstracts of or extracts from the documents of title relating to the mortgaged property in the custody or power of the mortgagee.

44 & 45 Vict.
c. 41, s. 16.

(2.) This section applies only to mortgages made after the commencement of this act, and shall have effect notwithstanding any stipulation to the contrary.

A director of a mortgage company was refused inspection of a subsidiary mortgage deed (*Burn v. London & S. Wales Co.*, 1890, W. N. 209).

Apart from this section, the rule is, that after a mortgage has become absolute the mortgagor cannot see the title deeds in the hands of the mortgagee without paying him off (*Chichester v. Donegall*, 5 Ch. 502; *Bank of N. S. W. v. O'Connor*, 14 App. Cas. 283).

17.—(1.) A mortgagor seeking to redeem any one mortgage, shall, by virtue of this act, be entitled to do so, without paying any money due under any separate mortgage made by him, or by any person through whom he claims, on property other than that comprised in the mortgage which he seeks to redeem.

Restriction
on consoli-
dation of
mortgages.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deeds or one of them.

(3.) This section applies only where the mortgages or one of them are or is made after the commencement of this act.

Before this act the right to consolidate mortgages was well established. It meant the right to treat them as one and decline to be redeemed as to any unless redeemed as to all (*Jennings v. Jordan*, 6 A. C. 700). This right (which could only arise when all the mortgages were originally made by the same mortgagor, *Sharp v. Rickards*, 1909, 1 Ch. 109) is explained in *Pledge v. White*, 1895, A. C. 192; Coote, 873.

The above section deals with claims of consolidation over different properties in several mortgages (*Re Salmon*, 1903, 1 K. B. 149); and governs cases where redemption is sought by a puisne mortgagee as well as by a mortgagor (*Hughes v. Britannia Society*, 1906, 2 Ch. 611). In any such case where one of the mortgages is made since 1881, the section prevents consolidation except where there is a contrary intention. A sufficient intention can be expressed by one of the mortgages (*Re Salmon, sup.*); and where it occurs, the old law applies (*Hughes v. Britannia Society, sup.*); but the right of consolidation is not extended (*Bird v. Wenn*, 33 Ch. D. 218).

The costs of foreclosing two mortgages cannot, in cases to which this section applies, be consolidated, but must be apportioned (*De Cauz v. Skipper*, 31 Ch. Div. 635). An agreement in a memorandum of deposit binding the mortgagor to execute a legal mortgage in such form as the mortgagee might require did not entitle the latter to the insertion of a clause excluding this section (*Farmer v. Pitt*, 1902, 1 Ch. 954).

Leases.

18.—(1.) A mortgagor of land while in possession shall, as against every incumbrancer, have, by virtue of this act, power to make from time to time any such lease of the mortgaged land, or any part thereof, as is in this section described and authorized.

Leasing
powers of
mortgagor
and of mort-
gagee in
possession.

44 & 45 Vict.
c. 41, s. 18.

(2.) A mortgagee of land while in possession shall, as against all prior incumbrancers, if any, and as against the mortgagor, have, by virtue of this act, power to make from time to time any such lease as aforesaid.

(3.) The leases which this section authorizes are—

(i.) An agricultural or occupation lease for any term not exceeding twenty-one years; and

(ii.) A building lease for any term not exceeding ninety-nine years.

(4.) Every person making a lease under this section may execute and do all assurances and things necessary or proper in that behalf.

(5.) Every such lease shall be made to take effect in possession not later than twelve months after its date.

(6.) Every such lease shall reserve the best rent that can reasonably be obtained, regard being had to the circumstances of the case, but without any fine being taken.

(7.) Every such lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified not exceeding thirty days.

(8.) A counterpart of every such lease shall be executed by the lessee and delivered to the lessor, of which execution and delivery the execution of the lease by the lessor shall, in favour of the lessee and all persons deriving title under him, be sufficient evidence.

(9.) Every such building lease shall be made in consideration of the lessee, or some person by whose direction the lease is granted, having erected, or agreeing to erect within not more than five years from the date of the lease, buildings, new or additional, or having improved or repaired buildings, or agreeing to improve or repair building within that time, or having executed, or agreeing to execute, within that time, on the land leased, an improvement for or in connexion with building purposes (*l*).

(10.) In any such building lease a peppercorn rent, or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years, or any less part of the term.

(11.) In case of a lease by the mortgagor, he shall, within one month after making the lease, deliver to the mortgagee, or, where there are more than one, to the mortgagee first in priority, a counterpart of the lease duly executed by the lessee; but the lessee shall not be concerned to see that this provision is complied with.

(12.) A contract to make or accept a lease under this section may be enforced by or against every person on whom the lease if granted would be binding.

(13.) This section applies only if and as far as a contrary intention is not expressed by the mortgagor and mortgagee in

the mortgage deed, or otherwise in writing, and shall have effect subject to the terms of the mortgage deed or of any such writing and to the provisions therein contained. 44 & 45 Vict.
c. 41, s. 18.

(14.) Nothing in this act shall prevent the mortgage deed from reserving to or conferring on the mortgagor or the mortgagee, or both, any further or other powers of leasing or having reference to leasing; and any further or other powers so reserved or conferred shall be exerciseable, as far as may be, as if they were conferred by this act, and with all the like incidents, effects, and consequences, unless a contrary intention is expressed in the mortgage deed.

(15.) Nothing in this act shall be construed to enable a mortgagor or mortgagee to make a lease for any longer term or on any other conditions than such as could have been granted or imposed by the mortgagor, with the concurrence of all the incumbrancers, if this act had not been passed.

(16.) This section applies only in case of a mortgage made after the commencement of this act; but the provisions thereof, or any of them, may, by agreement in writing made after the commencement of this act, between mortgagor and mortgagee, be applied to a mortgage made before the commencement of this act, so, nevertheless, that any such agreement shall not prejudicially affect any right or interest of any mortgagee not joining in or adopting the agreement.

(17.) The provisions of this section referring to a lease shall be construed to extend and apply, as far as circumstances admit, to any letting, and to an agreement, whether in writing or not, for leasing or letting.

(t) See as to the statement of the "consideration" mentioned in subsect. 9, and sect. 55 (*post*), *Renner v. Tolley*, 1893, W. N. 90.

Before this act, a lease could not be granted by a mortgagor in possession so as to bind the mortgagee (*Robbins v. Whyte*, 1906, 1 K. B. 129; see *Keith v. Gancia*, 1904, 1 Ch. 783). Or (in the absence of necessity) by a mortgagee in possession so as to bind the mortgagor (*Hungerford v. Clay*, 9 Mod. 1; *Franklin v. Ball*, 33 Beav. 560).

Since this act, a lease by a mortgagor under this section has the same effect as if the mortgagees had joined (*Wilson v. Queen's Club*, 1891, 3 Ch. 525). And the mortgagee, on giving notice to the tenant to pay rent to himself can sue on the tenant's covenants (*Municipal Society v. Smith*, 22 Q. B. Div. 70; compare the mortgagor's right to sue where no such notice, *Turner v. Walsh*, 1909, 2 K. B. 484). Where a first mortgagee and the mortgagor in possession granted a lease, the lessee held under title derived from the mortgagor leasing under this section (as being the better title), and was bound by restrictive covenants binding on the mortgagor (*John Brothers Co. v. Holmes*, 1900, 1 Ch. 188).

A mortgagor in possession can under this section grant a lease of a mortgaged house with sporting rights over other parts of the mortgaged land (*Brown v. Peto*, 1900, 2 Q. B. 653); and may give the lessee an option to determine the lease or to renew it (*King v. Bird*, 1909, 1 K. B. 837); but must not include in one lease at a single rent land comprised in the mortgage with land not so comprised (*Ib.*). He cannot without the concurrence of his mortgagee accept a surrender of a lease granted by himself (*Robbins v. Whyte*, 1906, 1 K. B. 125).

Where an agreement dated before the act for a mortgage stipulated for all

44 & 45 Vict. c. 41, s. 18. clauses usual in mortgages, the mortgagee was not entitled to a clause excluding sect. 18, sub-sect. (1) (*Re Nugent and Riley*, 49 L. T. 132. See *Farmer v. Pitt*, 1902, 1 Ch. 954). A trustee advancing money on mortgage is not bound to exclude the mortgagor's power of granting occupation leases (*Shaw v. Cates*, 1909, 1 Ch. 408).

Sale ; Insurance ; Receiver ; Timber.

Powers incident to estate or interest of mortgagee.

19.—(1.) A mortgagee, where the mortgage is made by deed, shall, by virtue of this act, have the following powers, to the like extent, as if they had been in terms conferred by the mortgage deed, but not further (namely) (*u*):

- (i.) A power when the mortgage money has become due, to sell, or to concur with any other person in selling, the mortgaged property, or any part thereof, either subject to prior charges, or not, and either together or in lots, by public auction or by private contract, subject to such conditions respecting title, or evidence of title, or other matter, as he (the mortgagee) thinks fit, with power to vary any contract for sale, and to buy in at an auction, or to rescind any contract for sale, and to re-sell, without being answerable for any loss occasioned thereby (*x*); and
- (ii.) A power, at any time after the date of the mortgage deed, to insure and keep insured against loss or damage by fire any building, or any effects or property of an insurable nature, whether affixed to the freehold or not, being or forming part of the mortgaged property, and the premiums paid for any such insurance shall be a charge on the mortgaged property, in addition to the mortgage money, and with the same priority, and with interest at the same rate, as the mortgage money; and
- (iii.) A power, when the mortgage money has become due, to appoint a receiver of the income of the mortgaged property, or of any part thereof (*y*); and
- (iv.) A power, while the mortgagee is in possession, to cut and sell timber and other trees ripe for cutting, and not planted or left standing for shelter or ornament, or to contract for any such cutting and sale, to be completed within any time not exceeding twelve months from the making of the contract.

(2.) The provisions of this act relating to the foregoing powers, comprised either in this section, or in any subsequent section regulating the exercise of those powers, may be varied or extended by the mortgage deed, and, as so varied or extended, shall, as far as may be, operate in the like manner and with all the like incidents, effects, and consequences, as if such variations or extensions were contained in this act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the mortgage deed, and shall have effect subject to the terms of the mortgage deed and to the provisions therein contained. 44 & 45 Vict.
c. 41, s. 19.

(4.) This section applies only where the mortgage deed is executed after the commencement of this act.

(u) As to the appointment, powers, &c., of a receiver, see sect. 24, *post*, p. 586.

Like powers may be exercised in certain events by the owner of a rent-charge created under the Copyhold Act, 1894 (57 & 58 Vict. c. 46, s. 30 (4)).

(x) The power of sale under this section can, after an order *nisi* for foreclosure, be exercised with leave of court (*Stevens v. Theatres*, 1903, 1 Ch. 863). An equitable mortgagee selling under this section can only sell his interest under the mortgage (*Re Hodson and Howe*, 35 Ch. Div. 668; compare *Hiatt v. Helman*, 19 W. R. 694, under 23 & 24 Vict. c. 145, s. 15, *ante*, p. 546). This section does not give power to sell fixtures apart from the freehold (*Re Yates, Batchelor v. Yates*, 38 Ch. Div. 112; see *Born v. Turner*, 1900, 2 Ch. 215). But a mortgagee selling part of the mortgaged property can give an implied easement of light over the unsold part (*Born v. Turner*, 1900, 2 Ch. 211).

The power of sale given by this section is not incorporated in a bill of sale in the statutory form (*Calvert v. Thomas*, 19 Q. B. Div. 204). It has been said that it does not apply in the case of debentures of a joint-stock company (*Blaker v. Herts Co.*, 41 Ch. D. 399); but see *Palmer's Comp. Precedents*, 9th ed. Part III. 403. Apart from this act a mortgagee of stock or shares, who has the legal title, can without express power sell on default in payment after a reasonable time (*Deverges v. Sandeman*, 1902, 1 Ch. 579).

(y) When a foreclosure action is pending, it is desirable that the appointment of a receiver should be made, not by the mortgagee but by the court (*Tillet v. Nixon*, 25 Ch. D. 238). As to whether a receiver can be appointed, under this section, of mortgaged book debts, see *Rutter v. Everett* (1895, 2 Ch. 872).

20. A mortgagee shall not exercise the power of sale conferred by this act unless and until— Regulation of
exercise of
power of sale.

- (i.) Notice requiring payment of the mortgage money has been served on the mortgagor or one of several mortgagors, and default has been made in payment of the mortgage money, or of part thereof, for three months after such service (z); or
- (ii.) Some interest under the mortgage is in arrear and unpaid for two months after becoming due; or
- (iii.) There has been a breach of some provision contained in the mortgage deed or in this act, and on the part of the mortgagor, or of some person concurring in making the mortgage, to be observed or performed, other than and besides a covenant for payment of the mortgage money or interest thereon.

(z) A notice under sub-sect. (1) does not prevent a sale under sub-sects. (2) and (3), as soon as the condition of those sub-sections are fulfilled (*Farrar v. Farrars, Limited*, 40 Ch. D. 395). As to notices, see sect. 67, *post*, p. 611.

44 & 45 Vict.
c. 41, s. 20.

A notice under sub-sect. (1), given by a mortgagee who holds several mortgages executed by the same mortgagor, and has excluded sect. 17 of this act, does not affect the mortgagee's right to consolidate (*Griffith v. Pound*, 45 Ch. D. 553). Where the notice fixed a date for payment, the three months' "default" ran from the service of the notice, not from the fixed date (*Barke v. Illingworth*, 1908, 2 Ch. 20).

The "interest in arrear" may, where a mortgagor can pay by instalments, be part of an instalment (*Walsh v. Derrick*, 19 Times L. R. 209).

Conveyance,
receipt, &c.
on sale.

21.—(1.) A mortgagee exercising the power of sale conferred by this act shall have power, by deed, to convey the property sold, for such estate and interest therein as is the subject of the mortgage, freed from all estates, interests, and rights to which the mortgage has priority, but subject to all estates, interests, and rights which have priority to the mortgage; except that, in the case of copyhold or customary land, the legal right to admittance shall not pass by a deed under this section, unless the deed is sufficient otherwise by law, or is sufficient by custom, in that behalf (a).

(2.) Where a conveyance is made in professed exercise of the power of sale conferred by this act, the title of the purchaser shall not be impeachable on the ground that no case had arisen to authorize the sale, or that due notice was not given, or that the power was otherwise improperly or irregularly exercised; but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power (b).

(3.) The money which is received by the mortgagee, arising from the sale, after discharge of prior incumbrances to which the sale is not made subject, if any, or after payment into court under this act of a sum to meet any prior incumbrance, shall be held by him in trust to be applied by him, first, in payment of all costs, charges, and expenses, properly incurred by him, as incident to the sale or any attempted sale, or otherwise; and secondly, in discharge of the mortgage money, interest, and costs, and other money, if any, due under the mortgage; and the residue of the money so received shall be paid to the person entitled to the mortgaged property, or authorized to give receipts for the proceeds of the sale thereof (c).

(4.) The power of sale conferred by this act may be exercised by any person for the time being entitled to receive and give a discharge for the mortgage money (d).

(5.) The power of sale conferred by this act shall not affect the right of foreclosure.

(6.) The mortgagee, his executors, administrators, or assigns, shall not be answerable for any involuntary loss happening in or about the exercise or execution of the power of sale conferred by this act or of any trust connected therewith.

(7.) At any time after the power of sale conferred by this act has become exerciseable, the person entitled to exercise the same may demand and recover from any person, other than a person

having in the mortgaged property an estate, interest, or right in priority to the mortgage, all the deeds and documents relating to the property, or to the title thereto, which a purchaser under the power of sale would be entitled to demand and recover from him. 44 & 45 Vict.
c. 41, s. 21.

(a) This section does not enable an equitable mortgagee to convey the legal estate (*Re Hodson and Howe*, 35 Ch. Div. 668).

(b) Sub-sect. 2 does not apply until after conveyance (*Life Interest Corporation v. Hand in Hand*, 1898, 2 Ch. 238; compare the language of the proviso in *Dicker v. Angerstein*, 3 Ch. D. 600). Before conveyance the sub-sect. does not preclude a purchaser from inquiring whether the power is exerciseable or from proving that it was improperly exercised (*Ib.*). After conveyance, however, the sub-sect. absolutely protects a *bonâ fide* purchaser who has no notice of any irregularity in the sale, at all events when he has the legal estate (*Bailey v. Barnes*, 1894, 1 Ch. 25; see *Re Thompson and Holt*, 44 Ch. D. 492); but not a purchaser who has notice (*Bailey v. Barnes*, 1894, 1 Ch. 30; *Selwyn v. Graft*, 38 Ch. Div. 273). See, as to registering a title acquired under this sub-section, *Re Tritton* (1891, W. N. 194). The damages under this sub-section may be recovered by common law action in the county court when the amount is within the jurisdiction (*Ames v. Higdon*, 69 L. T. 292).

(c) A mortgagee with notice of a subsequent mortgage will be answerable if, on exercising his power of sale, he pays over the surplus to the wrong person (*West London Bank v. Reliance Society*, 29 Ch. Div. 962). Sub-sect. (3).

(d) Sub-sect. 4 does not extend to everybody who has power to give a receipt, *e.g.*, an agent. It applies only to those persons who are either mortgagees or have vested in them the property of the mortgagees, such as executors (*Re Dowson and Jenkins*, 1904, 2 Ch. 223). On the construction of a mortgage dated before this Act, an express power of sale was not exerciseable by a transferee (*Re Rumney and Smith*, 1897, 2 Ch. 351). Sub-sect. (4).

22.—(1.) The receipt in writing of a mortgagee shall be a sufficient discharge for any money arising under the power of sale conferred by this act, or for any money or securities comprised in his mortgage, or arising thereunder; and a person paying or transferring the same to the mortgagee shall not be concerned to inquire whether any money remains due under the mortgage. Mortgagee's receipts, discharges, &c.

(2.) Money received by a mortgagee under his mortgage or from the proceeds of securities comprised in his mortgage shall be applied in like manner as in this act directed respecting money received by him arising from a sale under the power of sale conferred by this act; but with this variation, that the costs, charges, and expenses payable shall include the costs, charges, and expenses properly incurred of recovering and receiving the money or securities, and of conversion of securities into money, instead of those incident to sale.

The effect of this section is that trustees of a fund the beneficial interest in which is mortgaged are, if acting *bonâ fide*, perfectly safe in paying over the money to the mortgagee, and are not concerned to inquire whether any money remains due on the mortgage (*Hockey v. Weston*, 1898, 1 Ch. 356; see *Re Hancock, Hancock v. Berrey*, 59 L. T. 199; and compare *Re Hazeldine*, 1907, 1 Ch. 686). But they may refuse to pay over on reasonable

44 & 45 Vict. c. 41, s. 22. grounds—*e.g.* where they know that there may be some dispute as to the amount due (*Ib.*), or where they have notice of subsequent incumbrances (*Re Bell, Jeffery v. Sales*, 1896, 1 Ch. 1).

Amount and application of insurance money.

23.—(1.) The amount of an insurance effected by a mortgagee against loss or damage by fire under the power in that behalf conferred by this act shall not exceed the amount specified in the mortgage deed, or, if no amount is therein specified, then shall not exceed two third parts of the amount that would be required, in cases of total destruction, to restore the property insured.

(2.) An insurance shall not, under the power conferred by this act, be effected by a mortgagee in any of the following cases (namely):

(i.) Where there is a declaration in the mortgage deed that no insurance is required:

(ii.) Where an insurance is kept up by or on behalf of the mortgagor in accordance with the mortgage deed:

(iii.) Where the mortgage deed contains no stipulation respecting insurance, and an insurance is kept up by or on behalf of the mortgagor, to the amount in which the mortgagee is by this act authorized to insure.

(3.) All money received on an insurance effected under the mortgage deed or under this act shall, if the mortgagee so requires, be applied by the mortgagor in making good the loss or damage in respect of which the money is received.

(4.) Without prejudice to any obligation to the contrary imposed by law, or by special contract, a mortgagee may require that all money received on an insurance be applied in or towards discharge of the money due under his mortgage.

Appointment, powers, remuneration, and duties of receiver.

24.—(1.) A mortgagee entitled to appoint a receiver under the power in that behalf conferred by this act shall not appoint a receiver until he has become entitled to exercise the power of sale conferred by this act, but may then, by writing under his hand, appoint such person as he thinks fit to be receiver.

(2.) The receiver shall be deemed to be the agent of the mortgagor; and the mortgagor shall be solely responsible for the receiver's acts or defaults, unless the mortgage deed otherwise provides.

(3.) The receiver shall have power to demand and recover all the income of the property of which he is appointed receiver, by action, distress, or otherwise, in the name either of the mortgagor or of the mortgagee, to the full extent of the estate or interest which the mortgagor could dispose of, and to give effectual receipts, accordingly, for the same.

(4.) A person paying money to the receiver shall not be concerned to inquire whether any case has happened to authorize the receiver to act.

(5.) The receiver may be removed, and a new receiver may

be appointed, from time to time by the mortgagee by writing under his hand. 44 & 45 Vict.
c. 41, s. 24.

(6.) The receiver shall be entitled to retain out of any money received by him, for his remuneration, and in satisfaction of all costs, charges, and expenses incurred by him as receiver, a commission at such rate, not exceeding five per centum on the gross amount of all money received, as is specified in his appointment, and if no rate is so specified, then at the rate of five per centum on that gross amount, or at such higher rate as the court thinks fit to allow, on application made by him for that purpose.

(7.) The receiver shall, if so directed in writing by the mortgagee, insure and keep insured against loss or damage by fire, out of the money received by him, any building, effects, or property comprised in the mortgage, whether affixed to the freehold or not, being of an insurable nature.

(8.) The receiver shall apply all money received by him as follows (namely):

(i.) In discharge of all rents, taxes, rates, and outgoings whatever affecting the mortgaged property; and

(ii.) In keeping down all annual sums or other payments, and the interest on all principal sums, having priority to the mortgage in right whereof he is receiver; and

(iii.) In payment of his commission, and of the premiums on fire, life, or other insurances, if any, properly payable under the mortgage deed or under this act, and the cost of executing necessary or proper repairs directed in writing by the mortgagee; and

(iv.) In payment of the interest accruing due in respect of any principal money due under the mortgage;

and shall pay the residue of the money received by him to the person who, but for the possession of the receiver, would have been entitled to receive the income of the mortgaged property, or who is otherwise entitled to that property (*e*).

The appointment of a receiver under the act determined the interest of a mortgagor in possession, and extinguished or suspended the interest of a tenant by elegit under a judgment obtained against such mortgagor (*Johns v. Pink*, 1900, 1 Ch. 296). After the appointment of a receiver the mortgagor cannot distrain without the receiver's authority (*Woolston v. Ross*, 1900, 1 Ch. 788). Even where the receiver refuses, or is negligent (*ib.*; *Bayley v. Went*, 51 L. T. 764). In the case of a mortgage of book debts, the appointment of a receiver without notice being given to the debtors will not take the book debts out of the order and disposition of the mortgagor (*Rutter v. Everett*, 1895, 2 Ch. 872). The mere fact of a receiver having been appointed will not prevent an application by the mortgagee for judgment under R. S. C. Ord. XIV. (*Lynde v. Waithman*, 1895, 2 Q. B. 180; see *Poulett v. Hill*, 1893, 1 Ch. 277).

In a case where sub-sect. 2 was in question, it was said that the section Sub-sect. (2) only applies as between mortgagor and mortgagee, and where a receiver who had originally been appointed under this act by a mortgagee of leaseholds by sub-demise was subsequently appointed receiver by the court, his agency for the mortgagor thereupon ceased (*Hand v. Blow*, 1901, 2 Ch. 732).

In the last case a claim by the ground landlord to be paid ground rent out of moneys in the hands of the receiver representing property of the mortgagor

44 & 45 Vict. c. 41, s. 24. was disallowed (*Ib.*). In another case where a mortgagee of leaseholds by sub-demise appointed a receiver under this act, the payment of rent to such receiver by the occupying tenant did not under the circumstances create a tenancy by estoppel as between the tenant and the mortgagee (*Serjeant v. Nash*, 1903, 2 K. B. 304).

Sub-sect. 2 is a statutory recognition and approval of the previous practice in conveyancing of making the mortgagee's appointee the agent of the mortgagor (*Gaskell v. Gosling*, 1896, 1 Q. B. 693; 1897, A. C. 596). Such previous practice is stated, *Jefferys v. Dickson*, 1 Ch. 190. The effect of sub-sect. 2, however, may be modified by the provisions of the mortgage deed, as in *Richards v. Kidderminster*, 1896, 2 Ch. 220; compare *Robinson v. Chic*, 1905, 2 Ch. 123, where a receiver appointed under a power in debentures was held to be the agent of the debenture holders.

Sub-sect. (3). A receiver under this act was permitted to sue for rent in the name of the mortgagor's heir on giving an indemnity (*Fairholme v. Kennedy*, 24 L. R. Ir. 498).

Sub-sect. (8). As regards repairs executed by the receiver, the cost will not, on taking the accounts, be allowed against the mortgagee where he had not directed such repairs in writing (*White v. Metcalfe*, 1903, 2 Ch. 567). Having regard to sub-sect. 8, it seems that a payment by a receiver under this act of an instalment of an unsecured debt of the mortgagor, would not keep such a debt alive as against the mortgagor's estate (*Re Hale, Lilley v. Foad*, 1899, 2 Ch. 117; compare *Wandsworth v. Worthington*, 1906, 1 K. B. 420, where payments by a receiver in lunacy were held to have been authorized by the order appointing him and to keep a debt alive).

Action respecting Mortgage.

Sale of
mortgaged
property in
action for
foreclosure,
&c.

25.—(1.) Any person entitled to redeem mortgaged property may have a judgment or order for sale instead of for redemption in an action brought by him either for redemption alone, or for sale alone, or for sale or redemption, in the alternative.

(2.) In any action, whether for foreclosure, or for redemption, or for sale, or for the raising and payment in any manner of mortgage money, the court, on the request of the mortgagee, or of any person interested either in the mortgage money or in the right of redemption, and notwithstanding the dissent of any other person, and notwithstanding that the mortgagee or any person so interested does not appear in the action, and without allowing any time for redemption or for payment of any mortgage money, may, if it thinks fit, direct a sale of the mortgaged property, on such terms as it thinks fit, including, if it thinks fit, the deposit in court of a reasonable sum fixed by the court, to meet the expenses of sale and to secure performance of the terms.

(3.) But, in an action brought by a person interested in the right of redemption and seeking a sale, the court may, on the application of any defendant, direct the plaintiff to give such security for costs as the court thinks fit, and may give the conduct of the sale to any defendant, and may give such directions as it thinks fit respecting the costs of the defendants or any of them.

(4.) In any case within this section the court may, if it thinks fit, direct a sale without previously determining the priorities of incumbrancers.

(5.) This section applies to actions brought either before or after the commencement of this act. 44 & 45 Vict. c. 41, s. 25.

(6.) *The enactment described in Part II. of the second schedule to this act is hereby repealed.* 15 & 16 Vict. c. 86, s. 48.

(7.) This section does not extend to Ireland.

The powers given by sub-sects. (1) and (2) are distinct (*Woolley v. Colman*, 21 Ch. D. 873). It has been said that the order for sale under sub-sect. (1) is a matter of right (*Clarke v. Pannell*, 29 S. J. 147). The discretion referred to in sub-sect. (2) must be exercised judicially (*Merchant Banking Co. v. London, &c.*, 55 L. J. Ch. 479). Where a mortgagee's notice to pay off had expired and his power of sale was exerciseable, and the mortgagor commenced an action for sale or redemption, an order for sale was made on the application of the mortgagor, such sale to be conducted by himself out of court, and to take place within three months (*Brewer v. Square*, 1892, 2 Ch. 111). In a foreclosure action a sale was ordered at the request of the mortgagor upon his depositing 150*l.* in court to meet expenses of sale (*Weston v. Davidson*, 1882, W. N. 28). A sale has been ordered under sub-sect. (2), at the request of an equitable mortgagee by simple deposit (*Oldham v. Stringer*, 51 L. T. 895; 33 W. R. 251); and of a second mortgagee (*Saul v. Pattinson*, 54 L. T. 670; 55 L. J. Ch. 831); and of a fourth mortgagee on a deposit in court being made (*Norman v. Beaumont*, 1893, W. N. 45). A sale may be ordered of so much only as will satisfy the plaintiff's claim (*Wade v. Wilson*, 22 Ch. D. 235). At the request of the mortgagee, orders for sale have been made without allowing time for redemption (*Wade v. Wilson, sup.*; *Oldham v. Stringer, sup.*); but such time will usually be given (*Green v. Biggs*, 52 L. T. 680). Three months have been given (*Ib.*, *Jones v. Harris*, 55 L. T. 884). Ten days, where the security was clearly insufficient (*Charlewood v. Hammer*, 28 S. J. 710; see *Williams v. Owen*, 27 S. J. 256).

The sale may be ordered out of court, a reserve price being fixed and the purchase-money being paid into court (*Union Bank v. Ingram*, 20 Ch. D. 463; *Woolley v. Colman*, 21 Ch. D. 169; *Davies v. Wright*, 32 Ch. D. 220; see R. S. C. Ord. 51, r. 1a). But a sale out of court can only be ordered when all parties interested are before the court or bound by the order (R. S. C. Ord. 51, r. 1a); e.g., a second mortgagee (*Brewer v. Square*, 1892, 2 Ch. 114). As to when a sale is "altogether out of court," see *Cumberland Banking Co. v. Maryport Co.* (1892, 1 Ch. 92).

The conduct of the sale has been given to the mortgagor (*Woolley v. Colman, sup.*; *Davies v. Wright, sup.*; *Brewer v. Square, sup.*; see *Christy v. Van Tromp*, 1886, W. N. 111). Where the mortgagor requests a sale he should give security for costs where the conduct is to be by the mortgagee (*Davies v. Wright*, 32 Ch. D. 220; see *Weston v. Davidson*, 1882, W. N. 28); and the mortgagor has been ordered to give security where he has the conduct himself (*Woolley v. Colman*, 21 Ch. D. 169; *Brewer v. Square*, 1892, 2 Ch. 111; but see *Davies v. Wright, sup.*). When the mortgagee requests the sale and the conduct is given to the mortgagor, the mortgagor need not give security (*Davies v. Wright, sup.*). The conduct has been given to a fourth mortgagee on giving security (*Norman v. Beaumont*, 1893, W. N. 45).

A sale may be ordered on an interlocutory application (*Woolley v. Colman*, 21 Ch. D. 173); or upon motion for judgment (*Wade v. Wilson*, 22 Ch. D. 235); or at any time before a foreclosure decree has become absolute (*Union Bank v. Ingram*, 20 Ch. D. 463); as when application for final order is made (*Weston v. Davidson*, 1882, W. N. 28).

A sale has been refused when in an action for foreclosure alone it was asked for in the absence of the mortgagor, and without notice to him (*South Western Bank v. Turner*, 47 L. T. 433; 31 W. R. 113); also when asked by a second mortgagee in a case where the value was clearly insufficient for the first mortgage (*Merchant Banking Co. v. London, &c.*, 55 L. J. Ch. 479; see *Provident Clerks' Assoc. v. Lewis*, 62 L. J. Ch. 89; 67 L. T. 644, where

Sale at request, of mortgagor;

of mortgagee.

Sale out of court.

Conduct of sale.

At what time sale will be ordered.

Sale refused.

44 & 45 Vict. c. 41, s. 25. see also for other reasons); also when the order asked for would necessarily include property not subject to the mortgage (*Gibbs v. Hayden*, 47 L. T. 184; 30 W. R. 725). This section does not enable the court, at the instance of debenture holders, to order a sale of an undertaking of a public character (*Blaker v. Herts, &c. Co.*, 41 Ch. D. 406).

V.—STATUTORY MORTGAGE.

Form of
statutory
mortgage in
schedule.

26.—(1.) A mortgage of freehold or leasehold land may be made by a deed expressed to be made by way of statutory mortgage, being in the form given in Part I. of the third schedule to this act, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) There shall be deemed to be included, and there shall by virtue of this act be implied, in the mortgage deed—

First, a covenant with the mortgagee by the person expressed therein to convey as mortgagor to the effect following (namely):

That the mortgagor will, on the stated day, pay to the mortgagee the stated mortgage money, with interest thereon in the meantime, at the stated rate, and will thereafter, if and as long as the mortgage money or any part thereof remains unpaid, pay to the mortgagee interest thereon, or on the unpaid part thereof, at the stated rate, by equal half-yearly payments, the first thereof to be made at the end of six calendar months from the day stated for payment of the mortgage money:

Secondly, a proviso to the effect following (namely):

That if the mortgagor, on the stated day, pays to the mortgagee the stated mortgage money with interest thereon in the meantime, at the stated rate, the mortgagee at any time thereafter, at the request and cost of the mortgagor, shall re-convey the mortgaged property to the mortgagor, or as he shall direct.

This section does not impose any personal liability on an assignee of the equity of redemption (*Re Errington, Ex p. Mason*, 1894, 1 Q. B. 11).

Forms of
statutory
transfer of
mortgage in
schedule.

27.—(1.) A transfer of a statutory mortgage may be made by a deed expressed to be made by way of statutory transfer of mortgage, being in such one of the three forms (A.) and (B.) and (C.) given in Part II. of the third schedule to this act as may be appropriate to the case, with such variations and additions, if any, as circumstances may require, and the provisions of this section shall apply thereto.

(2.) In whichever of those three forms the deed of transfer is made, it shall have effect as follows (namely):

(i.) There shall become vested in the person to whom the benefit of the mortgage is expressed to be transferred, who, with his executors, administrators, and assigns, is hereafter in this section designated the transferee, the right to demand, sue

for, recover, and give receipts for the mortgage money, or the unpaid part thereof, and the interest then due, if any, and thenceforth to become due thereon, and the benefit of all securities for the same, and the benefit of and the right to sue on all covenants with the mortgagee, and the right to exercise all powers of the mortgagee :

44 & 45 Vict.
c. 41, s. 27.

(ii.) All the estate and interest, subject to redemption, of the mortgagee in the mortgaged land shall vest in the transferee, subject to redemption.

(3.) If the deed of transfer is made in the form (B.), there shall also be deemed to be included, and there shall by virtue of this act be implied therein, a covenant with the transferee by the person expressed to join therein as covenantor to the effect following (namely) :

That the covenantor will, on the next of the days by the mortgage deed fixed for payment of interest, pay to the transferee the stated mortgage money, or so much thereof as then remains unpaid, with interest thereon, or on the unpaid part thereof, in the meantime, at the rate stated in the mortgage deed; and will thereafter, as long as the mortgage money, or any part thereof, remains unpaid, pay to the transferee interest on that sum, or the unpaid part thereof, at the same rate, on the successive days by the mortgage deed fixed for payment of interest.

(4.) If the deed of transfer is made in the form (C.), it shall, by virtue of this act, operate not only as a statutory transfer of mortgage, but also as a statutory mortgage, and the provisions of this section shall have effect in relation thereto, accordingly; but it shall not be liable to any increased stamp duty by reason only of it being designated a mortgage.

A transfer in the statutory form of a mortgage made before this act in ordinary form did not pass the legal estate (*Re Beachey, Heaton v. Beachey*, 1904, 1 Ch. 67).

28. In a deed of statutory mortgage, or of statutory transfer of mortgage, where more persons than one are expressed to convey as mortgagors, or to join as covenantors, the implied covenant on their part shall be deemed to be a joint and several covenant by them; and where there are more mortgagees or more transferees than one, the implied covenant with them shall be deemed to be a covenant with them jointly, unless the amount secured is expressed to be secured to them in shares or distinct sums, in which latter case the implied covenant with them shall be deemed to be a covenant with each severally in respect of the share or distinct sum secured to him.

Implied cove-
nants, joint
and several.

29. A re-conveyance of a statutory mortgage may be made by a deed expressed to be made by way of statutory re-conveyance of mortgage, being in the form given in Part III. of the third schedule to this act, with such variations and additions, if any, as circumstances may require.

Form of re-
conveyance
of statutory
mortgage in
schedule.

44 & 45 Vict.
c. 41, s. 30.

VI.—TRUST AND MORTGAGE ESTATES ON DEATH.

Devolution
of trust and
mortgage
estates on
death.

30.—(1.) Where an estate or interest of inheritance, or limited to the heir as special occupant, in any tenements or hereditaments, corporeal or incorporeal, is vested on any trust, or by way of mortgage, in any person solely, the same shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time, in like manner as if the same were a chattel real vesting in them or him; and accordingly all the like powers, for one only of several joint personal representatives, as well as for a single personal representative, and for all the personal representatives together, to dispose of and otherwise deal with the same, shall belong to the deceased's personal representatives or representative from time to time, with all the like incidents, but subject to all the like rights, equities, and obligations, as if the same were a chattel real vesting in them or him; and, for the purposes of this section, the personal representatives, for the time being, of the deceased, shall be deemed in law his heirs and assigns, within the meaning of all trusts and powers.

37 & 38 Vict.
c. 78.

38 & 39 Vict.
c. 87.

(2.) *Section four of the Vendor and Purchaser Act, 1874, and section forty-eight of the Land Transfer Act, 1875, are hereby repealed (f).*

(3.) This section, *including the repeals therein*, applies only in cases of death after the commencement of this act.

The operation of sub-sect. (1) of this section (which has not been expressly repealed) appears not to be affected by sect. 1, sub-sect. (1), of the L. T. Act, 1897. The language of the two enactments should be compared. The power (referred to in the present sub-section) of one of several joint personal representatives to deal with property of the deceased (see as to chattels real, *Simpson v. Gutteridge*, 1 Mad. 609; *Cole v. Miles*, 10 Hare, 139) has been expressly excluded in the case of real estate vesting under the last mentioned act (L. T. Act, 1897, s. 2, sub-s. (2)).

The concluding words of sub-s. (1) were discussed in *Re Crunden and Meux*, 1909, 1 Ch. 690, where it was laid down that the person who is to execute a trust or power must be in some way pointed out by the creator thereof as a proper person to execute it. Accordingly where land was devised in trust to several named persons, their heirs and assigns, the executors of a surviving trustee (as being "his heirs and assigns" under the above section) could execute a power of sale (*Re Pixton and Tong*, 1897, W. N. 178); and were held to be trustees of the will (*Re Waidanis, Rivers v. Waidanis*, 1908, 1 Ch. 125). Their trusteeship however ceased on the appointment of new trustees (*Re Routledge, R. v. Saul*, 1909, 1 Ch. 280). On the other hand, where land was devised in trust to several named persons, the reference to heirs being omitted, the executors of the survivor could not execute a trust for sale (*Re Crunden and Meux, sup.*; *Re Ingleby*, 13 L. R. Ir. 326).

As to who are "his personal representatives" within the section in a case where all the named executors do not prove, see *Re Parker*, 1894, 1 Ch. 722; *Re Boucherett, Barne v. Erskine*, 1908, 1 Ch. 180. Where there is no personal representative, there is a difficulty as to the legal estate (*Re Pilling*, 26 Ch. D. 432; *John v. J.*, 1898, 2 Ch. 576; see *Re Prothero*, L. R. 3 P. & M. 209; see also the form of vesting order given under sect. 26 of the Trustee Act, 1893, *post*).

When a testator devised freeholds absolutely and afterwards sold them but received a reconveyance to secure part of the purchase-money, the devisee did not take the mortgage money notwithstanding that the legal estate under this section vested in the executor (*Re Clowes*, 1893, 1 Ch. 214). But a devise by a mortgagee in possession was held to pass the mortgage debt (*Re Carter, Dodds v. Pearson*, 1900, 1 Ch. 801).

Copyholds were within the section (*Re Hughes*, 1884, W. N. 53; see *Re Mills*, 40 Ch. Div. 18); but they have now been excluded (Copyhold Acts, 1887, s. 45, and 1894, s. 88).

(f) By sect. 4 of the V. & P. Act, 1874, the personal representative of a mortgagee of freeholds, or of copyholds to which the latter had been admitted, was enabled to convey the estate. By sect. 5 of the V. & P. Act, 1874 (re-enacted in a limited form by sect. 48 of the L. T. Act, 1875), freeholds held by a bare trustee vested in his personal representative. As to what was a bare trustee within the sections, see *Cunningham v. Frayling* (1891, 2 Ch. 567).

[Sects. 31—38 were repealed and in effect re-enacted by the Trustee Act, 1893, ss. 10, 37, 11, 13, 20, 21, 22, post.]

VIII.—MARRIED WOMEN.

39.—(1.) Notwithstanding that a married woman is restrained from anticipation, the court may, if it thinks fit, where it appears to the court to be for her benefit, by judgment or order, with her consent, bind her interest in any property.

(2.) This section applies only to judgments or orders made after the commencement of this act.

This section does not give the court power to remove restraint generally, but only to make binding any particular disposition made by a married woman if the court thinks it is for her benefit (*Re Warren*, 49 L. T. 696; 52 L. J. Ch. 928). What binds the property is the order of the court, not the disposition of the married woman (*Paget v. P.*, 1898, 1 Ch. 476). A strong case must be made before the jurisdiction will be exercised (*Re Little, Harrison v. H.*, 40 Ch. Div. 424). As to considering the benefit of the husband and children, see *Re Wood, Wood v. Kimber* (29 S. J. 183). The court requires to be satisfied that the application is in accordance with the married woman's free will (*Re Currey, Gibson v. Way*, 56 L. T. 80; *Musgrave v. Sandeman*, 48 L. T. 215); but will not always require a separate examination (*Harris v. Harford*, 1888, W. N. 190; see *Hodges v. H.*, 20 Ch. D. 755). Where money is raised under this section to pay the debts of the husband, and the wife is under the circumstances entitled to an indemnity from him, the order may conveniently express this, but it is not essential (*Paget v. P.*, 1898, 1 Ch. 470). Where on a decree *nisi* being made the wife agreed to the annulment of the marriage settlement (whereby she was restrained from anticipation), and the decree was subsequently made absolute, the agreement was held invalid and this section did not apply (*Thomson v. T.*, 1896, P. 263).

Orders have been made binding the property of married women in the following cases:—Where a married woman was harassed by creditors (*Hodges v. Hodges*, 20 Ch. D. 749; *Re Little, Re Harrison*, 36 Ch. D. 701; *Re C.'s Settlement*, 56 L. T. 299; 56 L. J. Ch. 556; see *Re Wilson-Stewart, Keown-Boyd v. Gilmour*, 75 L. T. 381). To pay the debts of a married woman, the balance of the capital being invested in an annuity for her life (*Latham v. L.*, 1889, W. N. 171). To pay the debts of the husband (*Paget v. P.*, 1898, 1 Ch. 470; see *Re S. G. v. C.*, 1893, W. N. 127; *Re Wilson Stewart*, 75 L. T. 381). To enable land of the married woman to be sold

Power for court to bind interest of married woman.

Orders made.

44 & 45 Vict.
c. 41, s. 39.

(*Re Tippet and Newbould*, 37 Ch. D. 444; *Bates v. Kesterton*, 1896, 1 Ch. 159). To carry into effect a sale under the Settled Estates Act, 1877 (*Re Landfield, L. v. L.*, 46 L. T. 227; 30 W. R. 377; see *Re Segrave*, 17 L. R. Ir. 373); or a scheme for partition and re-settlement (*Re Currey, Gibson v. Way*, 56 L. T. 80); or an exchange for the purpose of quieting the title (*Re Currey, Gibson v. Way*, 32 Ch. D. 365); or a sale by a tenant for life free from a jointure of the married woman (*Re Ailesbury and Iveagh*, 1893, 2 Ch. 345). To enable a profitable investment to be continued, which otherwise would have been unauthorized (*Re Wright*, 15 L. R. Ir. 331). To enable money to be raised for emigration (*Re Flood*, 11 L. R. Ir. 355; or for stocking a farm for a son (*Re Sawyer*, 1896, 1 Ir. R. 40). With a view to a mortgage (*Ex p. Thompson*, 1884, W. N. 28). To enable a married woman to carry out a compromise (*Sedgwick v. Thomas*, 48 L. T. 100; *Musgrave v. Sandeman*, *id.* 215; *Tamplin v. Miller*, 30 W. R. 422; *Harris v. Harford*, 1888, W. N. 190). To enable income to be applied in paying premiums on policies on the husband's life and interest on mortgages (*Re Milner*, 1891, 3 Ch. 547). The restraint was released on terms in *Re a Marriage Settlement* (30 S. J. 702).

Order refused. An application under this section has been refused where the order might have caused a forfeiture (*Re Jordan, Kino v. Picard*, 54 L. T. 127; 55 L. J. Ch. 330); also where it was asked to enable a married woman to obtain a personal benefit by releasing a power of appointment (*Re Little, Harrison v. Harrison*, 40 Ch. Div. 418); or to enable funds in court to be paid out to trustees of a settlement with a view to re-investment, so as to produce a larger income (*Re Blundell*, 1901, 2 Ch. 221); or to pay debts incurred through extravagance, or due to money-lenders (*Re Pollard*, 1896, 1 Ch. 901; 2 Ch. 552; see, however, *Paget v. P.*, 1898, 1 Ch. 47); or to pay the husband's debts under the circumstances (*Re S. G. v. C.*, 1893, W. N. 127). See also *Re Warren* (49 L. T. 696; 52 L. J. Ch. 928); *Thomson v. T.* (1896, P. 263).

Practice.

The application under the section should, in general, be made by summons, not by petition (*Re Lillwall*, 30 W. R. 243; *Latham v. L.*, 1889, W. N. 171); but *semble* may be made on petition (*Re Blundell*, 1901, 2 Ch. 221). Orders have been made at the trial of an action (*Sedgwick v. Thomas*, 48 L. T. 100); on a petition to sanction the compromise of an action (*Harris v. Harford*, 1888, W. N. 190); on a petition under the Settled Estates Act, 1877, to confirm a sale; in which case it was held unnecessary to entitle the petition in the matter of the Conv. Act, 1881 (*Re Landfield, L. v. L.*, 46 L. T. 227); on a summons under the Vendor and Purchaser Act, 1874 (*Re Tippet and Newbould*, 37 Ch. D. 444). For form of orders generally, see Seton, 6th ed. 905.

Service on the trustees of the settlement has been dispensed with (*Re Little, Re Harrison*, 36 Ch. Div. 701).

Other statutory powers of releasing restraint.

Notwithstanding a restraint on anticipation, the costs of proceedings commenced by a married woman may be recovered out of her property (M. W. P. Act, 1893, s. 2, *ante*, p. 366), and the court may charge costs on a fund preserved (Solicitors Act, 1860 s. 28; *Re Keane, Lumley v. Desborough*, 12 Eq. 115); and may impound a married woman's interest to indemnify trustees (Trustee Act, 1893, s. 45 (1), *post*, replacing Trustee Act, 1888, s. 6).

Power of attorney of married woman.

40.—(1) A married woman, whether an infant or not, shall by virtue of this act have power, as if she were unmarried and of full age, by deed, to appoint an attorney on her behalf for the purpose of executing any deed or doing any other act which she might herself execute or do; and the provisions of this act relating to instruments creating powers of attorney shall apply thereto.

(2.) This section applies only to deeds executed after the commencement of this act.

Under this section a married woman can appoint an attorney to receive her income even if she is restrained from anticipation (*Stewart v. Fletcher*, 38 Ch. D. 627). For the law before the act, see *Oulds v. Samson* (3 Taunt. 261); *Graham v. Jackson* (6 Q. B. 811); *Kenrick v. Wood* (9 Eq. 377). As to powers of attorney generally, see sects. 46—48 (*post*, p. 601), and sects. 8 and 9 of Conv. Act, 1882 (*post*, p. 623).

44 & 45 Vict.
c. 41, s. 40.

IX.—INFANTS.

41. Where a person in his own right seized of or entitled to land for an estate in fee simple, or for any leasehold interest at a rent, is an infant, the land shall be deemed to be a settled estate within the Settled Estates Act, 1877.

Sales and
leases on
behalf of
infant owner.
40 & 41 Vict.
c. 18.

Land to which an infant was entitled contingently on attaining 21, was held to be settled estate under this section (*Liddell v. L.*, 31 W. R. 238; 52 L. J. Ch. 207; see *Re Sparrow*, 1892, 1 Ch. 412; see S. L. Act, 1882, s. 59, *post*).

42.—(1.) If and as long as any person who would but for this section be beneficially entitled to the possession of any land is an infant, and being a woman is also unmarried, the trustees appointed for this purpose by the settlement, if any, or if there are none so appointed, then the persons, if any, who are for the time being under the settlement trustees with power of sale of the settled land, or of part thereof, or with power of consent to or approval of the exercise of such a power of sale, or if there are none, then any persons appointed as trustees for this purpose by the court, on the application of a guardian or next friend of the infant, may enter into and continue in possession of the land; and in every such case the subsequent provisions of this section shall apply.

Management
of land and
receipt and
application
of income
during
minority.

(2.) The trustees shall manage or superintend the management of the land, with full power to fell timber or cut underwood from time to time in the usual course of sale, or for repairs or otherwise, and to erect, pull down, rebuild, and repair houses, and other buildings and erections, and to continue the working of mines, minerals, and quarries which have usually been worked, and to drain or otherwise improve the land or any part thereof, and to insure against loss by fire, and to make allowances to and arrangements with tenants and others, and to determine tenancies, and to accept surrenders of leases and tenancies, and generally to deal with the land in a proper and due course of management; but so that, where the infant is impeachable for waste, the trustees shall not commit waste, and shall cut timber on the same terms only, and subject to the same restrictions, on and subject to which the infant could, if of full age, cut the same.

(3.) The trustees may from time to time, out of the income of the land, including the produce of the sale of timber and underwood, pay the expenses incurred in the management, or in the exercise of any power conferred by this section, or otherwise in relation to the land, and all outgoings not payable by

44 & 45 Vict.
c. 41, s. 42.

any tenant or other person, and shall keep down any annual sum, and the interest of any principal sum, charged on the land.

(4.) The trustees may apply at discretion any income which, in the exercise of such discretion, they deem proper, according to the infant's age, for his or her maintenance, education, or benefit, or pay thereout any money to the infant's parent or guardian, to be applied for the same purposes.

(5.) The trustees shall lay out the residue of the income of the land in investment on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, with power to vary investments; and shall accumulate the income of the investments so made in the way of compound interest, by from time to time similarly investing such income and the resulting income of investments; and shall stand possessed of the accumulated fund arising from income of the land and from investments of income on the trusts following (namely):

- (i.) If the infant attains the age of twenty-one years, then in trust for the infant;
- (ii.) If the infant is a woman and marries while an infant, then in trust for her separate use, independently of her husband, and so that her receipt after she marries, and though still an infant, shall be a good discharge; but,
- (iii.) If the infant dies while an infant, and being a woman without having been married, then, where the infant was, under a settlement, tenant for life, or by purchase tenant in tail or tail male or tail female, on the trusts, if any, declared of the accumulated fund by that settlement; but where no such trusts are declared, or the infant has taken the land from which the accumulated fund is derived by descent, and not by purchase, or the infant is tenant for an estate in fee simple, absolute or determinable, then in trust for the infant's personal representatives, as part of the infant's personal estate;

but the accumulations, or any part thereof, may at any time be applied as if the same were income arising in the then current year.

(6.) Where the infant's estate or interest is an undivided share of land, the powers of this section relative to the land may be exercised jointly with persons entitled to possession of, or having power to act in relation to, the other undivided share or shares.

(7.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(8.) This section applies only where that instrument comes into operation after the commencement of this act. 44 & 45 Vict.
c 41, s. 42.

This section has been held applicable to the case of an infant taking land by descent (*Re Cowley*, 1901, 1 Ch. 38; *Re Glover*, 1899, 1 I. R. 337).

Trustees for the purpose of the S. L. Acts who can, under sect. 60 of the S. L. Act, 1882, exercise the statutory power of sale of an infant tenant for life, are not trustees with power of sale within this section (*Re Helyar, H. v. Beckett*, 1902, 1 Ch. 391). It was said that sub-sects. (2) and (3) seemed to exclude any power to pay expenses of management out of corpus (*Re Jackson, J. v. Talbot*, 21 Ch. D. 787; where costs of repairs were raised by mortgage of an infant's estate).

Where out of the income of the tenant for life who was an infant, the trustees had paid the premiums on a fire insurance of the settled mansion house, the remaindermen were entitled under 14 Geo. 3, c. 78, sect. 83, to have the policy money applied in rebuilding (*Re Quicke, Poltimore v. Quicke*, 1908, 1 Ch. 887). But money recovered on a chattel policy similarly effected belonged to the infant (*ib.*). Trustees for the purpose of this section were appointed by the court (*Tuthill v. T.*, 1902, 1 I. R. 429).

43.—(1.) Where any property is held by trustees in trust for an infant, either for life, or for any greater interest, and whether absolutely, or contingently on his attaining the age of twenty-one years, or on the occurrence of any event before his attaining that age, the trustees may, at their sole discretion, pay to the infant's parent or guardian, if any, or otherwise apply for or towards the infant's maintenance, education, or benefit, the income of that property, or any part thereof, whether there is any other fund applicable to the same purpose, or any person bound by law to provide for the infant's maintenance or education, or not (*g*).

Application
by trustees of
income of
property of
infant for
maintenance,
&c.

(2.) The trustees shall accumulate all the residue of that income in the way of compound interest, by investing the same and the resulting income thereof from time to time on securities on which they are by the settlement, if any, or by law, authorized to invest trust money, and shall hold those accumulations for the benefit of the person who ultimately becomes entitled to the property from which the same arise; but so that the trustees may at any time, if they think fit, apply those accumulations, or any part thereof, as if the same were income arising in the then current year (*h*).

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the interest of the infant arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained (*i*).

(4.) This section applies whether that instrument comes into operation before or after the commencement of this act.

(*g*) This section only authorizes the application for maintenance of income to which, independently of the section, the infant is or will, on or before attaining twenty-one, become entitled (*Re Dickson, Hill v. Grant*, 29 Ch. Div. 331; *Re Judkin*, 25 Ch. D. 743).

Independently of the section it is settled that in the case of immediate General rules

44 & 45 Vict.
c. 41, s. 43.

as to when a
gift carries
income.

gifts an infant is entitled as from the testator's death to the income of realty, and also of personalty included in a specific or residuary bequest; and is also entitled (at least from the expiration of one year from the testator's death) to the income of a general legacy (see the cases collected, Theobald, 7th ed., pp. 180, 188). In the case of future or contingent gifts, a distinction must be drawn between real and personal estate. As regards personal estate, a future bequest carries the intermediate income where (1) the gift is residuary (*Re Taylor, Smart v. Taylor*, 1901, 2 Ch. 136); or where (2) the property is directed to be set apart from the rest of the estate (*Re Woodin, Woodin v. Glass*, 1895, 2 Ch. 309; *Re Clements, Clements v. Pearsall*, 1894, 1 Ch. 665; *Re Medlock, Ruffle v. Medlock*, 54 L. T. 828); or where (3) the bequest being of a general legacy to an infant legatee the testator stands *in loco parentis* to the infant and the will provides no other maintenance (*Re George*, 5 Ch. D. 843). In the last case what the infant is entitled to is not interest but maintenance (*Re Bowlby, B. v. B.*, 1904, 2 Ch. 706-713). And as regards providing "other maintenance" it has been held that such provision is not found in the mere bequest to the infant of a share of residue out of the income of which he can be maintained (*Re Moody, Woodroffe v. Moody*, 1895, 1 Ch. 109). On the other hand where the property was not directed to be set apart, the intermediate income was not carried by a future bequest of specific personalty (*Guthrie v. Walrond*, 22 Ch. D. 573), or by a contingent bequest of a general legacy, where the testator did not stand *in loco parentis* to the legatee (*Re Dickson, Hill v. Grant*, 29 Ch. D. 331). In the case of a bequest to a class contingently on their attaining twenty-one, if the bequest carries the intermediate income, any beneficiary attaining twenty-one is entitled only to his share of income, having regard to the number of the class for the time being in existence (*Re Holford, H. v. H.*, 1894, 3 Ch. 30; *Re Jeffery, Arnold v. Burt*, 1895, 2 Ch. 577). But if the bequest does not carry the intermediate income, it seems that the first beneficiary attaining twenty-one takes as from that time the whole income until another share vests (*Furneaux v. Rucker*, 1879, W. N. 135; *Re Adams, A. v. A.*, 1893, 1 Ch. 332; *Re Holford, H. v. H.*, 1894, 3 Ch. 40; as to *Furneaux v. Rucker*, however, see *Re Woodin, Woodin v. Glass*, 1895, 2 Ch. 309).

As regards real estate, a future devise does not carry intermediate income (*Re Eddel's Trusts*, 11 Eq. 559), even where the devise is residuary (*Wade Gery v. Handley*, 3 Ch. D. 374). But where realty and personalty are given together, the rules as to income in the case of bequests of personalty (*sup.*) apply (*Re Townsend, T. v. T.*, 34 Ch. D. 357; *Re Burton, Banks v. Heaven*, 1892, 2 Ch. 38). Where real estate is devised to a class contingently on their attaining twenty-one, the first beneficiary attaining that age takes as from that time the whole income until another share vests (*Re Averill, Salisbury v. Buckle*, 1898, 1 Ch. 523).

Cases under
sub-sect. (1).

Having regard to the above rules the powers of the section have been held available in the case of future or contingent gifts of (1) residuary personalty (*Re Holford, H. v. H.*, 1894, 3 Ch. 30); (2) personalty directed to be set apart, consisting of either a pecuniary legacy (*Re Medlock, Ruffle v. Medlock*, 54 L. T. 828), or a specific legacy (*Re Clements, Clements v. Pearsall*, 1894, 1 Ch. 665), or leaseholds (*Re Woodin, Woodin v. Glass*, 1895, 2 Ch. 309); (3) a legacy given by a parent (*Re Moody, Woodroffe v. Moody*, 1895, 1 Ch. 101); and (4) realty and personalty given together (*Re Burton, Banks v. Heaven*, 1892, 2 Ch. 38; *Re Jeffery, Arnold v. Burt*, 1895, 2 Ch. 577). But the powers of the section have been held not available in the case of a contingent pecuniary legacy not directed to be set apart (*Re Judkin*, 25 Ch. D. 743; *Re Dickson, Hill v. Grant*, 29 Ch. Div. 331).

Where there is a gift (carrying income) in favour of a class on attaining twenty-one, the income is divisible into as many shares as there are members in existence, one share being payable to each adult, the other shares being applicable under this section for the benefit of the infants (*Re Holford, H. v. H.*, 1894, 3 Ch. 30; *Re Jeffery, Arnold v. Burt*, 1895, 2 Ch. 577).

Where residue is bequeathed to an infant, the following have been held trustees within the section, viz., an executor on the residue being ascertained (*Re Smith, Henderson-Roe v. Hitchins*, 42 Ch. D. 302), and an administrator with the will annexed (*Re Adams, Verrier v. Haskins*, 1906, W. N. 220). 44 & 45 Vict. c. 41, s. 43.

It seems doubtful whether the section applies to an absolute gift subject to a gift over on not attaining twenty-one (*Re Buckley*, 22 Ch. D. 583, decided on 23 & 24 Vict. c. 145, s. 26). It did not apply where an infant was entitled contingently on (1) surviving his father, and (2) attaining twenty-one (*Tuthill v. T.*, 1902, 1 I. R. 429).

(h) Where residue was bequeathed to the testator's daughters who should attain twenty-one, each daughter's share to be in trust for her life and after her death for her children, income accumulated during a daughter's minority formed an accretion to the capital (*Re Bowlby, B. v. B.*, 1904, 2 Ch. 685; overruling *Re Scott, S. v. S.*, 1902, 1 Ch. 918; see *Re Wells, Wells v. Wells*, 43 Ch. D. 281; *Re Humphreys, Humphreys v. Levett*, 1893, 3 Ch. 1). It was said that sub-sect. (2) did not apply until a fund had been appropriated in satisfaction of the contingent legacy (*Re Bowlby*, 1904, 2 Ch. 714). Past accumulations may be applied for past maintenance (*Re Pitts, Collins v. Pitts*, 1884, W. N. 225, 242; compare *Re Wise, Jackson v. Parrott*, 1896, 1 Ch. 281). Income accruing during the minority of a life tenant may be applied for maintenance (*Re Long, Lovegrove v. Long*, 1902, W. N. 166), and may be paid to the guardians, who can give a good receipt (*Ib.*). Accumulations. Sub-sect. (2).

(i) A contrary intention, which excluded sub-sect. (1), was found in an express gift of residue (*Re Dickson, Hill v. Grant*, 29 Ch. D. 339). A contrary intention excluding sub-sect. (2) was not found in a direction to accumulate income and pay it to legatees when shares become payable (*Re Thatcher*, 26 Ch. D. 427), but was found in the creation of an immediate vested life interest (*Re Humphreys, H. v. Levett*, 1893, 3 Ch. 1). See, in general, as to the cases in which the court will direct payments for maintenance notwithstanding directions to accumulate, *Re Allen, Havelock v. H.* (17 Ch. D. 807); *Re Collins, C. v. C.* (32 Ch. D. 229); *Re Alford, Hunt v. Parry* (*id.* 383); *Re Waller, W. v. Duncombe*, 1901, 1 Ch. 879). Contrary intention. Sub-sect. (3).

X.—RENTCHARGES AND OTHER ANNUAL SUMS.

44.—(1.) Where a person is entitled to receive out of any land, or out of the income of any land, any annual sum, payable half-yearly or otherwise, whether charged on the land or on the income of the land, and whether by way of rentcharge or otherwise, not being rent incident to a reversion, then, subject and without prejudice to all estates, interests, and rights having priority to the annual sum, the person entitled to receive the same shall have such remedies for recovering and compelling payment of the same as are described in this section, as far as those remedies might have been conferred by the instrument under which the annual sum arises, but not further. Remedies for recovery of annual sums charged on land.

(2.) If at any time the annual sum or any part thereof is unpaid for twenty-one days next after the time appointed for any payment in respect thereof, the person entitled to receive the annual sum may enter into and distrain on the land charged or any part thereof, and dispose according to law of any distress found, to the intent that thereby or otherwise the annual sum and all arrears thereof, and all costs and expenses occasioned by non-payment thereof, may be fully paid.

(3.) If at any time the annual sum or any part thereof is

44 & 45 Vict.
c. 41, s. 44.

unpaid for forty days next after the time appointed for any payment in respect thereof, then, although no legal demand has been made for payment thereof, the person entitled to receive the annual sum may enter into possession of and hold the land charged or any part thereof, and take the income thereof, until thereby or otherwise the annual sum and all arrears thereof due at the time of his entry, or afterwards becoming due during his continuance in possession, and all costs and expenses occasioned by non-payment of the annual sum, are fully paid; and such possession when taken shall be without impeachment of waste.

(4.) In the like case the person entitled to the annual charge, whether taking possession or not, may also by deed demise the land charged, or any part thereof, to a trustee for a term of years, with or without impeachment of waste, on trust, by mortgage, or sale, or demise, for all or any part of the term, of the land charged, or of any part thereof, or by receipt of the income thereof, or by all or any of those means, or by any other reasonable means, to raise and pay the annual sum and all arrears thereof due or to become due, and all costs and expenses occasioned by non-payment of the annual sum, or incurred in compelling or obtaining payment thereof, or otherwise relating thereto, including the costs of the preparation and execution of the deed of demise, and the costs of the execution of the trusts of that deed; and the surplus, if any, of the money raised, or of the income received, under the trusts of that deed shall be paid to the person for the time being entitled to the land therein comprised in reversion immediately expectant on the term thereby created.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument under which the annual sum arises, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(6.) This section applies only where that instrument comes into operation after the commencement of this act.

This section has been extended to the rentcharges created under the Copyhold Acts, 1887, s. 16, and 1894, s. 27 (e), but an owner of such a rentcharge can still pursue his other remedies, *e.g.*, by action (*Searle v. Cooke*, 43 Ch. Div. 533). This section also applies to rentcharges created under the Improvement of Land Acts (62 & 63 Vict. c. 46, s. 3). As to the equitable jurisdiction to raise by sale or mortgage arrears of a rentcharge issuing out of rents and profits, see *Hambro v. Hambro* (1894, 2 Ch. 564).

A lessee who had granted an underlease for a term exceeding his lease, and had therefore no reversion, had not in respect of the rent reserved by such underlease the powers of this section (*Lewis v. Baker*, 1905, 1 Ch. 46).

As to rentcharges and the remedies for receiving them, see *ante*, pp. 118, 120.

Redemption
of quitrents

45.—(1.) Where there is a quitrent, chief-rent, rentcharge, or other annual sum issuing out of land (in this section referred

to as the rent), the Copyhold Commissioners shall at any time, on the requisition of the owner of the land, or of any person interested therein, certify the amount of money in consideration whereof the rent may be redeemed.

44 & 45 Vict.
c. 41, s. 45.

and other
perpetual
charges.

(2.) Where the person entitled to the rent is absolutely entitled thereto in fee simple in possession, or is empowered to dispose thereof absolutely, or to give an absolute discharge for the capital value thereof, the owner of the land, or any person interested therein may, after serving one month's notice on the person entitled to the rent, pay or tender to that person the amount certified by the commissioners.

(3.) On proof to the commissioners that payment or tender has been so made, they shall certify that the rent is redeemed under this act; and that certificate shall be final and conclusive, and the land shall be thereby absolutely freed and discharged from the rent.

(4.) Every requisition under this section shall be in writing; and every certificate under this section shall be in writing, sealed with the seal of the commissioners.

(5.) This section does not apply to tithe rentcharge, or to a rent reserved on a sale or lease, or to a rent made payable under a grant or licence for building purposes, or to any sum or payment issuing out of land not being perpetual.

(6.) This section applies to rents payable at, or created after, the commencement of this act.

(7.) This section does not extend to Ireland.

The Board of Agriculture and Fisheries has now taken the place of the Copyhold Commissioners (S. L. Act, 1882, s. 48; Board of Agriculture and Fisheries Acts, 1889 and 1903). As to the meaning of "quitrent," "chief-rent," and "rentcharge," see *ante*, p. 118.

XI.—POWERS OF ATTORNEY.

46.—(1.) The donee of a power of attorney may, if he thinks fit, execute or do any assurance, instrument, or thing in and with his own name and signature and his own seal, where sealing is required, by the authority of the donor of the power; and every assurance, instrument, and thing so executed and done shall be as effectual in law, to all intents, as if it had been executed or done by the donee of the power in the name and with the signature and seal of the donor thereof.

Execution
under power
of attorney.

(2.) This section applies to powers of attorney created by instruments executed either before or after the commencement of this act.

Sects. 46 to 48 should be read in connection with sects. 8 and 9 of the Conv. Act, 1882, *post*, p. 623.

47.—(1.) Any person making or doing any payment or act, in good faith, in pursuance of a power of attorney, shall not be

Payment by
attorney
under power

44 & 45 Vict.
c. 41, s. 47.

without
notice of
death, &c.
good.

liable in respect of the payment or act by reason that before the payment or act the donor of the power had died or become lunatic, of unsound mind, or bankrupt, or had revoked the power, if the fact of death, lunacy, unsoundness of mind, bankruptcy, or revocation was not at the time of the payment or act known to the person making or doing the same.

(2.) But this section shall not affect any right against the payee of any person interested in any money so paid; and that person shall have the like remedy against the payee as he would have had against the payer if the payment had not been made by him.

(3.) This section applies only to payments and acts made and done after the commencement of this act.

This section extends to all persons the protection which was given to trustees and executors by Law of Prop. Amdt. Act, 1859, s. 26; now replaced by sect. 23 of the Trustee Act, 1893, *post*, where see note.

Deposit of
original
instruments
creating
powers of
attorney.

48.—(1.) An instrument creating a power of attorney, its execution being verified by affidavit, statutory declaration, or other sufficient evidence, may, with the affidavit or declaration, if any, be deposited in the Central Office of the Supreme Court of Judicature.

(2.) A separate file of instruments so deposited shall be kept, and any person may search that file, and inspect every instrument so deposited, and an office copy thereof shall be delivered out to him on request.

(3.) A copy of an instrument so deposited may be presented at the office, and may be stamped or marked as an office copy, and when so stamped or marked shall become and be an office copy.

(4.) An office copy of an instrument so deposited shall without further proof be sufficient evidence of the contents of the instrument and of the deposit thereof in the Central Office.

(5.) General rules may be made for purposes of this section, regulating the practice of the Central Office, and prescribing, with the concurrence of the *commissioners of her Majesty's Treasury*, the fees to be taken therein.

(6.) This section applies to instruments creating powers of attorney executed either before or after the commencement of this act.

See Rule 6 relating to this section (*post*, p. 629). The fees mentioned in sub-sect. (5) are regulated by an order dated 1st January, 1883, for which see Shelford, R. P. Stat. p. 641, 9th ed.

XII.—CONSTRUCTION AND EFFECT OF DEEDS AND OTHER INSTRUMENTS.

Use of word
grant un-
necessary.

49.—(1.) It is hereby declared that the use of the word grant is not necessary in order to convey tenements or hereditaments, corporeal or incorporeal.

(2.) This section applies to conveyances made before or after the commencement of this act. 44 & 45 Vict.
c. 41, s. 49.

As to the word "grant," see notes to sects. 2 and 4 of the Real Property Act, 1845, *ante*, p. 522.

50.—(1.) Freehold land, or a thing in action, may be conveyed by a person to himself jointly with another person, by the like means by which it might be conveyed by him to another person; and may, in like manner, be conveyed by a husband to his wife, and by a wife to her husband, alone or jointly with another person. Conveyance
by a person
to himself, &c.

(2.) This section applies only to conveyances made after the commencement of this act.

According to the old common law, a person could not convey or assign real or personal estate to himself and another. As regards freeholds, this inconvenience was avoided by means of the Statute of Uses (see Williams' Real Property, p. 198, 14th ed.). Sect. 21 of Law of Prop. Amdt. Act, 1859 (*ante*, p. 535), gave power to a person to assign to himself and another "personal property now by law assignable including chattels real." The power did not include choses in action which were not then assignable (Williams' Personal Property, p. 4, 12th ed.). A similar power has now been extended to freeholds and things in action by the above section.

Compare note to sect. 1 of M. W. P. Act, 1882, *ante*, p. 347.

51.—(1.) In a deed it shall be sufficient, in the limitation of an estate in fee simple, to use the words in fee simple, without the word heirs; and in the limitation of an estate in tail, to use the words in tail without the words heirs of the body; and in the limitation of an estate in tail male or in tail female, to use the words in tail male, or in tail female, as the case requires, without the words heirs male of the body, or heirs female of the body. Words of
limitation in
fee or in tail.

(2.) This section applies only to deeds executed after the commencement of this act.

Apart from this section it was settled as regards legal interests that under a grant of land by deed to A., without mentioning his heirs, A. took only an estate for his life (see *Re Hunter and Hewlett*, 1907, 1 Ch. 46).

As regards equitable interests, an equitable fee simple may in certain cases pass without words of limitation (*Re Irwin, Irwin v. Parkes*, 1904, 2 Ch. 764). And it is clear that a limitation (in a deed) of a trust of land for A. without words of limitation will confer an equitable fee where the intention is sufficiently shown by the deed (*Re Oliver, Evered v. Leigh*, 1905, 1 Ch. 191).

In a case since this act freeholds on payment off of a mortgage were reconveyed to the mortgagor "in fee freed and discharged" from the mortgage; the legal estate in the fee simple, however, did not pass, the court refusing to supply by construction the word "simple" (*Re Ethel and Mitchell*, 1901, 1 Ch. 945).

52.—(1.) A person to whom any power, whether coupled with an interest or not, is given may by deed release, or contract not to exercise, the power. Powers
simply
collateral.

44 & 45 Vict.
c. 41, s. 52.

(2.) This section applies to powers created by instruments coming into operation either before or after the commencement of this act.

Before this act powers simply collateral could not be released, but powers appendant or in gross might be (see *ante*, p. 323; Farwell on Powers, pp. 11 *et seq.* 2nd ed.; *Re Radcliffe, Radcliffe v. Bewes*, 1892, 1 Ch. 231). Any power may now be released by deed under the above section, and may be disclaimed under sect. 6 of the Conv. Act, 1882, *post*, p. 623. As to the release of a power by conduct, see *Foakes v. Jackson*, 1900, 1 Ch. 807. The power to release, however, does not apply to powers given by the S. L. Act, 1882 (S. L. Act, 1882, sect. 50, *post*). Nor does it apply to a power coupled with a duty (*Re Eyre, Eyre v. Eyre*, 49 L. T. 259; see *Saul v. Pattinson*, 54 L. T. 670; 55 L. J. Ch. 831; *Re Somes, Smith v. Somes*, 1896, 1 Ch. 250, 255).

A married woman may, under this section, by deed unacknowledged release her power over any property real or personal, and whether in possession or reversion; and, where the power is coupled with an interest, whether in respect of such interest she is restrained from anticipation or not (*Re Chisholm, Hemphill v. Hemphill*, 1901, 2 Ch. 82; see Farwell, p. 18, 2nd ed.; *Re Davenport, Turner v. King*, 1895, 1 Ch. 361).

As to the release of a power of appointing among children or issue, see *Cunynghame v. Thurlow* (1 R. & M. 436, n.); *Smith v. Houlton* (26 Beav. 482); *Horner v. Swan* (T. & R. 430); *Re Little, Harrison v. Harrison* (40 Ch. D. 418). In a case since the Conv. Act, 1881, where a father released a power of appointment, in default of the exercise of which his children took equally, he was held absolutely entitled to the share of a deceased child (*Shirley v. Fisher*, 47 L. T. 109). In a similar case the release was held valid by the C. A., and the father was held entitled, on surrendering his life interest, to have the child's share transferred to him (*Re Radcliffe, Radcliffe v. Bewes*, 1892, 1 Ch. 227; see *Re Somes, Smith v. Somes*, 1896, 1 Ch. 250). But a limited power cannot be released by the donee's trustee in bankruptcy (*Re Rose*, 1904, 2 Ch. 348; 1905, 1 Ch. 94).

Construction
of supple-
mental or
annexed deed.

53.—(1.) A deed expressed to be supplemental to a previous deed, or directed to be read as an annex thereto, shall, as far as may be, be read and have effect as if the deed so expressed or directed were made by way of indorsement on the previous deed, or contained a full recital thereof.

(2.) This section applies to deeds executed either before or after the commencement of this act.

Receipt in
deed suffi-
cient.

54.—(1.) A receipt for consideration money or securities in the body of a deed shall be a sufficient discharge for the same to the person paying or delivering the same, without any further receipt for the same being indorsed on the deed.

(2.) This section applies only to deeds executed after the commencement of this act.

Since this act the absence of an indorsed receipt, when there is a receipt in the body of the deed, does not put a purchaser upon inquiry as previously (*Capell v. Winter*, 1907, 2 Ch. 382; *Lloyds Bank v. Bullock*, 1896, 2 Ch. 192).

Receipt in
deed or
indorsed,
evidence for

55.—(1.) A receipt for consideration money or other consideration in the body of a deed or indorsed thereon shall in favour of a subsequent purchaser, not having notice that the

money or other consideration thereby acknowledged to be received was not in fact paid or given wholly or in part, be sufficient evidence of the payment or giving of the whole amount thereof.

44 & 45 Vict.
c. 41, s. 55.

subsequent
purchaser.

(2.) This section applies only to deeds executed after the commencement of this act.

A mortgagor who had executed a deed containing a receipt for the full amount named therein could only redeem from a transferee without notice, on payment of the full amount, though a less sum was really due on the mortgage (*Bickerton v. Walker*, 31 Ch. D. 151; *Gordon v. James*, 30 Ch. Div. 249; *Lloyds Bank Ltd. v. Bullock*, 1896, 2 Ch. 192). And the fact that the original mortgagee was the solicitor of the mortgagor was no notice that there were accounts between them (*Saunders v. Kent*, 1885, W. N. 147; *Powell v. Browne*, 1907, W. N. 228; see as to such dealings between a solicitor and his client, *Gresley v. Mousley*, 3 D. F. & J. 433, and *Bateman v. Hunt*, *inf.*). So a sub-mortgagee without notice was entitled as against the original mortgagor to rely on a receipt in the body of the original mortgage as showing that the full amount had been paid (*Bateman v. Hunt*, 1904, 2 K. B. 530; *Powell v. Browne*, *sup.*). Again an equitable mortgagee without notice who has had deposited with him a conveyance containing a proper receipt for the purchase money may be entitled as against an unpaid vendor's lien to rely on the receipt as giving him a better equity (*Capell v. Winter*, 1907, 2 Ch. 381). But where land held on trust for sale was fraudulently conveyed by a trustee, a receipt for purchase money being inserted in the deed, the beneficiaries were not under the circumstances estopped by the receipt (as between themselves and a subsequent equitable mortgagee) from showing that the money had not been paid (*Capell v. Winter*, *sup.*).

As to what constitutes a receipt, see, further, *Renner v. Tolley* (1893, W. N. 90). A statement in a transfer of mortgage made in form prescribed by statute that consideration money had been paid was a receipt within the section and created an estoppel (*Rimmer v. Webster*, 1902, 2 Ch. 163).

56.—(1.) Where a solicitor produces a deed, having in the body thereof or indorsed thereon a receipt for consideration money or other consideration, the deed being executed, or the indorsed receipt being signed, by the person entitled to give a receipt for that consideration, the deed shall be sufficient authority to the person liable to pay or give the same for his paying or giving the same to the solicitor, without the solicitor producing any separate or other direction or authority in that behalf from the person who executed or signed the deed or receipt.

Receipt in
deed or
indorsed,
authority for
payment to
solicitor.

(2.) This section applies only in cases where consideration is to be paid or given after the commencement of this act.

This section, which had been held not to extend to the case of trustees selling (*Re Bellamy and Metropolitan Board*, 24 Ch. Div. 387), was extended to them (Trustee Act, 1888, s. 2, now replaced by Trustee Act, 1893, s. 17 (1), *post*). A deed in the form pointed out in the section is equivalent to a special authority given to the solicitor to receive the money (*Re Bellamy and Metropolitan Board*, 24 Ch. Div. 399, 403). The solicitor producing the deed must be a solicitor acting for the payee (*Day v. Woolwich Society*, 40 Ch. Div. 491; see *Gordon v. James*, 30 Ch. Div. 256). It has been said that if it should turn out that the solicitor had stolen the deed, or had not been permitted by the person for whom he is acting to have the custody

44 & 45 Vict. c. 41, s. 56. of the deed and to produce it, the purchaser would not be protected (*Re Hetling and Merton*, 1893, 3 Ch. 280). On the other hand, in the absence of anything to suggest the contrary, the person paying the money is bound to assume that the solicitor producing the deed is acting as solicitor for the person having power to give a discharge (*King v. Smith*, 1900, 2 Ch. 432). And if a purchaser, without reason, requires proof of the vendor's permission to the solicitor to have the custody of the deed and to produce it, such purchaser would *prima facie* be acting unreasonably (*Re Hetling and Merton*, 1893, 3 Ch. 280). The fact of a deed being in the office of a solicitor is not equivalent to its production (*Day v. Woolwich Society*, *sup.*).

Sufficiency
of forms in
Fourth
Schedule.

57. Deeds in the form of and using the expressions in the forms given in the fourth schedule to this act, or in the like form or using expressions to the like effect, shall, as regards form and expression in relation to the provisions of this act, be sufficient.

Covenants to
bind heirs, &c.

58.—(1.) A covenant relating to land of inheritance, or devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his heirs and assigns, and shall have effect as if heirs and assigns were expressed.

(2.) A covenant relating to land not of inheritance, or not devolving on the heir as special occupant, shall be deemed to be made with the covenantee, his executors, administrators, and assigns, and shall have effect as if executors, administrators, and assigns were expressed.

(3.) This section applies only to covenants made after the commencement of this act.

A covenant by a lessee of minerals with surface owners (who were not parties to the lease) was held to have been made with such owners, their heirs and assigns, and could be sued on by the devisees of one who was a surface owner at the date of the lease (*Forster v. Elvet*, 1908, 1 K. B. 641).

Covenants to
extend to
heirs, &c.

59.—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, though not expressed to bind the heirs, shall operate in law to bind the heirs and real estate, as well as the executors and administrators and personal estate, of the person making the same, as if heirs were expressed.

(2.) This section extends to a covenant implied by virtue of this act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the terms of the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this act.

Effect of
covenant with
two or more
jointly.

60.—(1.) A covenant, and a contract under seal, and a bond or obligation under seal, made with two or more jointly, to pay money or to make a conveyance, or to do any other act, to

them or for their benefit, shall be deemed to include, and shall, by virtue of this act, imply, an obligation to do the act to, or for the benefit of, the survivor or survivors of them, and to, or for the benefit of, any other person to whom the right to sue on the covenant, contract, bond, or obligation devolves. 44 & 45 Vict.
c. 41, s. 60.

(2.) This section extends to a covenant implied by virtue of this act.

(3.) This section applies only if and as far as a contrary intention is not expressed in the covenant, contract, bond, or obligation, and shall have effect subject to the covenant, contract, bond, or obligation, and to the provisions therein contained.

(4.) This section applies only to a covenant, contract, bond, or obligation made or implied after the commencement of this act.

61.—(1.) Where in a mortgage, or an obligation for payment of money, or a transfer of a mortgage or of such an obligation, the sum, or any part of the sum, advanced or owing is expressed to be advanced by or owing to more persons than one out of money, or as money, belonging to them on a joint account, or a mortgage, or such an obligation, or such a transfer is made to more persons than one, jointly, and not in shares, the mortgage money, or other money, or money's worth for the time being due to those persons on the mortgage or obligation, shall be deemed to be and remain money or money's worth belonging to those persons on a joint account, as between them and the mortgagor or obligor; and the receipt in writing of the survivors or last survivor of them, or of the personal representatives of the last survivor, shall be a complete discharge for all money or money's worth for the time being due, notwithstanding any notice to the payer of a severance of the joint account. Effect of advance on joint account, &c.

(2.) This section applies only if and as far as a contrary intention is not expressed in the mortgage, or obligation, or transfer, and shall have effect subject to the terms of the mortgage, or obligation, or transfer, and to the provisions therein contained.

(3.) This section applies only to a mortgage, or obligation, or transfer made after the commencement of this act.

The old joint account clause was usually inserted in the case of trustees investing on mortgage; and as between the trustees and a purchaser from them, or the mortgagor, the court (in a case where the trusts were not disclosed) refused to go behind the clause (*Re Harman & Uabridge R. Co.*, 24 Ch. D. 726). It may be different where the trusts are disclosed (*Re Blaiberg and Abrahams*, 1899, 2 Ch. 340). As between the mortgagees *inter se*, the court has gone behind the clause, and on the evidence held the mortgagees to be tenants in common (*Re Jackson, Smith v. Sibthorpe*, 34 Ch. D. 732).

62.—(1.) A conveyance of freehold land to the use that any person may have, for an estate or interest not exceeding Grants of easements,

44 & 45 Vict. c. 41, s. 62. duration the estate conveyed in the land, any easement, right, liberty, or privilege in, or over, or with respect to that land, or any part thereof, shall operate to vest in possession in that person that easement, right, liberty, or privilege, for the estate or interest expressed to be limited to him; and he, and the persons deriving title under him, shall have, use, and enjoy the same accordingly.

&c. by way of use.

(2.) This section applies only to conveyances made after the commencement of this act.

Provision for all the estate, &c.

63.—(1.) Every conveyance shall, by virtue of this act, be effectual to pass all the estate, right, title, interest, claim, and demand which the conveying parties respectively have in, to, or on the property conveyed, or expressed or intended so to be, or which they respectively have power to convey in, to, or on the same.

(2.) This section applies only if and as far as a contrary intention is not expressed in the conveyance, and shall have effect subject to the terms of the conveyance, and to the provisions therein contained.

(3.) This section applies only to conveyances made after the commencement of this act.

Under this section a mortgage deed purporting to convey the legal fee was held to pass the only interest of the mortgagor, which was an equitable title to a term (*Thellusson v. Liddard*, 1900, 2 Ch. 635).

Construction of implied covenants.

64. In the construction of a covenant or proviso, or other provision, implied in a deed by virtue of this act, words importing the singular or plural number, or the masculine gender, shall be read as also importing the plural or singular number, or as extending to females, as the case may require.

XIII.—LONG TERMS.

Enlargement of residue of long term into fee simple.

65.—(1.) Where a residue unexpired of not less than two hundred years of a term, which, as originally created, was for not less than three hundred years, is subsisting in land, whether being the whole land originally comprised in the term, or part only thereof, without any trust or right of redemption affecting the term in favour of the freeholder, or other person entitled in reversion expectant on the term, and without any rent, or with merely a peppercorn rent or other rent having no money value, incident to the reversion, or having had a rent, not being merely a peppercorn rent or other rent having no money value, originally so incident, which subsequently has been released, or has become barred by lapse of time, or has in any other way ceased to be payable, then the term may be enlarged into a fee simple in the manner, and subject to the restrictions, in this section provided.

(2.) Each of the following persons (namely):

44 & 45 Vict.
c. 41, s. 65.

- (i.) Any person beneficially entitled in right of the term, whether subject to any incumbrance or not, to possession of any land comprised in the term; but, in case of a married woman, with the concurrence of her husband, unless she is entitled for her separate use, whether with restraint on anticipation or not, and then without his concurrence;
- (ii.) Any person being in receipt of income as trustee, in right of the term, or having the term vested in him in trust for sale, whether subject to any incumbrance or not;
- (iii.) Any person in whom, as personal representative of any deceased person, the term is vested, whether subject to any incumbrance or not;

shall, as far as regards the land to which he is entitled, or in which he is interested, in right of the term, in any such character as aforesaid, have power by deed to declare to the effect that, from and after the execution of the deed, the term shall be enlarged into a fee simple.

(3.) Thereupon, by virtue of the deed and of this act, the term shall become and be enlarged accordingly, and the person in whom the term was previously vested shall acquire and have in the land a fee simple instead of the term.

(4.) The estate in fee simple so acquired by enlargement shall be subject to all the same trusts, powers, executory limitations over, rights, and equities, and to all the same covenants and provisions relating to user and enjoyment, and to all the same obligations of every kind, as the term would have been subject to if it had not been so enlarged.

(5.) But where any land so held for the residue of a term has been settled in trust by reference to other land, being freehold land, so as to go along with that other land as far as the law permits, and, at the time of enlargement, the ultimate beneficial interest in the term, whether subject to any subsisting particular estate or not, has not become absolutely and indefeasibly vested in any person, then the estate in fee simple acquired as aforesaid shall, without prejudice to any conveyance for value previously made by a person having a contingent or defeasible interest in the term, be liable to be, and shall be conveyed and settled in like manner as the other land, being freehold land, aforesaid, and until so conveyed and settled shall devolve beneficially as if it had been so conveyed and settled.

(6.) The estate in fee simple so acquired shall, whether the term was originally created without impeachment of waste or not, include the fee simple in all mines and minerals which at the time of enlargement have not been severed in right, or in fact, or have not been severed or reserved by an inclosure act or award.

(7.) This section applies to every such term as aforesaid subsisting at or after the commencement of this act.

44 & 45 Vict. c. 41, s. 65. A rent of three shillings has been held to be a rent "having money value" (*Re Smith and Stott*, 29 Ch. D. 1009, n.) and a rent of one shilling (*Blaiberg v. Keeves*, 1906, 2 Ch. 175); but not a rent of one silver penny (*Re Chapman and Hobbs*, 29 Ch. D. 1007). The terms of years to which the section applies are further defined, Conv. Act, 1882, s. 11 (*post*, p. 625).

Modes in which rents cease to be payable.

As regards the modes in which rents incident to a reversion may cease to be payable, it is settled that the right to recover proper arrears of such a rent is not barred by non-payment for however long a time, so long as the relation of landlord and tenant under a lease in writing subsists (*ante*, p. 127). But a release might be presumed from non-payment for 50 years of a rent of one shilling reserved by an old lease for a long term (*Blaiberg v. Keeves*, 1906, 2 Ch. 182). So from non-payment for 35 years of a rent secured by covenant in such a lease (*Tennent v. Neil*, 1 R. 5 Ch. 418; see *Lefroy v. Walsh*, 1 Ir. C. L. R. 311). Compare the release of a restrictive covenant presumed from long continued breach (*Hepworth v. Pickles*, 1900, 1 Ch. 108; *Gibson v. Doeg*, 2 H. & N. 615; *Gibbon v. Payne*, 23 Times L. R. 250).

A similar question has been dealt with in the case of quitrents payable to the lord of a manor. Such a rent was barred by non-payment for the statutory period under the R. P. Lim. Act, 1874 (*Howitt v. Harrington*, 1893, 2 Ch. 497); and might have been barred by non-payment for 50 years under the earlier Stat. Lim. (*Eldridge v. Knott*, Cowper, 216; see *ante*, p. 121). In the last-mentioned case a release was not presumed from non-payment for 37 years. Where, however, a quitrent had for 120 years been paid by a person not apparently liable, a lost grant was presumed (*Bomford v. Neville*, 1904, 1 L. R. 474; compare *Adnam v. Sandwich*, 2 Q. B. D. 485; *Foley v. Dudley*, 1910, 1 K. B. 317).

XIV.—ADOPTION OF ACT.

Protection of solicitor and trustees adopting act.

66.—(1.) It is hereby declared that the powers given by this act to any person, and the covenants, provisions, stipulations, and words which under this act are to be deemed included or implied in any instrument, or are by this act made applicable to any contract for sale or other transaction, are and shall be deemed in law proper powers, covenants, provisions, stipulations, and words, to be given by or to be contained in any such instrument, or to be adopted in connexion with, or applied to, any such contract or transaction; and a solicitor shall not be deemed guilty of neglect or breach of duty, or become in any way liable, by reason of his omitting, in good faith, in any such instrument, or in connexion with any such contract or transaction, to negative the giving, inclusion, implication, or application of any of those powers, covenants, provisions, stipulations, or words, or to insert or apply any others in place thereof, in any case where the provisions of this act would allow of his doing so.

(2.) But nothing in this act shall be taken to imply that the insertion in any such instrument, or the adoption in connexion with, or the application to, any contract or transaction, of any further or other powers, covenants, provisions, stipulations, or words is improper.

(3.) Where the solicitor is acting for trustees, executors, or other persons in a fiduciary position, those persons shall also be protected in like manner.

(4.) Where such persons are acting without a solicitor, they shall also be protected in like manner.

XV.—MISCELLANEOUS.

44 & 45 Vict.
c. 41, s. 67.

67.—(1.) Any notice required or authorized by this act to be served shall be in writing. Regulations
respecting
notice.

(2.) Any notice required or authorized by this act to be served on a lessee or mortgagor shall be sufficient, although only addressed to the lessee or mortgagor by that designation, without his name, or generally to the persons interested, without any name, and notwithstanding that any person to be affected by the notice is absent, under disability, unborn, or unascertained (*k*).

(3.) Any notice required or authorized by this act to be served shall be sufficiently served if it is left at the last-known place of abode or business in the United Kingdom of the lessee, lessor, mortgagee, mortgagor, or other person to be served, or, in case of a notice required or authorized to be served on a lessee or mortgagor, is affixed or left for him on the land or any house or building comprised in the lease or mortgage, or, in case of a mining lease, is left for the lessee at the office or counting-house of the mine.

(4.) Any notice required or authorized by this act to be served shall also be sufficiently served, if it is sent by post in a registered letter addressed to the lessee, lessor, mortgagee, mortgagor, or other person to be served, by name, at the aforesaid place of abode or business, office, or counting-house, and if that letter is not returned through the post-office undelivered; and that service shall be deemed to be made at the time at which the registered letter would in the ordinary course be delivered.

(5.) This section does not apply to notices served in proceedings in the court.

(*k*) Where a lease had been assigned, a notice addressed to the original lessee and all others concerned and served on the occupier was sufficient (*Cronin v. Rogers*, 1 Cab. & El. 348). But where a lessee had executed an assignment for the benefit of his creditors, which contained a declaration of trust of his leaseholds for the benefit of the creditors' trustee, and such trustee had entered, a notice addressed to and served on such trustee alone, was insufficient (*Gentle v. Faulkner*, 1900, 2 Q. B. 267).

68. *The act described in Part II. of the first schedule to this act shall, by virtue of this act, have the short title of the Statutory Declaration Act, 1835, and may be cited by that short title in any declaration made for any purpose under or by virtue of that act, or in any other document, or in any act of parliament.* Short title of
5 & 6 Will. 4,
c. 62.

XVI.—COURT; PROCEDURE; ORDERS.

69.—(1.) All matters within the jurisdiction of the court under this act shall, subject to the acts regulating the court, be assigned to the Chancery Division of the court. Regulations
respecting
payments
into court and
applications.

44 & 45 Vict.
c. 41, s. 69.

(2.) Payment of money into court shall effectually exonerate therefrom the person making the payment.

(3.) Every application to the court shall, except where it is otherwise expressed, be by summons at chambers (*l*).

(4.) On an application by a purchaser notice shall be served in the first instance on the vendor.

(5.) On an application by a vendor notice shall be served in the first instance on the purchaser.

(6.) On any application notice shall be served on such persons, if any, as the court thinks fit.

(7.) The court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application.

39 & 40 Vict.
c. 59, s. 17. (8.) General rules for purposes of this act shall be deemed rules of court within section seventeen of the Appellate Jurisdiction Act, 1876, and may be made accordingly.

(9.) The powers of the court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and rules for regulating proceedings in that court shall be from time to time made by the chancellor of the Duchy of Lancaster, with the advice and consent of a judge of the High Court acting in the Chancery Division, and of the vice-chancellor of the County Palatine (*m*).

(10.) *General rules, and rules of the Court of Chancery of the County Palatine, under this act may be made at any time after the passing of this act, to take effect on or after the commencement of this act.*

(*l*) See *Re Lillwall*, 1882, W. N. 6; 30 W. R. 243.

(*m*) Under Palatine Court of Durham Act, 1889, s. 10, the powers of the court may be exercised by the Palatine Court of Durham.

Orders of
court con-
clusive.

70.—(1.) An order of the court under any statutory or other jurisdiction shall not as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not.

40 & 41 Vict.
c. 18, s. 40.

(2.) This section shall have effect with respect to any lease, sale, or other act under the authority of the court, and purporting to be in pursuance of the Settled Estates Act, 1877, notwithstanding the exception in section forty of that act, or to be in pursuance of any former act repealed by that act, notwithstanding any exception in such former act.

(3.) This section applies to all orders made before or after the commencement of this act, except any order which has before the commencement of this act been set aside or determined to be invalid on any ground, and except any order as regards which an action or proceeding is at the commencement of this act pending for having it set aside or determined to be invalid.

Having regard to this section an order of the court will be conclusive even where the blot appears on the face of it (*Re Hall Dare*, 21 Ch. D. 41). The section prevented a purchaser of land sold in an administration action to whom a conveyance of the legal estate was offered from requiring an abstract of an equitable title (*Re Witham, Witham v. Davis*, 1901, W. N. 86); or (on a sale in a foreclosure action to which the administratrix of the mortgagor was a party) from requiring the concurrence in the conveyance of the mortgagor's heir (*Re Harrowby and Paine*, 1902, W. N. 137). On a sale in an administration action, it was held that the purchasers were entitled to the conveyance of the fee in an absolute form from mortgagor and first mortgagee, notwithstanding the existence of puisne mortgagees not parties to the action, and that as against such puisne mortgagees this section would protect the purchaser (*Mostyn v. Mostyn*, 1893, 3 Ch. 376). Where, however, the order for sale was made on the assumption that the property belonged to A., whereas it in fact belonged to B., who was not a party to the action, this section did not give the purchaser a good title against B. (*Jones v. Barnett*, 1900, 1 Ch. 370; see *Re Hambrough, H. v. H.*, 1909, 2 Ch. 627). The court will not, in reliance on this section, attempt to exercise a jurisdiction which it does not possess (*Re Montagu, Derbishire v. Montagu*, 1897, 2 Ch. 8).

44 & 45 Vict.
c. 41, s. 70.

XVII.—REPEALS.

71.—(1.) *The enactments described in Part III. of the second schedule to this act are hereby repealed.*

Repeal of
enactments in
Part III. of
Second
Schedule;
restriction on
all repeals.

(2.) *The repeal by this act of any enactment shall not affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this act, or any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this act; but this provision shall not be construed as qualifying the provision of this act relating to section forty of the Settled Estates Act, 1877, or any former act repealed by that act.*

Where a mortgage was made prior to 1882, the mortgagee can still exercise the powers given by 23 & 24 Vict. c. 145, *ante*, p. 544 (*Re Solomon and Meagher*, 40 Ch. D. 508). So under sect. 27 of the last-mentioned act (which confers the power of appointing on the "acting executor" of a surviving trustee) new trustees of the will of a testator who died prior to 1882 were validly appointed by one (and the only proving) executor out of several executors of a surviving trustee (*Re Boncherett, Barne v. Erskine*, 1908, 1 Ch. 180; see *Trustee Act*, 1893, sect. 10, *post*).

As regards the construction of a statute which contains a repealing clause followed by a saving clause, there to the extent of its language the saving clause *primâ facie* annuls the repeal. But if you find in the repealing act something incompatible with the general enactments in the repealed act, there to the extent of the incompatibility the repeal takes effect (*Re R.*, 1906, 1 Ch. 736).

XVIII.—IRELAND.

72.—(1.) In the application of this Act to Ireland the foregoing provisions shall be modified as in this section provided.

Modifications
respecting
Ireland.

44 & 45 Vict.
c. 41, s. 72.

(2.) The court shall be Her Majesty's High Court of *Justice* in Ireland.

(3.) All matters within the jurisdiction of that court shall, subject to the acts regulating that court, be assigned to the Chancery Division of that court; but general rules under this act may direct that any of those matters be assigned to the land judges of that Division.

(4.) The proper office of the Supreme Court of *Judicature* in Ireland shall be substituted for the central office of the Supreme Court of *Judicature*.

40 & 41 Vict.
c. 57, s. 69.

(5.) General rules for purposes of this act for Ireland shall be deemed rules of court within the Supreme Court of *Judicature* Act (Ireland), and may be made accordingly, *at any time after the passing of this act, to take effect on or after the commencement of this act.*

Death of bare
trustee intes-
tate, &c.
37 & 38 Vict.
c. 78.

73.—(1.) Section five of the Vendor and Purchaser Act, 1874, is hereby repealed from and after the commencement of this act, as regards cases of death thereafter happening; and section seven of the Vendor and Purchaser Act, 1874, is hereby repealed as from the date at which it came into operation.

(2.) This section extends to Ireland only.

SCHEDULES.

THE FIRST SCHEDULE.

ACTS AFFECTED.

PART I. (n).

- 1 & 2 Vict. c. 110.—*An act for abolishing arrest on mesne process in civil actions, except in certain cases; for extending the remedies of creditors against the property of debtors; and for amending the laws for the relief of insolvent debtors in England.*
- 2 & 3 Vict. c. 11.—*An act for the better protection of purchasers against judgments, crown debts, lis pendens, and fiats in bankruptcy.*
- 18 & 19 Vict. c. 15.—*An act for the better protection of purchasers against judgments, crown debts, cases of lis pendens, and life annuities or rent-charges.*
- 22 & 23 Vict. c. 35.—*An act to further amend the law of property and to relieve trustees.*
- 23 & 24 Vict. c. 38.—*An act to further amend the law of property.*
- 23 & 24 Vict. c. 115.—*An act to simplify and amend the practice as to the entry of satisfaction on crown debts and on judgments.*
- 27 & 28 Vict. c. 112.—*An act to amend the law relating to future judgments, statutes, and recognizances.*
- 28 & 29 Vict. c. 104.—*The Crown Suits, &c. Act, 1865.*
- 31 & 32 Vict. c. 54.—*The Judgments Extension Act, 1868.*

(n) See Conv. Act, 1882, s. 2 (1), *post*, p. 620.

PART II. (o).

44 & 45 Vict.
c. 41.

5 & 6 Will. 4, c. 62.—*An act to repeal an act of the present session of parliament, intituled "An act for the more effectual abolition of oaths and affirmations taken and made in various departments of the State, and to substitute declarations in lieu thereof; and for the more entire suppression of voluntary and extra-judicial oaths and affidavits;" and to make other provisions for the abolition of unnecessary oaths.*

(o) See Conv. Act, 1881, s. 68, ante, p. 611.

THE SECOND SCHEDULE.

REPEALS.

A description or citation of a portion of an act is inclusive of the words, section, or other part, first or last mentioned, or otherwise referred to as forming the beginning, or as forming the end, of the portion comprised in the description or citation.

PART I. (p).

22 & 23 Vict. c. 35 ... in part.	An act to further amend the law of property and to relieve trustees ... Sections four to nine.	} in part; namely,—
23 & 24 Vict. c. 126... in part.	The Common Law Procedure Act, 1860 ... Section two.	

PART II. (q).

15 & 16 Vict. c. 86 ... in part.	An act to amend the practice and course of proceeding in the High Court of Chancery ... Section forty-eight.	} in part; namely,—

PART III. (r).

8 & 9 Vict. c. 119 ...	An act to facilitate the conveyance of real property.	} in part; namely,—
23 & 24 Vict. c. 145... in part.	An act to give to trustees, mortgagees, and others certain powers now commonly inserted in settlements, mortgages, and wills ... Parts II. and III. (sections eleven to thirty).	

(p) See sect. 14 (7), ante, p. 576.

(q) See sect. 25 (6), ante, p. 589.

(r) See sect. 71 (1), ante, p. 613.

44 & 45 Vict.
c. 41.

THE THIRD SCHEDULE.

STATUTORY MORTGAGE.

PART I. (s).

Deed of Statutory Mortgage.

THIS INDENTURE made by way of statutory mortgage the day of 1882 between *A.* of [&c.] of the one part and *M.* of [&c.] of the other part WITNESSETH that in consideration of the sum of £ now paid to *A.* by *M.* of which sum *A.* hereby acknowledges the receipt *A.* as mortgagor and as beneficial owner hereby conveys to *M.* All that [&c.] To hold to and to the use of *M.* in fee simple for securing payment on the day of 1883 of the principal sum of £ as the mortgage money with interest thereon at the rate of [four] per centum per annum.

In witness &c.

* * * *Variations in this and subsequent forms to be made, if required, for leasehold land, or other matter.*

PART II. (t).

(A.)

Deed of Statutory Transfer, Mortgagor not joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *M.* of [&c.] of the one part and *T.* of [&c.] of the other part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [&c.] WITNESSETH that in consideration of the sum of £ now paid to *M.* by *T.* being the aggregate amount of £ mortgage money and £ interest due in respect of the said mortgage of which sum *M.* hereby acknowledges the receipt *M.* as mortgagee hereby conveys and transfers to *T.* the benefit of the said mortgage.

In witness &c.

(B.)

Deed of Statutory Transfer, a Covenantor joining.

THIS INDENTURE made by way of statutory transfer of mortgage the day of 1883 between *A.* of [&c.] of the first part *B.* of [&c.] of the second part and *C.* of [&c.] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [&c.] WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* being the mortgage money due in respect of the said mortgage no interest being now due and payable thereon of which sum *A.* hereby acknowledges the receipt *A.* as mortgagee with the concurrence of *B.* who joins herein as covenantor hereby conveys and transfers to *C.* the benefit of the said mortgage.

In witness &c.

(C.)

Statutory Transfer and Statutory Mortgage combined.

THIS INDENTURE made by way of statutory transfer of mortgage and statutory mortgage the day of 1883 between *A.* of [&c.] of the first part *B.* of [&c.] of the second part and *C.* of [&c.] of the third part supplemental to an indenture made by way of statutory mortgage dated the day of 1882 and made between [&c.] WHEREAS the principal

(s) See sect. 26 (1), *ante*, p. 590.

(t) See sect. 27 (1), *ante*, p. 590.

sum of £ only remains due in respect of the said mortgage as the mortgage money and no interest is now due and payable thereon AND WHEREAS *B.* is seised in fee simple of the land comprised in the said mortgage subject to that mortgage NOW THIS INDENTURE WITNESSETH that in consideration of the sum of £ now paid to *A.* by *C.* of which sum *A.* hereby acknowledges the receipt and *B.* hereby acknowledges the payment and receipt as aforesaid * *A.* as mortgagee hereby conveys and transfers to *C.* the benefit of the said mortgage AND THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as mortgagee and according to his estate and by direction of *B.* hereby conveys and *B.* as beneficial owner hereby conveys and confirms to *C.* All that [*&c.*] To hold to and to the use of *C.* in fee simple for securing payment on the day of 1882 of † the sum of £ as the mortgage money with interest thereon at the rate of [*four*] per centum per annum.

In witness, &c.

[*Or, in case of further advance, after aforesaid at* insert and also in consideration of the further sum of £ now paid by C. to B. of which sum B. hereby acknowledges the receipt, and after of at † insert the sums of £ and £ making together*]

* * Variations to be made, as required, in case of the deed being made by indorsement or in respect of any other thing.

PART III. (u).

Deed of Statutory Re-conveyance of Mortgage.

THIS INDENTURE made by way of statutory re-conveyance of mortgage the day of 1884 between *C.* of [*&c.*] of the one part and *B.* of [*&c.*] of the other part supplemental to an indenture made by way of statutory transfer of mortgage dated the day of 1883 and made between [*&c.*] WITNESSETH that in consideration of all principal money and interest due under that indenture having been paid of which principal and interest *C.* hereby acknowledges the receipt *C.* as mortgagee hereby conveys to *B.* all the lands and hereditaments now vested in *C.* under the said indenture To hold to and to the use of *B.* in fee simple discharged from all principal money and interest secured by and from all claims and demands under the said indenture.

In witness, &c.

* * Variations as noted above.

THE FOURTH SCHEDULE (x).

SHORT FORMS OF DEEDS.

I.—Mortgage.

THIS INDENTURE OF MORTGAGE made the day of 1882 between *A.* of [*&c.*] of the one part and *B.* of [*&c.*] and *C.* of [*&c.*] of the other part WITNESSETH that in consideration of the sum of £ paid to *A.* by *B.* and *C.* out of money belonging to them on a joint account of which sum *A.* hereby acknowledges the receipt *A.* hereby covenants with *B.* and *C.* to pay to them on the day of 1882 the sum of £ with interest thereon in the meantime at the rate of [*four*] per centum per annum and also as long after that day as any principal money remains due under this mortgage to pay to *B.* and *C.* interest thereon at the same rate by equal

(u) See sect. 29, *ante*, p. 591.

(x) See sect. 57, *ante*, p. 606.

44 & 45 Vict. half-yearly payments on the day of and the day of AND
c. 41. THIS INDENTURE ALSO WITNESSETH that for the same consideration *A.* as
beneficial owner hereby conveys to *B.* and *C.* All that [*&c.*] To hold to
and to the use of *B.* and *C.* in fee simple subject to the proviso for redemption
following (namely) that if *A.* or any person claiming under him shall on the
day of 1882 pay to *B.* and *C.* the sum of £ and interest
thereon at the rate aforesaid then *B.* and *C.* or the persons claiming under
them will at the request and cost of *A.* or the persons claiming under him
re-convey the premises to *A.* or the persons claiming under him And *A.*
hereby covenants with *B.* as follows [*here add covenant as to fire insurance*
or other special covenant required].

In witness, &c.

II.—Further Charge.

THIS INDENTURE made the day of 18 between [*the same*
parties as the foregoing mortgage] and supplemental to an indenture of
mortgage dated the day of 18 and made between the same
parties for securing the sum of £ and interest at [*four*] per centum
per annum on property at [*&c.*] WITNESSETH that in consideration of the
further sum of £ paid to *A.* by *B.* and *C.* out of money belonging to
them on a joint account [*add receipt and covenant as in the foregoing mortgage*]
and further that all the property comprised in the before-mentioned indenture
of mortgage shall stand charged with the payment to *B.* and *C.* of the sum
of £ and the interest thereon hereinbefore covenanted to be paid as
well as the sum of £ and interest secured by the same indenture.

In witness, &c.

III.—Conveyance on Sale.

THIS INDENTURE made the day of 1883 between *A.* of [*&c.*] of
the first part *B.* of [*&c.*] and *C.* of [*&c.*] of the second part and *M.* of [*&c.*] of
the third part WHEREAS by an indenture dated [*&c.*] and made between
[*&c.*] the lands hereinafter mentioned were conveyed by *A.* to *B.* and *C.* in
fee simple by way of mortgage for securing £ and interest and by a
supplemental indenture dated [*&c.*] and made between the same parties those
lands were charged by *A.* with the payment to *B.* and *C.* of the further sum
of £ and interest thereon AND WHEREAS a principal sum of £
remains due under the two before-mentioned indentures but all interest
thereon has been paid as *B.* and *C.* hereby acknowledge Now THIS
INDENTURE WITNESSETH that in consideration of the sum of £ paid by
the direction of *A.* to *B.* and *C.* and of the sum of £ paid to *A.* those
two sums making together the total sum of £ paid by *M.* for the
purchase of the fee simple of the lands hereinafter mentioned of which sum
of £ *B.* and *C.* hereby acknowledge the receipt and of which total sum
of £ *A.* hereby acknowledges the payment and receipt in manner
before-mentioned *B.* and *C.* as mortgagees and by the direction of *A.* as
beneficial owner hereby convey and *A.* as beneficial owner hereby conveys
and confirms to *M.* All that [*&c.*] To hold to and to the use of *M.* in fee
simple discharged from all money secured by and from all claims under the
before-mentioned indentures [*Add if required, And A. hereby acknowledges*
the right of M. to production of the documents of title mentioned in the
Schedule hereto and to delivery of copies thereof and hereby undertakes for
the safe custody thereof.]

In witness, &c.

[The Schedule above referred to.

To contain list of documents retained by A.]

IV.—*Marriage Settlement.*44 & 45 Vict.
c. 41.

THIS INDENTURE made the day of 1882 between *John M.* of [&c.] of the first part *Jane S.* of [&c.] of the second part and *X.* of [&c.] and *Y.* of [&c.] of the third part WITNESSETH that in consideration of the intended marriage between *John M.* and *Jane S.* *John M.* as settlor hereby conveys to *X.* and *Y.* All that [&c.] To hold to *X.* and *Y.* in fee simple to the use of *John M.* in fee simple until the marriage and after the marriage to the use of *John M.* during his life without impeachment of waste with remainder after his death to the use that *Jane S.* if she survives him may receive during the rest of her life a yearly jointure rentcharge of £ to commence from his death and to be paid by equal half-yearly payments the first thereof to be made at the end of six calendar months from his death if she is then living or if not a proportional part to be paid at her death and subject to the before-mentioned rentcharge to the use of *X.* and *Y.* for a term of five hundred years without impeachment of waste on the trusts hereinafter declared and subject thereto to the use of the first and other sons of *John M.* and *Jane S.* successively according to seniority in tail male with remainder [*insert here, if thought desirable, to the use of the same first and other sons successively according to seniority in tail with remainder*] to the use of all the daughters of *John M.* and *Jane S.* in equal shares as tenants in common in tail with cross remainders between them in tail with remainder to the use of *John M.* in fee simple [*Insert trusts of term of 500 years for raising portions; also, if required, power to charge jointure and portions on a future marriage; also powers of sale, exchange, and partition, and other powers and provisions, if and as desired.*]

In witness, &c.

THE CONVEYANCING ACT, 1882.

45 & 46 VICT. c. 39.

Preliminary.

1.—(1.) This act may be cited as the Conveyancing Act, 1882; and the Conveyancing and Law of Property Act, 1881 (in this act referred to as the Conveyancing Act of 1881) and this act may be cited together as the Conveyancing Acts, 1881, 1882.

45 & 46 Vict.
c. 39, s. 1.Short titles;
commence-
ment;
extent; in-
terpretation.

(2.) This act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this act referred to as the commencement of this act.

44 & 45 Vict.
c. 41.

(3.) This act does not extend to Scotland.

(4.) In this act and in the schedule thereto—

(i.) Property includes real and personal property, and any debt, and any thing in action, and any other right or interest in the nature of property, whether in possession or not;

(ii.) Purchaser includes a lessee or mortgagee, or an intending purchaser, lessee, or mortgagee, or other person, who, for valuable consideration, takes or deals for property,

45 & 46 Vict.
c. 39, s. 1.

3 & 4 Will. 4,
c. 74.

4 & 5 Will. 4,
c. 92.

and purchase has a meaning corresponding with that of purchaser;

(iii.) The act of the session of the third and fourth years of King William the Fourth (chapter seventy-four) "for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance" is referred to as the Fines and Recoveries Act; and the act of the session of the fourth and fifth years of King William the Fourth (chapter ninety-two) "for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance in Ireland" is referred to as the Fines and Recoveries (Ireland) Act.

Searches.

Official negative and other certificates of searches for judgments, crown debts, &c.

2.—(1.) Where any person requires, for purposes of this section, search to be made in the Central Office of the Supreme Court of Judicature for entries of judgments, deeds, or other matters or documents, whereof entries are required or allowed to be made in that office by any act described in Part I. of the first schedule to the Conveyancing Act of 1881 (*y*), or by any other act, he may deliver in the office a requisition in that behalf, referring to this section.

(2.) Thereupon the proper officer shall diligently make the search required, and shall make and file in the office a certificate setting forth the result thereof; and office copies of that certificate shall be issued on requisition, and an office copy shall be evidence of the certificate.

(3.) In favour of a purchaser, as against persons interested under or in respect of judgments, deeds, or other matters or documents, whereof entries are required or allowed as aforesaid, the certificate, according to the tenour thereof, shall be conclusive, affirmatively or negatively, as the case may be.

(4.) Every requisition under this section shall be in writing, signed by the person making the same, specifying the name against which he desires search to be made, or in relation to which he requires an office copy certificate of result of search, and other sufficient particulars; and the person making any such requisition shall not be entitled to a search, or an office copy certificate, until he has satisfied the proper officer that the same is required for the purposes of this section.

(5.) General rules shall be made for purposes of this section, prescribing forms and contents of requisitions and certificates, and regulating the practice of the office, and prescribing, with the concurrence of the Commissioners of her Majesty's Treasury, the fees to be taken therein; which rules shall be deemed Rules of Court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court

39 & 40 Vict.
c. 59.
44 & 45 Vict.
c. 68.

of Judicature Act, 1881, and may be made, at any time after the passing of this act, to take effect on or after the commencement of this act (z). 45 & 46 Vict.
c. 39, s. 2.

(6.) If any officer, clerk, or person employed in the office commits, or is party or privy to, any act of fraud or collusion, or is wilfully negligent, in the making of or otherwise in relation to any certificate or office copy under this section, he shall be guilty of a misdemeanour.

(7.) Nothing in this section or in any rule made thereunder shall take away, abridge, or prejudicially affect any right which any person may have independently of this section to make any search in the office; and every such search may be made as if this section or any such rule had not been enacted or made.

(8.) Where a solicitor obtains an office copy certificate of result of search under this section, he shall not be answerable in respect of any loss that may arise from error in the certificate.

(9.) Where the solicitor is acting for trustees, executors, agents, or other persons in a fiduciary position, those persons also shall not be so answerable.

(10.) Where such persons obtain such an office copy without a solicitor, they shall also be protected in like manner.

(11.) Nothing in this section applies to deeds inrolled under the Fines and Recoveries Act, or under any other act, or under any statutory rule. 3 & 4 Will. 4.
c. 74.

(12.) This section does not extend to Ireland.

(y) See *ante*, p. 614.

(z) See rules, *post*, p. 629. The fees are regulated by an order dated 1 Jan., 1883, for which see Shelford R. P. Stat. 9th ed., 64.

Notice.

3.—(1.) A purchaser shall not be prejudicially affected by notice of any instrument, fact, or thing unless— Restriction
on construc-
tive notice.

(i.) It is within his own knowledge, or would have come to his knowledge if such inquiries and inspections had been made as ought reasonably to have been made by him; or

(ii.) In the same transaction with respect to which a question of notice to the purchaser arises, it has come to the knowledge of his counsel, as such, or of his solicitor, or other agent, as such, or would have come to the knowledge of his solicitor, or other agent, as such, if such inquiries and inspections had been made as ought reasonably to have been made by the solicitor or other agent.

(2.) This section shall not exempt a purchaser from any liability under, or any obligation to perform or observe, any covenant, condition, provision, or restriction contained in any instrument under which his title is derived, mediately or immediately; and such liability or obligation may be enforced in

45 & 46 Vict.
c. 39, s. 3.

the same manner and to the same extent as if this section had not been enacted.

(3.) A purchaser shall not by reason of anything in this section be affected by notice in any case where he would not have been so affected if this section had not been enacted.

(4.) This section applies to purchases made either before or after the commencement of this act; save that, where an action is pending at the commencement of this act, the rights of the parties shall not be affected by this section.

Before this act the rule as to constructive notice was thus stated: Where a person has not actual notice of a matter of fact, he ought not to be treated as if he had notice unless the circumstances are such as enable the court to say not only that he might have acquired, but also that he ought to have acquired, the notice with which it is sought to affect him—that he would have acquired it but for his gross negligence in the conduct of the business in question (*Ware v. Egmont*, 4 D. M. & G. 473; *Bailey v. Barnes*, 1894, 1 Ch. 35; see, further, Seton, 6th ed. 2105). Under this section the law is substantially the same (*Molyneux v. Hawtrey*, 1903, 2 K. B. 493). But the negative form of the section shows that a restriction rather than an extension of the old doctrine was intended (*Bailey v. Barnes*, *sup.*; *Re Valletort Co.*, 1903, 2 Ch. 663). The words “ought reasonably to have been made” mean ought as a matter of prudence, having regard to what is usually done by men of business under similar circumstances (1894, 1 Ch. 35).

The inquiry which ought reasonably to be made by an intending mortgagee is an investigation of the title; so a mortgagee was held entitled as a purchaser for value without notice, on the ground that such an investigation would have disclosed no flaw (*Gainsborough v. Watcombe Co.*, 53 L. T. 116; see *Taylor v. London and County Bank*, 1901, 2 Ch. 231). In a case where the same solicitor acted for mortgagor and mortgagee, the court refused to impute to the mortgagee notice either of facts known to the mortgagor, or of facts which had come to the knowledge of the solicitor when acting in previous transactions for other mortgagees of the same property (*Re Cousins*, 31 Ch. D. 671; see *Taylor v. London and County Bank*, *sup.*).

A purchaser was not affected with constructive notice of impropriety in a previous sale by a mortgagee under which he claimed (*Bailey v. Barnes*, 1894, 1 Ch. 25). A sub-mortgagee was not affected with constructive notice where an independent solicitor, if he had been employed, would not have discovered the facts (*Bateman v. Hunt*, 1904, 2 K. B. 540). A purchaser of building lots was not affected with constructive notice of building stipulations which did not appear on the title (*Rowell v. Satchell*, 1903, 2 Ch. 221). And a purchaser of leaseholds was not affected with constructive notice of onerous covenants where it could not be said that his solicitor was reasonably bound to make further inquiry (*Molyneux v. Hawtrey*, 1903, 2 K. B. 497). A bank with whom a company's deeds were deposited was not affected with constructive notice of the contents of debentures previously issued (*Re Valletort Co.*, 1903, 2 Ch. 654).

On the other hand a mortgagee was affected with constructive notice where a reasonable inquiry would have disclosed an existing charge (*Re Alms Corn Charity*, 1901, 2 Ch. 762). So a trustee paying over money (*Davis v. Hutchings*, 1907, 1 Ch. 356). Again, a purchaser who accepts a title shorter than 40 years will be affected with constructive notice of such equities as he would have ascertained by reasonable inquiries for 40 years (*Re Nisbet and Potts*, 1906, 1 Ch. 408). A lessee was affected with constructive notice of restrictive covenants on the ground that they would have come to his knowledge had he made reasonable inquiries (*Holloway v. Hill*, 1902, 2 Ch. 620). The section, however, does not impose on a mortgagee the obligation of inquiring from a tenant as to the interest of his lessor (*Hunt v. Luck*, 1902, 1 Ch. 434).

Leases.

45 & 46 Vict.
c. 39, s. 4.

4.—(1.) Where a lease is made under a power contained in a settlement, will, act of parliament, or other instrument, any preliminary contract for or relating to the lease shall not, for the purpose of the deduction of title to an intended assign, form part of the title, or evidence of the title, to the lease.

(2.) This section applies to leases made either before or after the commencement of this act.

See *Hughes v. Flanagan*, 30 L. R. Ir. 111.

See V. & P. Act, 1874, sect. 2, rule 1, *ante*, p. 550; Conv. Act, 1881, sect. 13, *ante*, p. 574; S. L. Act, 1882, s. 31 (4), *post*, p. 697.

[*Sect. 5 was replaced by the Trustee Act, 1893, s. 10 (2) (b), post.*]

Powers.

6.—(1.) A person to whom any power, whether coupled with an interest or not, is given, may, by deed, disclaim the power; and, after disclaimer, shall not be capable of exercising or joining in the exercise of the power.

Disclaimer of
power by
trustees.

(2.) On such disclaimer, the power may be exercised by the other or others, or the survivors or survivor of the others, of the persons to whom the power is given, unless the contrary is expressed in the instrument creating the power.

(3.) This section applies to powers created by instruments coming into operation either before or after the commencement of this act.

See Conv. Act, 1881, sect. 52, and note, *ante*, p. 603; and the notes to the Fines and Recoveries Act, 1833, sects. 77, 78, *ante*, pp. 320, 322. A renunciation of executorship was held to be a disclaimer of a power of sale (*Re Fisher and Haslett*, 83 L. R. Ir. 546). The power given by the Settled Land Acts cannot be disclaimed (S. L. Act, 1882, s. 50, *post*).

[*Sect. 7, referring to acknowledgments by married women, is inserted ante, p. 333.*]

Powers of Attorney.

8.—(1.) If a power of attorney, given for valuable consideration, is in the instrument creating the power expressed to be irrevocable, then, in favour of a purchaser,—

Effect of
power of
attorney, for
value, made
absolutely
irrevocable.

(i.) The power shall not be revoked at any time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done at any time by the donee of the power, in pursuance of the power, shall be as valid as if anything done

45 & 46 Vict.
c. 39, s. 8.

by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power nor the purchaser shall at any time be prejudicially affected by notice of anything done by the donor of the power, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this act.

See *Frith v. F.*, 1906, A. C. 260, as to powers revocable and irrevocable.

Effect of
power of
attorney, for
value or not,
made irrevocable for
fixed time.

9.—(1.) If a power of attorney, whether given for valuable consideration or not, is in the instrument creating the power expressed to be irrevocable for a fixed time therein specified, not exceeding one year from the date of the instrument, then, in favour of a purchaser,—

(i.) The power shall not be revoked, for and during that fixed time, either by anything done by the donor of the power without the concurrence of the donee of the power, or by the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power; and

(ii.) Any act done within that fixed time, by the donee of the power, in pursuance of the power, shall be as valid as if anything done by the donor of the power without the concurrence of the donee of the power, or the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power, had not been done or happened; and

(iii.) Neither the donee of the power, nor the purchaser, shall at any time be prejudicially affected by notice either during or after that fixed time of anything done by the donor of the power during that fixed time, without the concurrence of the donee of the power, or of the death, marriage, lunacy, unsoundness of mind, or bankruptcy of the donor of the power within that fixed time.

(2.) This section applies only to powers of attorney created by instruments executed after the commencement of this act.

Executory Limitations.

Restriction
on executory
limitations.

10.—(1.) Where there is a person entitled to land for an estate in fee, or for a term of years absolute or determinable on life, or for term of life, with an executory limitation over on default or failure of all or any of his issue, whether within or at any specified period or time or not, that executory limitation shall be or become void and incapable of taking effect, if and as soon as there is living any issue who has attained the

age of twenty-one years, of the class on default or failure whereof the limitation over was to take effect. 45 & 46 Vict.
c. 39, s. 10.

(2.) This section applies only where the executory limitation is contained in an instrument coming into operation after the commencement of this act.

A declaration was made defining the effect of an executory limitation over in accordance with the section (*Re Booth, Pickard v. Booth*, 1900, 1 Ch. 768). The rules governing cases where this section does not apply are stated Theobald, 7th ed., 660.

Long Terms.

11. Section sixty-five of the Conveyancing Act of 1881 (*a*) shall apply to and include, and shall be deemed to have always applied to and included, every such term as in that section mentioned, whether having as the immediate reversion thereon the freehold or not; but not— Amendment
of enactment
respecting
long terms.

- (i.) Any term liable to be determined by re-entry for condition broken; or
- (ii.) Any term created by sub-demise out of a superior term, itself incapable of being enlarged into a fee simple.

(*a*) *Ante*, p. 608.

Mortgages.

12. The right of the mortgagor, under section fifteen of the Conveyancing Act of 1881 (*b*), to require a mortgagee, instead of re-conveying, to assign the mortgage debt and convey the mortgaged property to a third person, shall belong to and be capable of being enforced by each incumbrancer, or by the mortgagor, notwithstanding any intermediate incumbrance; but a requisition of an incumbrancer shall prevail over a requisition of the mortgagor, and, as between incumbrancers, a requisition of a prior incumbrancer shall prevail over a requisition of a subsequent incumbrancer. Reconvey-
ance on
mortgage.

(*b*) *Ante*, p. 578.

Saving.

13. The repeal by this act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, before the commencement of this act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this act. Restriction
on appeals in
this act.

THE CONVEYANCING AND LAW OF PROPERTY ACT, 1892.

55 & 56 VICT. c. 13.

*Preliminary.*55 & 56 Vict.
c. 13, s. 1.Short title
and extent.
44 & 45 Vict.
c. 41.
45 & 46 Vict.
c. 39.

1.—(1.) This act may be cited as the Conveyancing and Law of Property Act, 1892, and the Conveyancing and Law of Property Act, 1881, and the Conveyancing Act, 1882, and this act shall be read together and may be cited together as the Conveyancing Acts, 1881, 1882, and 1892.

(2.) This Act does not extend to Scotland.

*Leases, Under-Leases, Forfeiture.*Costs of
waiver, and
forfeiture in
case of bank-
ruptcy or
execution.

2.—(1.) A lessor shall be entitled to recover as a debt due to him from a lessee, and in addition to damages (if any) all reasonable costs and expenses properly incurred by the lessor in the employment of a solicitor and surveyor or valuer, or otherwise, in reference to any breach giving rise to a right of re-entry or forfeiture which, at the request of the lessee, is waived by the lessor by writing under his hand, or from which the lessee is relieved, under the provisions of the Conveyancing and Law of Property Act, 1881, or of this act (c).

(2.) Sub-section six of section fourteen of the Conveyancing and Law of Property Act, 1881, is to apply to a condition for forfeiture on bankruptcy of the lessee, or on taking in execution of the lessee's interest only after the expiration of one year from the date of the bankruptcy, or taking in execution, and provided the lessee's interest be not sold within such one year, but in case the lessee's interest be sold within such one year, sub-section six shall cease to be applicable thereto (d).

(3.) Sub-section two of this section is not to apply to any lease of—

- (a) Agricultural or pastoral land :
- (b) Zincs or minerals :
- (c) A house used or intended to be used as a public-house or beershop :
- (d) A house let as a dwelling-house, with the use of any furniture, books, works of art, or other chattels not being in the nature of fixtures :
- (e) Any property with respect to which the personal qualifications of the tenant are of importance for the preservation of the value or character of the property, or on the ground of neighbourhood to the lessor, or to any person holding under him.

(c) This section must be read with sect. 14 of the Conv. Act, 1881 (*ante*, p. 575), where see note. The waiver of the forfeiture should be express (Foa, 4th ed. 651).

Before this act it was held, under sect. 14, sub-sect. (2), of the Conv. Act, 1881, that payment by the lessee of the expenses of a solicitor, &c., might be made by the court a condition of relief (*Bridge v. Quick*, 61 L. J. Q. B. 375). 55 & 56 Vict. c. 13, s. 2.

An under-lessee is not as between himself and the lessor a "lessee" within this section, and the lessor cannot, therefore, recover costs from him under sub-sect. (1) (*Nind v. Nineteenth Century Society*, 1894, 2 Q. B. 226). In a case under the present sub-section an opinion was expressed in the C. A. that a lessee who by complying with the lessor's notice avoids a forfeiture, is not "relieved" from forfeiture within the sub-section (*Nind v. Nineteenth Century Society*, 1894, 2 Q. B. 233; see *Dendy v. Evans*, 1910, 1 K. B. 270). If this be correct, the operation of the sub-section would seem to be much narrowed.

(d) The effect of sub-sect. (2) is to take the case of forfeiture for bankruptcy or liquidation out of sub-sect. (6) of sect. 14 of Conv. Act, 1881 (*ante*, p. 576); and to make a notice necessary for one year from the bankruptcy or liquidation (*Horsey Estate, Ltd. v. Steiger*, 1899, 2 Q. B. 79, 91; where see also as to what is sufficient notice). Where, immediately after the bankruptcy, a lessor re-entered peaceably without giving notice, his re-entry was void against the bankruptcy trustee (*Re Riggs*, 1901, 2 K. B. 16). To come within the final words of the sub-section the sale must be completed by conveyance, or there must be an absolute contract for sale (*Re Castle, Mitchell v. Castle*, 94 L. T. 396). Sub-sect. (3) prevented sub-sect. (2) from applying to a public-house (*Fryer v. Ewart*, 1902, A. C. 187).

3. In all leases containing a covenant, condition, or agreement against assigning, underletting, or parting with the possession, or disposing of the land or property leased without licence or consent, such covenant, condition, or agreement shall, unless the lease contains an expressed provision to the contrary, be deemed to be subject to a proviso to the effect that no fine or sum of money in the nature of a fine shall be payable for or in respect of such licence or consent; but this proviso shall not preclude the right to require the payment of a reasonable sum in respect of any legal or other expense incurred in relation to such licence or consent. No fine to be exacted for licence to assign.

The section does not make the payment of a fine illegal, but imports into the lease as between the parties a proviso that no fine shall be payable for a licence (*Waite v. Jennings*, 1906, 2 K. B. 11; *Andrew v. Bridgman*, 1908, 1 K. B. 598). This imported proviso is analogous to the common proviso that a licence shall not be unreasonably withheld (*Andrew v. Bridgman, sup.*). Where a fine was in fact paid (not under protest) it could not be recovered back. The remedy of the lessee where consent is refused except on payment, is to ignore the covenant and assign without licence (*ib.*; see *Evans v. Levy*, 1910, W. N. 22). Effect of a section.

As to what is a fine, the word includes "premium or foregift and any payment, consideration or benefit in the nature of a fine, premium or foregift" (1881, Conv. Act, s. 2 (9), *ante*, p. 558). Having regard to this definition, *Moulton, L. J.*, laid down that a fine includes a benefit given to the landlord as the price of a licence, and accordingly included a covenant entered into by an intended assignee (on the occasion of the grant of the licence) to pay all future rent (*Waite v. Jennings*, 1906, 2 K. B. 18). The majority, however, of the C. A. considered that a covenant which only secured to the landlord the rent reserved by the lease was not a fine within the section (*ib.* 11). In an earlier case it was said that the section pointed at money which was to go irrevocably into the pocket of the landlord (*Re Cosh*, 1897, 1 Ch. 14); and accordingly the requiring (as a condition of a licence) a deposit of money to secure the fulfilment of the lessee's obligations in regard to other property, was not requiring a fine within the section (*ib.* 9). What is a fine.

55 & 56 Vict.
c. 13, s. 3.

Requiring an increased rent as a condition of consenting to an assignment was "requiring a fine" within the section and was contrary to the imported proviso (*Jenkins v. Price*, 1907, 2 Ch. 229; reversed on another point, 1908, 1 Ch. 10). Where consent to an assignment was refused because increased rent was not promised, the consent was held to have been "unreasonably withheld" within the subsequent words of the lease (*ib.*; see *Andrew v. Bridgman*, 1908, 1 K. B. 596).

Power of
court to pro-
tect under-
lessees on
forfeiture of
superior
leases.

4. Where a lessor is proceeding by action or otherwise to enforce a right of re-entry or forfeiture under any covenant, proviso, or stipulation in a lease, the court may, on application by any person claiming as under-lessee any estate or interest in the property comprised in the lease or any part thereof either in the lessor's action (if any) or in any action brought by such person for that purpose, make an order vesting for the whole term of the lease or any less term the property comprised in the lease or any part thereof in any person entitled as under-lessee to any estate or interest in such property upon such conditions, as to execution of any deed or other document, payment of rent, costs, expenses, damages, compensation, giving security, or otherwise, as the court in the circumstances of each case shall think fit, but in no case shall any such under-lessee be entitled to require a lease to be granted to him for any longer term than he had under his original sub-lease.

This section was passed in consequence of the decisions (*ante*, p. 577) that sect. 14 of the Conv. Act, 1881, did not apply as between ground landlord and under-lessee (*Nind v. Nineteenth Century Society*, 1894, 2 Q. B. 231). The section, however, is not a mere amendment of sect. 14 (*Gray v. Bonsall*, 1904, 1 K. B. 607). It enables the court to grant relief to an under-lessee in cases where no relief would have been granted to the original lessee, *e.g.*, bankruptcy (*Cholmeley School v. Sewell*, 1894, 2 Q. B. 906), or breach of covenant not to assign or underlet (*Imray v. Oakshette*, 1897, 2 Q. B. 218; see *Cohen v. Tannar*, 1900, 2 Q. B. 609, 614); or non-payment of rent (*Gray v. Bonsall*, *sup.*; see *London Bridge Co. v. Thompson*, 89 L. T. 50). But the jurisdiction will be exercised with caution (*Imray v. Oakshette*, *sup.*; see *Keith v. Gancia*, 1904, 1 Ch. 783, 791).

The estate vested by an order under the section is a new estate (*Serjeant v. Nash*, 1903, 2 K. B. 313), and the court has most ample discretion in fixing the terms of the new lease (*Ewart v. Fryer*, 1901, 1 Ch. 499; 1902, A. C. 187); which may be granted at an advanced rent (1901, 1 Ch. 507; see *Cholmeley School v. Sewell*, 1894, 2 Q. B. 913), and may include part only of the premises demised by the forfeited head lease (*London Bridge Co. v. Thompson*, 89 L. T. 50).

The application of the under-lessee may be made by defence and counterclaim in an action for possession by the lessor (*Cholmeley's School v. Sewell*, 1893, 2 Q. B. 254).

Before this statute the relation between a ground landlord and sub-lessee had been dealt with by sect. 6 of the Landlord and Tenant Act, 1730, and sect. 9 of the R. P. Act, 1845 (*ante*, p. 526).

Extension of
definitions
of "lease,"
"under-
lease," and
"under-
lessee."

5. In section fourteen of the Conveyancing and Law of Property Act, 1881, as amended by this act, and in this act, "lease" shall also include an agreement for a lease where the lessee has become entitled to have his lease granted, and "under-lease" shall also include an agreement for an under-lease where

the under-lessee has become entitled to have his under-lease granted, and in this act "under-lessee" shall include any person deriving title under or from an under-lessee. 55 & 56 Vict.
c. 13, s. 5.

See Conv. Act, sect. 14 (3), *ante*, p. 575. As to a tenancy agreement, see *Charrington v. Camp*, 1902, 1 Ch. 386.

[*Sect. 6 was replaced by the Trustee Act, 1893, s. 10 (2) (b), post.*]

RULE UNDER THE CONVEYANCING AND LAW OF PROPERTY ACT, 1881 (*e*).

Forms.

6. An alphabetical index of the names of the grantors of all powers of attorney filed under section 48 of the Conveyancing and Law of Property Act, 1881, shall be prepared and kept by the proper officer, and any person may search the index upon payment of the prescribed fee. No person shall take copies of or extracts from any power of attorney or other document filed under that section and produced for his inspection. All copies or extracts which may be required shall be made by the office.

(*e*) *Ante*, p. 602.

RULES UNDER SECTION 2 OF THE CONVEYANCING ACT, 1882 (*f*).

1. Every requisition for an official search shall state the name and address of the person requiring the search to be made. Every requisition and certificate shall be filed in the office where the search was made.

2. Every person requiring an official search to be made pursuant to section 2 of the Conveyancing Act, 1882, shall deliver to the officer a declaration according to the Forms I. and II. in the Appendix, purporting to be signed by the person requiring the search to be made, or by a solicitor, which declaration may be accepted by the officer as sufficient evidence that the search is required for the purposes of the said section. The declaration may be made in the requisition, or in a separate document.

3. Requisitions for searches under section 2 of the Conveyancing Act, 1882, shall be in the Forms III. to VI. in the Appendix, and the certificates of the results of such searches shall be in the Forms VII. to X., with such modifications as the circumstance may require.

4. Where a certificate setting forth the result of a search in any name has been issued, and it is desired that the search be continued in that name, to a date not more than one calendar month subsequent to the date of the certificate, a requisition in writing in the Form XI. in the Appendix may be left with the proper officer, who shall cause the search to be continued, and the result of the continued search shall be endorsed on the original certificate and upon any office copy thereof which may have been issued, if produced to the officer for that purpose. The endorsement shall be in the Form XII. in the Appendix with such modifications as circumstances require.

5. Every person shall, upon payment of the prescribed fee be entitled to have a copy of the whole or any part of any deed or document enrolled in the Enrolment Department of the Central Office.

(*f*) *Ante*, p. 620.

Forms.

APPENDIX.

FORM I.—DECLARATION BY SEPARATE INSTRUMENT AS TO PURPOSES OF SEARCH.

Supreme Court of Judicature. Central Office.

To the Clerk of Enrolments or The Registrar of

Royal Courts of Justice, London.

In the matter of A. B. and C. D.

I declare that the search (or searches) in the name (or names) of required to be made by the requisition for the search, dated the is (or are, required for the purposes of a sale (or mortgage, or lease, or as the case may be), by A. B. to C. D.

Signature, address, and description.

Dated .

FORM II.—DECLARATION AS TO PURPOSES OF SEARCH CONTAINED IN THE REQUISITION.

I declare that the above mentioned search is required for the purposes of a sale (or mortgage, or lease, or as the case may be), by A. B. to C. D.

FORM III.—REQUISITION FOR SEARCH IN THE ENROLMENT OFFICE, UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature. Central Office.

Requisition for Search.

To the Clerk of Enrolments, Royal Courts of Justice, London.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, search for deeds and other documents enrolled during the period from 18 to 18 both inclusive, in the following name (or names).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

(Add declaration, Form II.)

(State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.)

Signature, address, and description of person requiring the search.

Dated .

FORM IV.—REQUISITION FOR SEARCH IN THE BILLS OF SALE DEPARTMENT,
UNDER THE CONVEYANCING ACT, 1882, s. 2.

Forms.

Supreme Court of Judicature. Central Office.

Requisition for Search.

To the Registrar of Bills of Sale, Royal Courts of Justice, London.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, search for instruments registered or re-registered as bills of sale during the period from 18 to 18 both inclusive in the following name. (*or names*).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

(Add declaration, Form II.)

(State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.)

Signature, address, and description of person requiring the search.

Dated .

FORM V.—REQUISITION FOR SEARCH IN THE REGISTRY OF CERTIFICATES
OF ACKNOWLEDGMENTS OF DEEDS BY MARRIED WOMEN UNDER THE
CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature. Central Office.

Requisition for Search.

To the Registrar of Certificates of Acknowledgments of Deeds by Married Women, Royal Courts of Justice, London.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, search for certificates of acknowledgments of Deeds by Married Women during the period from 18 to 18 both inclusive, according to the particulars mentioned in the schedule hereto.

THE SCHEDULE.

Surname.	Christian Name or Name of Wife and Husband.	Date of Certificate if the Search relates to a particular Certificate.	Date of Deed, if the Search relates to a particular Deed.	County, Parish, or Place in which the Property is situate, or other description of the Property.

(Add declaration, Form II.)

(State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.)

Signature, address, and description of person requiring the search.

Dated .

*Forms under Conveyancing Act, 1882.***Forms.****FORM VI.—REQUISITION FOR SEARCH IN THE REGISTRY OF JUDGMENTS UNDER THE CONVEYANCING ACT, 1882, s. 2.**

Supreme Court of Judicature. Central Office.

Requisition for Search.

To the Registrar of Judgments, Royal Courts of Justice, London.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, search for judgments, revivals, decrees, orders, rules, and lis pendens, and for judgments at the suit of the Crown, statutes, recognizances, Crown bonds, inquisitions, and acceptances of office for the period from 18 to 18, both inclusive and for executions for the period from the 29th July 1864 (*or as the case may require*) to the 18, both inclusive, and for annuities for the period from the 26th April 1855 (*or as the case may require*) to the 18, both inclusive, in the following name (*or names*).

Surname.	Christian Name or Names.	Usual or last known Place of Abode.	Title, Trade, or Profession.

*(Add declaration, Form II.)**(State if an office copy of the certificate is desired, and whether it is to be sent by post or called for.)*

Signature, address, and description of person requiring the search.

Dated _____

FORM VII.—CERTIFICATE OF SEARCH BY ENROLMENT DEPARTMENT UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature. Central Office, Enrolment Department.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the Enrolment Office for deeds and other documents in the name (*or names*) of _____ for the period from _____ to _____, both inclusive, and that no deed or other document has been enrolled in the said office in that name (*or in any one or more of those names*) during the period aforesaid.

or and that except the _____ described in the schedule hereto no deed or document has been enrolled in that name (*or in any one or more of those names*) during the period aforesaid.

THE SCHEDULE.

Dated _____

FORM VIII.—CERTIFICATE OF SEARCH BY THE REGISTRAR OF BILLS OF SALE UNDER THE CONVEYANCING ACT, 1882.

Supreme Court of Judicature. Central Office, Bills of Sale Department.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the Register of Bills of Sale in the name (*or names*) of _____ for the period from _____

18 to 18 both inclusive, and that no instrument has been registered or re-registered as a bill of sale in that name (*or* in any one or more of those names) during that period.

Forms.

or, and that except the described in the schedule hereto, no instrument has been registered or re-registered as a bill of sale in the name (*or* in any one or more of those names) during the period aforesaid.

THE SCHEDULE.

Dated

FORM IX.—CERTIFICATE OF SEARCH BY REGISTRAR OF CERTIFICATES OF ACKNOWLEDGMENTS OF DEEDS BY MARRIED WOMEN UNDER THE CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature. Central Office.

Registry of Certificates of Acknowledgments of Deeds by Married Women.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the Office of the Registrar of Certificates of Acknowledgments of Deeds by Married Women in the name (*or* names) of for the period from to 18 , both inclusive, for a certificate dated the *or* for certificates of acknowledgment of a deed dated the .

or for certificates of acknowledgments of deeds relating to (*fill in the description of the property from the Requisition*) and that no such certificate has been filed in that name (*or* in any one or more of those names) during the period aforesaid.

or and that except the certificate (*or* certificates) described in the Schedule hereto, no such certificate has been filed in that name (*or* in any one or more of those names) during the period aforesaid.

Surname.	Christian Names of Wife and Husband.	Date of Certificate.	Date of Deed.	County, Parish, or Place in which Property situated, or other description of the Property.

Dated day of 188 .

FORM X.—CERTIFICATE OF SEARCH BY REGISTRAR OF JUDGMENTS UNDER CONVEYANCING ACT, 1882, s. 2.

Supreme Court of Judicature. Central Office.

The Registry of Judgments.

Certificate of Search pursuant to Section 2 of the Conveyancing Act, 1882.

In the matter of A. B. and C. D.

This is to certify that a search has been diligently made in the Office of the Registrar of Judgments for judgments, revivals, decrees, orders, rules, lis pendens, judgments at the suit of the Crown, Statutes, recognizances, Crown bonds, inquisitions, and acceptances of office, for the period from 18 to

Forms.

18 , both inclusive, and for executions for the period from 18 to
 18 , both inclusive, and for annuities for the period from 18 to
 18 , both inclusive, in the name (or names) of and that no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution, or annuity has been registered or re-registered in that name (or in any one or more of those names) during the respective periods covered by the aforesaid search.

or and that except the mentioned in the Schedule hereto, no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, Statute, recognizance, Crown bond, inquisition, acceptance of office, execution, or annuity has been registered or re-registered in that name (or in any one or more of those names) during the respective periods covered by the aforesaid search.

THE SCHEDULE.

Dated the day of 188 .

FORM XI.—REQUISITION FOR CONTINUATION OF SEARCH UNDER THE CONVEYANCING ACT, 1882.

Supreme Court of Judicature. Central Office.

Requisition for continuation of Search.

To the Clerk of Enrolments or The Registrar of
 Royal Courts of Justice, London, W.C.

In the matter of A. B. and C. D.

Pursuant to section 2 of the Conveyancing Act, 1882, continue the search for
 [], made pursuant to the requisition dated the day of 18 ,
 in the name (or names) of , from the day of to the day
 of 18 , both inclusive.

Signature, address, and description of person requiring the search.

Dated .

FORM XII.—CERTIFICATE OF RESULT OF CONTINUED SEARCH UNDER THE CONVEYANCING ACT, 1882, s. 2, TO BE ENDORSED ON ORIGINAL CERTIFICATE.

This is to certify that the search (or searches) mentioned in the within written certificate has (or have) been diligently continued to the day of , 18 , and that up to and including that date [except the mentioned in the schedule hereto (*these words to be omitted where nothing is found*)], no deed or other document has been enrolled, or no instrument has been registered, or re-registered, as a bill of sale, or no certificate has been filed, or no judgment, revival, decree, order, rule, lis pendens, judgment at the suit of the Crown, statute, recognizance, Crown bond, inquisition, acceptance of office, execution or annuity, has been registered or re-registered in the within-mentioned name (or in any one or more of the within-mentioned names).

Dated .

SETTLED LAND.

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I.—THE SETTLED ESTATES ACT, 1877.

40 & 41 VICT. c. 18.

1. This act may be cited for all purposes as “The Settled 40 & 41 Vict.
Estates Act, 1877.” c. 18, s. 1.

This act is a re-enactment with amendments of the Leases and Sales of Short title.
Settled Estates Act, 1856 (19 & 20 Vict. c. 120), and the four amending
acts (21 & 22 Vict. c. 77; 27 & 28 Vict. c. 45; 37 & 38 Vict. c. 33; and
39 & 40 Vict. c. 30), all which are repealed by this act. Such of the cases
decided under the last-mentioned acts as are applicable to the present act
are given in the notes.

2. The word “settlement” as used in this act shall signify Interpretation of
any act of parliament, deed, agreement, copy of court roll, will, “settlement”
or other instrument, or any number of such instruments, under and “settled
or by virtue of which any hereditaments of any tenure or any estates.”
estates or interests in any such hereditaments stand limited to
or in trust for any persons by way of succession, including any
such instruments affecting the estates of any one or more of
such persons exclusively (a).

The term “settled estates” as used in this act shall signify
all hereditaments of any tenure, and all estates or interests in
any such hereditaments, which are the subject of a settle-
ment (b); and for the purposes of this act a tenant-in-tail
after possibility of issue extinct shall be deemed to be a tenant
for life.

All estates or interests in remainder or reversion not disposed
of by the settlement, and reverting to a settlor or descending to
the heir of a testator, shall be deemed to be estates coming to
such settlor or heir under or by virtue of the settlement.

40 & 41 Vict.
c. 18, s. 2.

In determining what are settled estates within the meaning of this act, the court shall be governed by the state of facts, and by the trusts or limitations of the settlement at the time of the said settlement taking effect.

(a) This section re-enacts the provisions of 19 & 20 Vict. c. 120, s. 1; 21 & 22 Vict. c. 77, s. 1; and 27 & 28 Vict. c. 45, s. 3.

A will and a sub-settlement were held together to constitute a "settlement" (*Re Dendy*, 4 Ch. D. 879).

Cases under
old act.

Accruer was held succession within the Act of 1856 (*Re Goodwin*, 3 Giff. 620; see, however, *Re Bardin*, 7 W. R. 711; 5 Jur. N. S. 1378).

(b) The following were held to be settled estates within the Act of 1856:—Land limited to a person for life with remainder subject to a power of appointment to his heir (*Beioley v. Carter*, 4 Ch. 230); land devised in trust for several in fee, subject to the payment of one moiety of the income to B. for life (*Re Shephard*, 8 Eq. 571); land devised in trust for A. on a contingency, with a gift over in default (*Re Horne*, 29 L. T. 830; see *Re Bardin*, 7 W. R. 711; and as to an estate in fee with an executory devise over, the construction being doubtful, see *Re Williams*, 20 W. R. 967); land limited on trust for A. for life, and on her death on trust for sale (*Re Morgan*, 9 Eq. 578; *Carlyon v. Truscott*, 20 Eq. 348); land devised in trust for sale, the proceeds to go in succession (*Re Laing*, 1 Eq. 416; *Re Greene*, 10 Jur. N. S. 1098; *Collett v. Collett*, 2 Eq. 203; *Re Chamberlain*, 23 W. R. 852; *Re Morgan*, 49 L. J. Ch. 577; *Dixie v. Dixie*, 1881, W. N. 49). Where an undivided share of an estate was settled it was held that the whole must be considered a settled estate (*Re Shephard*, 8 Eq. 571; see *Re Goodwin*, 3 Giff. 620). As to copyholds, see *Re Adair* (16 Eq. 124).

Cases under
the sect.

Under sect. 41 of the Conv. Act, 1881 (*ante*, p. 595), land vested in an infant in fee or for a leasehold interest at a rent is a settled estate within this act. Land was held a settled estate under this section, where the interest of the infant was contingent on his attaining 21 (*Liddell v. Liddell*, 31 W. R. 238; see *Re Sparrow*, 1892, 1 Ch. 412).

Interpreta-
tion of "the
court."

3. The expression "the court" in this act shall, so far as relates to estates in England, mean the High Court of Justice, and all causes and matters in respect of such estates commenced or continued under this act shall, subject to the provisions of the Judicature Acts, be assigned to the Chancery Division of the High Court of Justice in like manner as if such causes and matters had arisen under an act of parliament by which, prior to the passing of the Judicature Acts, exclusive jurisdiction in respect to such causes and matters had been given to the Court of Chancery, or to any judges or judge thereof respectively.

The expression "the court" in this act shall, so far as relates to estates in Ireland, mean the Court of Chancery in Ireland.

Power to
authorize
leases of
settled
estates.

4. It shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this act contained, to authorize leases of any settled estates, or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not, provided the following conditions be observed (c).

First. *Every such lease shall be made to take effect in

possession at or within one year next after the making thereof, and shall be for a term of years not exceeding for an agricultural or occupation lease, so far as relates to estates in England twenty-one years, or so far as relates to estates in Ireland thirty-five years, and for a mining lease or a lease of water mills, way leaves, water leaves, or other rights or easements forty years, and for a repairing lease sixty years, and for a building lease ninety-nine years: Provided always, that any such lease (except an agricultural lease) may be for such term of years as the court shall direct, where the court shall be satisfied that it is the usual custom of the district and beneficial to the inheritance to grant such a lease for a longer term than the term hereinbefore specified in that behalf (*d*):

40 & 41 Vict.
c. 18, s. 4.

Secondly. On every such lease shall be reserved the best rent or reservation in the nature of rent, either uniform or not, that can be reasonably obtained, to be made payable half-yearly or oftener without taking any fine or other benefit in the nature of a fine: Provided always, that in the case of a mining lease, a repairing lease, or a building lease a peppercorn rent or any smaller rent than the rent to be ultimately made payable may, if the Court shall think fit so to direct, be made payable during all or any part of the first five years of the term of the lease (*e*):

Thirdly. Where the lease is of any earth, coal, stone, or mineral, a certain portion of the whole rent or payment reserved shall be from time to time set aside and invested as hereinafter mentioned, namely, when and so long as the person for the time being entitled to the receipt of such rent is a person who by reason of his estate or by virtue of any declaration in the settlement is entitled to work such earth, coal, stone, or mineral for his own benefit, one fourth part of such rent, and otherwise three fourth parts thereof; and in every such lease sufficient provision shall be made to ensure such application of the aforesaid portion of the rent by the appointment of trustees or otherwise as the court shall deem expedient (*f*):

Fourthly. No such lease shall authorize the felling of any trees except so far as shall be necessary for the purpose of clearing the ground for any buildings, excavations, or other works authorized by the lease:

Fifthly. Every such lease shall be by deed, and the lessee shall execute a counterpart thereof, and every such lease shall contain a condition for re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf.

(*e*) This section substantially re-enacts 19 & 20 Vict. c. 120, s. 2, and 21 & 22 Vict. c. 77, ss. 2 and 4. By this section, however, the term for Irish agricultural leases is extended from twenty-one to thirty-five years, and leases at a small rent for the first five years are allowed.

40 & 41 Vict.
c. 18, s. 4.

This section does not give a general power, which must be exerciseable at the instance of some one, but a modified power, subject to the restrictions of the act as to who can petition, &c. (*Taylor v. Taylor*, 1 Ch. D. 432). It requires the court to have regard to the interests of all parties (*Vine v. Raleigh*, 24 Ch. D. 241).

(d) On a surrender and new grant under sect. 7 (*infra*), an unexpired underlease does not prevent the new lease taking "effect in possession" (*Re Ford*, 8 Eq. 309). A lease with a covenant to grant a new lease at the end of the term will not be sanctioned (*Re Farnell*, 33 Ch. D. 599). A mining lease may include the use of contiguous land necessary for working the minerals (*Re Revelly*, 11 W. R. 744; see *Re Wallace*, 1869, W. N. 66). As to the meaning of "repairing lease," see *Truscott v. Diamond, &c., Co.* (20 Ch. Div. 251). Building leases have been authorized for 600 years (*Re Cross*, 27 Beav. 592); or for 999 years (*Re Carr*, 9 W. R. 776).

(e) In estimating the "best rent," the value of a surrendered lease may be taken into account (*Re Rawlins*, 1 Eq. 286; compare the cases quoted under sect. 7 of the S. L. Act, 1882, *post*). Where a building agreement provided that part of the land was to be let at a peppercorn rent, the court considered that this act could not safely be resorted to for granting the leases (*Cust v. Middleton*, 3 D. F. & J. 33).

(f) On the separate devolution of the surface and the minerals, the rent set aside will pass with the surface (*Re Searth*, 10 Ch. D. 499). Where two portions of a settled estate under which the same seam of coal ran were separated by a strip of land belonging to other owners and the seam had been worked from one of the portions, it was held that working the seam under the other portion was working an unopened mine and that three-fourths of the rent must be set aside (*Re Maynard*, 1899, 2 Ch. 347).

As regards open mines worked by a tenant for life not expressly declared unimpeachable for waste, it was suggested that the effect of the present section might be more favourable to the tenant for life than sect. 11 of the S. L. Act, 1882 (see Clerke's S. L. Acts, 2nd ed., 61; Hood & Challis, 5th ed., 214). But it is now decided that sect. 11 of the S. L. Act is equally favourable to him (*Re Chaytor*, 1900, 2 Ch. 804).

Leases of
infants' land.

Leases of infants' land may be granted (1) under this act (see sect. 41 or the Conv. Act, 1881, *ante*, p. 595); or (2) under S. L. Act, 1882, ss. 59, 60, *post*, p. 716; or (3) under 1 Will. 4, c. 65; as to which, see Seton, 1029, 6th ed.; *Re Letchford* (2 Ch. D. 719); *Re Griffiths* (29 Ch. D. 248); R. S. C. Ord. 55, r. 2 (9).

Form of
order.

For forms of orders under this section, see Seton, 1791 *et seq.*, 6th ed. And see *Re Boyd* (L. R. 8 Eq. 56), for form of order sanctioning mining lease of infant's land.

Compare with the provisions of sections 4—15 of the present act, the powers of a tenant for life under sections 6—17 of the S. L. Act, 1882, *post*, p. 676 *et seq.*

Leases may
contain
special
covenants.

5. Subject and in addition to the conditions hereinbefore mentioned, every such lease shall contain such covenants, conditions, and stipulations as the court shall deem expedient with reference to the special circumstances of the demise.

The court will not under this section sanction a covenant in a lease to grant a new lease at the end of the term (*Re Farnell*, 33 Ch. D. 599). See the S. E. Act Orders, No. 25 (*post*, p. 661), and Seton, 6th ed. 1794.

Parts of
settled estates
may be
leased.

6. The power to authorize leases conferred by this act shall extend to authorize leases either of the whole or any parts of the settled estates, and may be exercised from time to time.

Leases may be
surrendered
and renewed.

7. Any leases, whether granted in pursuance of this act or otherwise, may be surrendered either for the purpose of obtaining

a renewal of the same or not, and the power to authorize leases conferred by this act shall extend to authorize new leases of the whole or any part of the hereditaments comprised in any surrendered lease. 40 & 41 Vict. c. 18, s. 7.

This section is a substantial re-enactment of the provisions of 19 & 20 Vict. c. 120, s. 5, and 21 & 22 Vict. c. 77, s. 5. See *Re Ford* (8 Eq. 309); *Re Rawlins* (1 Eq. 286).

For forms of order, see Seton, 6th ed. 1798.

8. The power to authorize leases conferred by this act shall extend to authorize preliminary contracts to grant any such leases, and any of the terms of such contracts may be varied in the leases. Power to authorize leases to extend to preliminary contracts.

For form of order, see Seton, 6th ed. 1797.

9. All the powers to authorize and to grant leases contained in this act shall be deemed to include respectively powers to authorize the lords of settled manors and powers to the lords of settled manors to give licences to their copyhold or customary tenants to grant leases of lands held by them of such manors to the same extent and for the same purposes as leases may be authorized or granted of freehold hereditaments under this act. Powers of leasing to include powers to lords of settled manors to give licences to their copyhold or customary tenants to grant leases.

10. The power to authorize leases conferred by this act may be exercised by the court either by approving of particular leases or by ordering that powers of leasing, in conformity with the provisions of this act, shall be vested in trustees in manner hereinafter mentioned. Mode in which leases may be authorized.

11. When application is made to the court either to approve of a particular lease or to vest any powers of leasing in trustees, the court shall require the applicant to produce such evidence as it shall deem sufficient to enable it to ascertain the nature, value, and circumstances of the estate, and the terms and conditions on which leases thereof ought to be authorized. What evidence to be produced on an application to authorize leases.

12. When a particular lease or contract for a lease has been approved by the court, the court shall direct what person or persons shall execute the same as lessor; and the lease or contract executed by such person or persons shall take effect in all respects as if he or they was or were at the time of the execution thereof absolutely entitled to the whole estate or interest which is bound by the settlement, and had immediately afterwards settled the same according to the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the court shall direct. After approval of a lease, court to direct who shall be the lessor.

Under this section the court has directed the tenant for life to execute the lease (*Re Farnell*, 33 Ch. D. 599).

For form of order, see Seton, 6th ed. 1798.

40 & 41 Vict.
c. 18, s. 13.

Powers of
leasing may
be vested in
trustees.

13. Where the court shall deem it expedient that any general powers of leasing any settled estates conformably to this act should be vested in trustees, it may by order vest any such power accordingly either in the existing trustees of the settlement or in any other persons, and such powers, when exercised by such trustees, shall take effect in all respects as if the power so vested in them had been originally contained in the settlement, and so as to operate (if necessary) by way of revocation and appointment of the use or otherwise, as the court shall direct; and in every such case the court, if it shall think fit, may impose any conditions as to consents or otherwise on the exercise of such power, and the court may also authorize the insertion of provisions for the appointment of new trustees from time to time for the purpose of exercising such powers of leasing as aforesaid.

This section is a re-enactment in similar terms of 19 & 20 Vict. c. 120, s. 10, the decisions under which are accordingly applicable to the present section.

It has been said that it is intended that the persons in whom the court vests leasing powers shall be the persons making the application (*Vine v. Raleigh*, 24 Ch. D. 241). General powers have been vested to grant the following leases: building leases, for 600 years (*Re Cross*, 27 Beav. 592), or for 999 years (*Re Hoyle*, 12 W. R. 1124; *Re Elliott*, 1879, W. N. 135); mining leases (*Re Dorning*, 14 W. R. 125; *Folson v. Sheard*, 5 Ch. Div. 19; *Re Green*, 10 Jur. N. S. 1098), together with way-leaves (*Re Wallace*, 1869, W. N. 66); leases in accordance with a model settled in chambers (*Re Hemingway*, 7 W. R. 279; see *Re Chambers*, 28 Beav. 653; *A.-G. v. Christchurch*, 3 Giff. 514; *Re Jersey*, 9 W. R. 609). A general power was refused where some of the remaindermen opposed (*Re Hutchinson*, 14 W. R. 473).

Where a power of leasing in the settlement was subject to a consent, the court refused to vest a power under this section except subject to the same consent (*Re Hurle*, 2 H. & M. 196). General powers vested under this section in two sets of trustees over two different properties will not authorize a joint mining lease at a single undivided rent (*Folson v. Sheard*, 5 Ch. Div. 19). Where an order has been made under this section, proceedings under it must be stayed before leases can be granted under the S. L. Act, 1882 (*Re Poole*, 50 L. T. 585). Where owing to some of the tenants for life being permanently resident abroad there was difficulty in exercising the powers of the S. L. Acts, general powers were given to the trustees (*Re Houghton*, 1894, W. N. 20).

The vesting powers of the court under this section may be exercised even where some of the persons interested may not be in esse (*Re Cheshire*, 1908, W. N. 76).

For form of order, see Seton, 6th ed. 1791, 1795.

Conditions
that leases be
settled by the
court not to
be inserted in
orders made
under this
act.

14. Provided always, that in orders under this act for vesting any powers of leasing in any trustees or other persons, no conditions shall be inserted requiring that the leases thereby authorized should be submitted to or be settled by the court or a judge thereof or be made conformable with a model lease deposited in the judge's chambers, save only in any case in which the parties applying for the order may desire to have any such condition inserted, or in which it shall appear to the court

that there is some special reason rendering the insertion of such a condition necessary or expedient. 40 & 41 Vict.
c. 18, s. 14.

For a case where the lease was ordered to be settled in chambers, see *Re Farnell* (33 Ch. D. 599). See also the cases quoted under sect. 13 (*ante*).

15. Provided also, that in all cases of orders (whether under this act or under the corresponding enactment of the acts hereby repealed) in which any such condition as last aforesaid shall have been inserted, it shall be lawful for any party interested to apply to the court to alter and amend such order by striking out such condition, and the court shall have full power to alter the same accordingly, and the order so altered shall have the same validity as if it had originally been made in its altered state; but nothing herein contained shall make it obligatory on the court to act under this provision in any case in which from the evidence which was before it when the order sought to be altered was made, or from any other evidence, it shall appear to the court that there is any special reason why in the case in question such a condition is necessary or expedient. Conditions
where in-
serted, may
be struck out.

This section corresponds to 27 & 28 Vict. c. 45, s. 2 (see *Re Hoyle*, 12 W. R. 1124; *Re Dornning*, 14 W. R. 125; *Re Russell*, 22 W. R. 399; *Re Riley*, 30 W. R. 78).

For form of order, see Seton, 6th ed. 1798.

16. It shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and restrictions in this act contained, from time to time to authorize a sale of the whole or any parts of any settled estates or of any timber (not being ornamental timber) growing on any settled estates, and every such sale shall be conducted and confirmed in the same manner as by the rules and practice of the court for the time being is or shall be required in the sale of lands sold under a decree of the court. Court may
authorize
sales of
settled estates
and of timber.

This section is a substantial re-enactment of 19 & 20 Vict. c. 120, s. 11, the decisions under which appear to be applicable.

The existence of a power of sale in the settlement will not prevent an order authorizing a sale under this section (sect. 38, *post*, p. 651; *Re Thompson*, Johns. 418); but in such case a sale will only be authorized subject to any consents limiting the power (*Re Hurle*, 2 H. & M. 196). A sale has been authorized under this section notwithstanding the opposition of a contingent remainderman (*Re Spurway*, 10 Ch. D. 230; see further as to consents of persons interested, sects. 24—29, *post*, p. 644, and notes). The court refused to authorize a sale to the tenant for life without inquiry (*Re Hilton*, 1866, W. N. 107), or to give trustees a general power of sale (*Re Peacock*, 15 W. R. 100; see *Re Elliott*, 1879, W. N. 135); but where the settlement gave a general power after the death of a tenant for life, a general power was given by the court during his life (*Re Andrews*, 38 L. T. 877; 26 W. R. 811). Where the trustees were two ladies, the court at first refused to give them power to sell, but when no other suitable persons could be found to act as trustees, authority was given them during their joint lives to sell subject to the approval of the court in each case (*Re Peake*, 1894, 3 Ch. 520; see *Re Dickinson*, 1902, W. N. 104). A sale may be ordered

40 & 41 Vict.
c. 18, s. 16.

with an indefeasible title (25 & 26 Vict. c. 53, s. 49). The minerals under the land may be excepted from a sale (sect. 19, *post*), or the minerals may be sold apart from the surface (*Re Mallin*, 9 W. R. 588; *Re Gray*, 1875, W. N. 106; *Re Law*, 7 Jur. N. S. 511). And in the latter case wayleaves may be granted, and a rent reserved in respect of surface damage (*Re Milward*, 6 Eq. 248). Where part of the property sold was copyhold, it was ordered to be enfranchised, and the whole sold as freehold (*Re Adair*, 16 Eq. 124). Property not subject to settlement should not be included in an order under this section (*Re Thompson*, Johns. 418); but may be if the owner consents (*Grey v. Jenkins*, 26 Beav. 356; see *Re Spurway*, 10 Ch. D. 230; *Re Goodwin*, 3 Giff. 620). As to the effect of an order for sale dealing with such property, see note to sect. 40, *post*; *Re Shephard* (8 Eq. 571). The consideration for a sale of leaseholds under this section may be a rentcharge during the remainder of the term sold (*Re Grove*, 1888, W. N. 47). And under sect. 18 (*post*), the consideration for a building sale may be a fee farm rent (see *Re Carr*, 9 W. R. 776). In *Re Eyre* (4 K. & J. 268), it was said that the conveyance must be settled by the judge whether the parties differed or not; but in a later case this was only required when the parties differed (*Re Sheffield*, 1876, W. N. 152). An application that a sale under this act might be conducted out of court was refused (*Re Harvey*, 21 Ch. D. 123); but was granted (*Re Tonge*, 1902, W. N. 72). It seems that an order under this section will prevent a sale under the S. L. Act, 1882, until the proceedings are stayed (*Re Barrs-Haden*, 49 L. T. 645; 32 W. R. 194; see *Re Poole*, 50 L. T. 585).

For forms of orders, see Seton, 6th ed. 1799—1806. The order for sale may be varied by inserting the name of a new trustee (*Scott v. Heish*, 1875, W. N. 211).

Compare with the provisions of sects. 16—22 of the present act, the powers of a tenant for life under sects. 3, 4, 16 and 17 of the S. L. Act, 1882, *post*, p. 673 *et seq.*

[Sect. 17 is now repealed by sect. 64 of the S. L. Act, 1882, but somewhat similar provisions are contained in sect. 36 of the S. L. Act, 1882, *post*, p. 699, where see note.]

Consideration for land sold for building may be a fee-farm rent.

18. When any land is sold for building purposes it shall be lawful for the court, if it shall see fit, to allow the whole or any part of the consideration to be a rent issuing out of such land, which may be secured and settled in such manner as the court shall approve.

A grant at a fee-farm rent was authorized (*Re Carr*, 9 W. R. 776; *Re Christy*, 42 W. R. 613; 8 R. 439), but a general power to trustees to make such grants was refused (*Re Elliott*, 1879, W. N. 135).

Minerals, &c. may be excepted from sales.

19. On any sale of land, any earth, coal, stone, or mineral may be excepted, and any rights or privileges may be reserved, and the purchaser may be required to enter into any covenants or submit to any restrictions which the court may deem advisable.

For form of order excepting minerals, see Seton, 6th ed. 1801. And see the special covenant into which a purchaser was required to enter (*Re Mallin*, 9 W. R. 588).

Court may authorize dedication of any part of

20. It shall be lawful for the court, if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement, and subject to the provisions and

restrictions in this act contained, from time to time to direct that any part of any settled estates be laid out for streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, either to be dedicated to the public or not; and the court may direct that the parts so laid out shall remain vested in the trustees of the settlement, or be conveyed to or vested in any other trustees upon such trusts for securing the continued appropriation thereof to the purposes aforesaid in all respects, and with such provisions for the appointment of new trustees when required, as by the court shall be deemed advisable.

40 & 41 Vict.
c. 18, s. 20.

settled estates
for streets,
roads, and
other works.

This section is a substantial re-enactment of 19 and 20 Vict. c. 120, s. 14, the decisions under which appear to be applicable.

The object of this and the following section is the development of land as a building estate, and the court cannot sanction drainage for agricultural purposes (*Re Poynder, Dickson-Poynder v. Cook*, 45 L. T. 403). The court will not direct roads to be made except where they are beneficial to the property in its actual state, or will be in a state immediately contemplated (*Re Hurle*, 2 H. & M. 196). The court has authorized leases on the terms of the lessees making roads (*Re Chambers*, 28 Beav. 653). The court will not require plans to be laid before it in every case (*Re Hargreaves*, 15 W. R. 54; see *Re Christy*, 42 W. R. 613; 8 R. 439).

For forms of orders, see Seton, 6th ed. 1807—1809).

21. Where any part of any settled estates is directed to be laid out for such purposes as aforesaid, the court may direct that any such streets, roads, paths, squares, gardens, or other open spaces, sewers, drains, or watercourses, including all necessary or proper fences, pavings, connexions, and other works incidental thereto respectively, be made and executed, and that all or any part of the expenses in relation to such laying out and making and execution be raised and paid by means of a sale or mortgage of or charge upon all or any part of the settled estates, or be raised and paid out of the rents and profits of the settled estates or any part thereof, or out of any moneys or investments representing moneys liable to be laid out in the purchase of hereditaments to be settled in the same manner as the settled estates, or out of the income of such moneys or investments, or out of any accumulations of rents, profits, or income; and the court may also give such directions as it may deem advisable for any repair or maintenance of any such streets, roads, paths, squares, gardens, or other open spaces, sewers, drains or watercourses, or other works, out of any such rents, profits, income, or accumulations during such period or periods of time as to the court shall seem advisable.

As to laying
out and
making and
executing and
maintaining
streets, roads,
and other
works, and
expenses
thereof.

22. On every sale or dedication to be effected as hereinbefore mentioned the court may direct what person or persons shall execute the deed of conveyance; and the deed executed by such person or persons shall take effect as if the settlement had contained a power enabling such person or persons to effect such sale or dedication, and so as to operate (if necessary) by way of

How sales
and dedica-
tions are to
be effected
under the
direction of
the court,

40 & 41 Vict.
c. 18, s. 22.

revocation and appointment of the use or otherwise, as the court shall direct.

The wording of this section corresponds with 19 & 20 Vict. c. 120, s. 15, the decisions under which appear to be applicable.

Where land was sold and a person appointed to convey, the legal estate, which was outstanding in mortgagees who were bound by the order, passed by the conveyance (*Eyre v. Saunders*, 28 L. J. Ch. 439). Where the land was vested in eleven persons, the court refused to order one to convey for all (*Re Hole*, 1868, W. N. 70). Where one of two trustees directed to convey died before completion, a new trustee was appointed and the order varied (*Scott v. Heisch*, 33 L. T. 498). The effect of a conveyance under this section being the same as a revocation of the uses of the settlement, the land is freed from succession duty (*Re Warner*, 17 Ch. D. 711).

For forms of order, see Seton, 6th ed. 1800, 1807.

Application
by petition
to exercise
powers con-
ferred by this
act.

23. Any person entitled to the possession or to the receipt of the rents and profits of any settled estates for a term of years determinable on his death, or for an estate for life or any greater estate, and also any person entitled to the possession or to the receipt of the rents and profits of any settled estates as the assignee of any person who but for such assignment would be entitled to such estates for a term of years determinable with any life, or for an estate for any life or any greater estate, may apply to the court by petition in a summary way to exercise the powers conferred by this act.

This section corresponds with 19 & 20 Vict. c. 120, s. 16, with the addition, however, of the words relating to an assignee. The decisions under the latter section appear to be applicable.

The following have been held proper persons to petition. A widow and her children, where she was entitled during widowhood with remainder to her children (*Williams v. Williams*, 9 W. R. 888); trustees where there was no equitable tenant for life (*Vine v. Raleigh*, 24 Ch. D. 238; *Re Christy*, 42 W. R. 613; 8 R. 439; see *Re Smith*, 1878, W. N. 196), but not in such a case a receiver (24 Ch. D. 243). *Jessel*, M. R., considered that the words of the section did not apply to a tenant for life whose life estate was subject to a power of management in others (*Taylor v. Taylor*, 1 Ch. D. 432; 20 Eq. 302; but see 3 Ch. Div. 147). Orders have been made on the petition of a tenant for life and the trustees of prior terms (*Ex p. Puxley*, 1 R. 2 Eq. 237; *Re Harris*, 42 L. T. 583; and see *Re Smith*, 1878, W. N. 196; *Re Williams*, 20 W. R. 967). Where one share was settled after the petition had been presented, the trustees of the settled share were joined as co-petitioners (*Re Wilkinson*, 21 W. R. 537). It was said by *Jessel*, M. R., that no person other than those described can petition (*Taylor v. Taylor*, 1 Ch. D. 431; but see *Re Harris*, *sup.*). It seems that a petition is necessary although an action is pending (*Harvey v. Clark*, 25 Beav. 7). The assignee of a tenant for life can petition under this act for a sale (*Re Ebsworth and Tidy*, 42 Ch. Div. 23). He could not sell under the S. L. Act, 1882 (see s. 50 of that act, *post*).

As to the title, &c., of the petition, see S. E. Act Orders (*post*, pp. 658, 662); *Re Burnley* (23 W. R. 546); *Re Ward* (1895, W. N. 41). See the rules adopted by the Practice Masters stated in the Annual Practice. See also as to petitions, R. S. C. Ord. 52, rr. 16, 17.

With whose
consent such
application
to be made.

24. Subject to the exceptions hereinafter contained, every application to the court must be made with the concurrence or consent of the following parties; namely,

Where there is a tenant-in-tail under the settlement in existence and of full age, then the parties to concur or consent shall be such tenant-in-tail, or if there is more than one such tenant-in-tail, then the first of such tenants-in-tail and all persons in existence having any beneficial estate or interest under or by virtue of the settlement prior to the estate of such tenant-in-tail, and all trustees having any estate or interest on behalf of any unborn child prior to the estate of such tenant-in-tail:

40 & 41 Vict.
c. 18, s. 24.

And in every other case the parties to concur or consent shall be all the persons in existence having any beneficial estate or interest under or by virtue of the settlement, and also all trustees having any estate or interest on behalf of any unborn child.

The reference to exceptions ("the exceptions hereinafter contained") in the present section is wider than the similar reference in 19 & 20 Vict. c. 120, s. 17; but except in this respect the wording of the two sections is identical. The following cases were decided on the older section. It did not apply to petitions dealing with purchase-money (*Re Cleveland*, 1 Dr. & Sm. 481; *Re Seaton Barnes*, 10 W. R. 416). The concurrence was held necessary, of remaindermen (*Re Merry*, 15 W. R. 307); of persons interested in a term for raising portions (*Re Boughton*, 12 W. R. 34), or in the proceeds of a trust for sale after the death of the tenant for life (*Re Ives, Bailey v. Holmes*, 3 Ch. D. 690); or interested contingently under a sub-settlement (*Re Dendy*, 4 Ch. D. 879; see, however, *Re Hodge*, 1895, W. N. 69). Trustees could only concur on behalf of unborn persons (*Grey v. Jenkins*, 26 Beav. 351; *Eyre v. Saunders*, 4 Jur. N. S. 830), not living *cestuis que trusts* (*Re Boughton*; *Re Ives*; *Re Dendy, sup.*).

25. Provided always, that where an infant is tenant-in-tail under the settlement, it shall be lawful for the court, if it shall think fit, to dispense with the concurrence or consent of the person, if only one, or all or any of the persons, if more than one, entitled, whether beneficially or otherwise, to any estate or interest subsequent to the estate tail of such infant.

Court may dispense with consent in respect of certain estates.

See *Camden v. Murray* (27 S. J. 652).

26. Provided always, that where on an application under this act the concurrence or consent of any such person as aforesaid shall not have been obtained, notice shall be given to such person in such manner as the court to which the application shall be made shall direct, requiring him to notify within a time to be specified in such notice whether he assents to or dissents from such application, or submits his rights or interests so far as they may be affected by such application to be dealt with by the court, and every such notice shall specify to whom and in what manner such notification is to be delivered or left. In case no notification shall be delivered or left in accordance with the notice and within the time thereby limited, the person to or for whom such notice shall have been given or left shall be deemed to have submitted his rights and interests to be dealt with by the court.

Notice to be given to persons who do not consent to or concur in the application.

40 & 41 Vict.
c. 18, s. 26.

This section corresponds in substance with 37 & 38 Vict. c. 33, s. 2.

As to the mode of giving notices required by this section, see S. E. Act, Ords. Nos. 4—9, 11, 12, and 22, *post*. The court has ordered notice to be given to a person of unsound mind (*Re Crabtree*, 10 Ch. 201); to a married woman resident out of the jurisdiction (*Re Rylar*, 24 W. R. 949); to an infirm person (*Re Stark*, 1875, W. N. 224); to persons who might be included in a class determinable at a future date (*Re Chamberlain*, 23 W. R. 852); and to infants contingently entitled (*Re Dendy*, 4 Ch. D. 879). Notification in writing of submission to the court by a married woman is sufficient without separate examination (*Re Stanley*, 1889, W. N. 164).

Notice as well as consent may now be dispensed with under sect. 27 of the present act. It has been dispensed with in the case of a child *en ventre sa mère* (*Re Rayner*, 1891, W. N. 152), and annuitants whose security was increased (*Re Harris*, 42 L. T. 583), and was not required to persons subsequent to an infant tenant in tail (*Ib.*). Before the present act it was dispensed with in the case of infants contingently entitled (*Re Chamberlain*, 23 W. R. 852); persons of unsound mind remotely interested (*Re Franklin*, 7 W. R. 45; *Re Turbutt*, 2 N. R. 158). Leave to effect service out of the jurisdiction of proceedings under the act was refused in *Re Mewburn* (22 W. R. 752), but granted in *Re Rylar* (24 W. R. 949). See S. E. Act, Ord. No. 4, *post*; *Re Busfield* (32 Ch. Div. 132).

For form of orders, see Seton, 6th ed. 1789, 1790.

Court may
dispense with
notice under
certain cir-
cumstances.

27. Provided also, that where on an application under this act the concurrence or consent of any such person as aforesaid shall not have been obtained, and in case such person cannot be found, or in case it shall be uncertain whether he be living or dead, or in case it shall appear to the court that such notice as aforesaid cannot be given to such person without expense disproportionate to the value of the subject-matter of the application, then and in any such case the court, if it shall think fit, either on the ground of the rights or interests of such person being small or remote, or being similar to the rights or interests of any other person or persons, or on any other ground, may by order dispense with notice to such person, and such person shall thereupon be deemed to have submitted his rights and interests to be dealt with by the court.

See note to sect. 26 (*ante*). For orders, see Seton, 6th ed. 1790.

Court may
dispense with
consent,
having regard
to the num-
ber and
interests of
parties.

28. An order may be made upon any application notwithstanding that the concurrence or consent of any such person as aforesaid shall not have been obtained or shall have been refused, but the court in considering the application shall have regard to the number of persons who concur in or consent to the application, and who dissent therefrom, or who submit or are to be deemed to submit their rights or interests to be dealt with by the court, and to the estates or interests which such persons respectively have or claim to have in the estate as to which such application is made; and every order of the court made upon such application shall have the same effect as if all such persons had been consenting parties thereto.

This section corresponds with 37 & 38 Vict. c. 33, s. 3.

The court will not dispense with the consent of persons equal in number and nearly equal in interest to the applicants (*Taylor v. Taylor*, 1 Ch. D.

433; 3 Ch. Div. 145). The consents of the following persons have been dispensed with: a remainderman whose estate was contingent on the death of four children without issue (*Re Spurway*, 10 Ch. D. 230; see *Re Hooke*, 1875, W. N. 29); a married woman having a small share (*Re Cundee*, 37 L. T. 271; *Re Thorp*, 1876, W. N. 251; see *Re Rylar*, 24 W. R. 949); a married woman having a contingent interest represented by trustees (*Re Kilmorey*, 26 W. R. 54); an infant remainderman born since the presentation of the petition (*Re Lewis*, 24 W. R. 103); a person too infirm to concur in writing (*Re Stark*, 1875, W. N. 224); and also (in cases decided before 37 & 38 Vict. c. 33) persons only remotely interested (*Re Chomondely*, 1866, W. N. 388); tenants for life in remainder (*Re Hutchinson*, 14 W. R. 473); and persons who could not be presently ascertained (*Beioley v. Carter*, 4 Ch. 230; *Re Strutt*, 16 Eq. 629).

40 & 41 Vict.
c. 18, s. 28.

29. Provided nevertheless, that it shall be lawful for the court, if it shall think fit, to give effect to any petition subject to and so as not to affect the rights, estate, or interest of any person whose concurrence or consent has been refused, or who has not submitted or is not deemed to have submitted his rights or interests to be dealt with by the court, or whose rights, estate, or interest ought in the opinion of the court to be excepted.

Petition may
be granted
without con-
sent, saving
rights of non-
consenting
parties.

This section corresponds to 19 & 20 Vict. c. 120, s. 18, but is considerably wider. Under that section the rights of legatees having charges on the estate have been left unaffected (*Re Legge*, 6 W. R. 20; *Re Parry*, 34 Beav. 462).

For form of order, see Seton, 6th ed. 1794, 1795, 1803.

30. Notice of any application to the court under this act shall be served on all trustees who are seised or possessed of any estate in trust for any person whose consent or concurrence to or in the application is hereby required, and on any other parties who in the opinion of the court ought to be so served, unless the court shall think fit to dispense with such notice.

Notice of
application to
be served on
all trustees,
&c.

The wording of this section corresponds with 19 & 20 Vict. c. 120, s. 19. See as to notice, the note to sect. 26 (*ante*).

As to notices under this section, see S. E. Act Orders, Nos. 16, 18, 22 (*post*). For form of order, see Seton, 6th ed. 1793.

31. Notice of any application to the court under this act shall, if the court shall so direct, but not otherwise, be inserted in such newspapers as the court shall direct, and any person or body corporate, whether interested in the estate or not, may apply to the court by motion for leave to be heard in opposition to or in support of any application which may be made to the court under this act; and the court is hereby authorized to permit such person or corporation to appear and be heard in opposition to or support of any such application, on such terms as to costs or otherwise, and in such manner as it shall think fit.

Notice of
application
to be given in
newspapers if
court direct.

The wording of this section corresponds with 19 & 20 Vict. c. 120, s. 20, the following words, however, being added: "if the court shall so direct but not otherwise." It has been said that the court will only so direct in

40 & 41 Vict. c. 18, s. 31. exceptional cases (*Re Chilcott*, 1877, W. N. 259; see S. E. Act Orders, Nos. 18—21, *post*, Form 13, *post*; Seton, 6th ed. 1791, 1792).

The following cases were decided under the former act. Substantial agreement between the petition and the advertisements is sufficient (*Re Whiteley*, 8 Eq. 574; *Re Bicknell*, 14 Eq. 467; *Re Snell*, 19 W. R. 1000); especially where all parties are before the court (*Re Hemsley*, 16 Eq. 315). Where the petition is amended, the court did not necessarily direct fresh advertisements to be issued unless the amendment involved new facts and new parties (*Re Bunbury*, 13 W. R. 370; *Ex p. Puxley*, 1 L. R. 2 Eq. 237). As to dispensing with the repetition of advertisements, see further *Re Horton* (34 Beav. 386); *Re Corbet* (1866, W. N. 318); *Re Wilkinson* (9 Eq. 71); *Re Marshall* (15 Eq. 66); *Re Wilkinson* (21 W. R. 537); *Re Kentish Town Estate* (1 J. & H. 230); *Wheeler v. Tootel* (16 W. R. 273).

No application under this act to be granted where a similar application has been rejected by Parliament.

32. The court shall not be at liberty to grant any application under this act in any case where the applicant, or any party entitled, has previously applied to either House of Parliament for a private act to effect the same or a similar object, and such application has been rejected on its merits, or reported against by the judges to whom the bill may have been referred.

See S. E. Act Orders, No. 17 (*post*). A rejection by either House will be presumed to have been on the merits, if the contrary is not shown (*Re Wilson*, 1 L. T. 25).

Notice of the exercise of powers to be given as directed by the court.

33. The court shall direct that some sufficient notice of any exercise of any of the powers conferred on it by this act shall be placed on the settlement or on any copies thereof, or otherwise recorded in any way it may think proper, in all cases where it shall appear to the court to be practicable and expedient for preventing fraud or mistake.

See S. E. Act Orders, No. 23 (*post*, p. 661); *Re Cross* (27 B. 292); *Re Burnley* (1868, W. N. 148).

For form of order, see Seton, 6th ed. 1794.

Payment and application of moneys arising from sales or set aside out of rent, &c. reserved on mining leases.

34. All money to be received on any sale effected under the authority of this act, or to be set aside out of the rent or payments reserved on any lease of earth, coal, stone, or minerals as aforesaid, may, if the court shall think fit, be paid to any trustees of whom it shall approve, or otherwise the same, so far as relates to estates in England, shall be paid into court *ex parte* the applicant in the matter of this act, and so far as relates to estates in Ireland, shall be paid into the Bank of Ireland to the account of the Accountant-General *ex parte* the applicant in the matter of this act; and such money shall be applied as the court shall from time to time direct to some one or more of following purposes, namely,—

So far as relates to estates in England the purchase or redemption of the land tax, and so far as relates to estates in Ireland the purchase or redemption of rentcharge in lieu of tithes, crown rent, or quit rent (*g*);

The discharge or redemption of any incumbrance affecting

the hereditaments in respect of which such money was paid, or affecting any other hereditaments subject to the same uses or trusts; or

The purchase of other hereditaments to be settled in the same manner as the hereditaments in respect of which the money was paid; or

The payment to any person becoming absolutely entitled (*h*).

40 & 41 Vict.
c. 18, s. 34.

(*g*) The express provision as to the redemption of tithe rentcharge, crown rent, or quit rent on Irish estates is new. But with this exception this section corresponds with 19 & 20 Vict. c. 120, s. 23, the decisions under which appear to be applicable.

(*h*) A charge created to pay a fine on renewal has been discharged out of money received on a sale under this act (*Re Barber*, 18 Ch. D. 624), and an assessment for paving a new street (*Re Hilliard*, 38 L. T. 93).

Discharge of
incum-
brances.

Where money received on a sale under this act was laid out in land, the court required new trustees to be appointed to accept a conveyance (*Re Sexton Barnes*, 10 W. R. 416). Moneys liable to be laid out in the purchase of hereditaments, &c., may be applied in payment of the expenses of laying out roads and streets (sects. 20 and 21, *ante*, p. 642).

Purchase of
other here-
ditaments to
be settled.

It has been laid down in general that under this section money may be applied in erecting new buildings on the settled land, whether in addition to existing buildings or in substitution for ruinous buildings (*Drake v. Trefusis*, 10 Ch. 367; *Re Leigh*, 6 Ch. 887; *Re Speer*, 3 Ch. D. 262; *Donaldson v. Donaldson*, 3 Ch. D. 743; *Vine v. Raleigh*, 1891, 2 Ch. 13; as to a mansion-house burnt down, see *Jesse v. Lloyd*, 48 L. T. 656); but cannot be applied in executing repairs or permanent improvements (*Drake v. Trefusis*, *sup.*; *Brunskill v. Caird*, 16 Eq. 493; see, however, *Re Newman*, 9 Ch. 681; *Re Leadbitter*, 30 W. R. 378). Compare the orders made under the general jurisdiction of the court providing for the expenditure of money on settled land, where a case of salvage was established (*Conway v. Fenton*, 40 Ch. D. 512; *Re Household*, 27 Ch. D. 553; *Re Jackson*, *Jackson v. Talbot*, 21 Ch. D. 786; *Neill v. N.*, 1904, 1 I. R. 513); but refused where the case did not amount to salvage (*Re De Teissier*, 1893, 1 Ch. 153; *Re De Tabley*, *Leighton v. Leighton*, 1896, W. N. 162; *Re Montagu*, *Derbshire v. Montagu*, 1897, 2 Ch. 8; *Re Willis*, *Willis v. Willis*, 1902, 1 Ch. 15; *Re Legh*, 1902, 2 Ch. 274). Compare also the effect of the Thellusson Act on a trust for repairs, discussed in *Re Mason*, *Mason v. Mason* (1891, 3 Ch. 467); and see the note to sect. 25 of the S. L. A., 1882 (*post*, p. 693). Under this section money will not be applied in repaying to the tenant for life money expended by him in new buildings (*Re Leigh*, 6 Ch. 887; see *Jesse v. Lloyd*, 48 L. T. 656).

Where money received on a sale under this act had been invested in consols until it could be applied under this section, the court permitted the consols to be sold and the proceeds re-invested under sect. 21 of the S. L. Act, 1882 (*Re Tennant*, 40 Ch. D. 594). Proceeds arising from leaseholds for lives sold under this act (as to which there was a trust for renewal out of rents) were invested in ordinary securities and the income paid to the tenant for life (*Re Barber*, 18 Ch. D. 624).

Other invest-
ments.

The concluding words of the section are similar to those of sect. 69 of the L. C. C. Act, 1845, under which it has been held that trustees with a power of sale are "persons becoming absolutely entitled" (*Re Hobson*, 7 Ch. Div. 708; *Ex p. Bowman*, 1888, W. N. 179; *Re Ward*, 28 Ch. D. 100; *Re Morgan*, *Smith v. May*, 1900, 2 Ch. 474; *Re Sheffield*, 1903, 1 Ch. 208; but see *Re Smith*, 40 Ch. Div. 391; compare the wider language of the S. L. Act, 1882, s. 21, sub-s. ix., *post*, p. 686). Money received from sales under the S. E. Act, 1877, has been paid to trustees to be held on the trusts of the settlement (*Re Morgan*, 9 Eq. 587; *Re Hemsley*, 29 L. T. 173; see *Re Evans*, 14 Ch. D. 511).

Payment to
persons
becoming
absolutely
entitled.

40 & 41 Vict.
c. 18, s. 34.

Before payment out to a tenant in tail, a disentailing deed should be executed (*Re Broadwood*, 1 Ch. D. 438; *Re Reynolds*, 3 Ch. Div. 61; *contra*, *Re Wood*, 20 Eq. 372); and an affidavit of no incumbrances should be made (*Thornhill v. Millbank*, 12 W. R. 523). Where the survivor of a husband and wife was entitled absolutely in default of issue, and the wife was past child-bearing, money was paid to their joint account on the execution of a deed acknowledged by the wife (*Re Belt*, 37 L. T. 272; 25 W. R. 901). Payment of the purchase money of a lunatic's land into court to the credit of a lunacy is not a payment "to a person becoming absolutely entitled" (*Re Barker*, 17 Ch. Div. 241).

As to the effect of this section on conversion, see *Re Lloyd* (9 P. D. 65), and note to sect. 8 of the Partition Act, 1863, *post*.

For form of order as to appointment of trustees to receive rents or proceeds of sales, &c., see Seton, 6th ed. 1797, 1801.

Trustees may
apply moneys
in certain
cases without
application
to court.

35. The application of the money in manner aforesaid may, if the court shall so direct, be made by the trustees (if any) without any application to the court, or otherwise upon an order of the court upon the petition of the person who would be entitled to the possession or the receipt of the rents and profits of the land if the money had been invested in the purchase of land.

This section corresponds to 19 & 20 Vict. c. 120, s. 24, under which the following cases were decided. The court directed the application of money by the trustees in *Re Peacock* (15 W. R. 100); *Re Hoare* (30 W. R. 177). Petitions under this section are not affected by sect. 24 (*ante*), as to consents (*Re Cleveland*, 1 Dr. & S. 481), or by sect. 31 (*ante*), as to advertisements (*Re Sexton Barnes*, 10 W. R. 416); as to service, see *Re Bolton* (19 W. R. 429).

For form of order, see Seton, 6th ed. 1799.

Until money
can be ap-
plied to be
invested, and
dividends to
be paid to
parties en-
titled.

36. Until the money can be applied as aforesaid, the same shall be invested as the court shall direct in some or one of the investments in which cash under the control of the court is for the time being authorized to be invested, and the interest and dividends of such investments shall be paid to the person who would have been entitled to the rents and profits of the land if the money had been invested in the purchase of land.

The order should specify the particular investment (*Re Taylor*, 28 W. R. 594). The mode of investment must be according to the course of the court (*Re Woodcock*, 13 Eq. 183; see Supreme Court Funds Rules, 1894). As to what investments are authorized for cash under the control of the court, see 762, *post*. An investment on mortgage has been authorized (*Wall v. Hall*, 11 W. R. 298).

For form of order as to an investment, see Seton, 6th ed. 1796, 1800.

Court may
direct appli-
cation of
money in
respect of
leases or
reversions as
may appear
just.

37. Where any purchase money paid into court under the provisions of this act, shall have been paid in respect of any lease for a life or lives or years, or for a life or lives and years, or any estate in lands less than the whole fee simple thereof, or of any reversion dependent on any such lease or estate, it shall be lawful for the court on the petition of any party interested in such money to order that the same shall be laid out, invested, accumulated, and paid in such manner as the said court may consider will give to the parties interested in such money the

same benefit therefrom as they might lawfully have had from the lease, estate, or reversion in respect of which such money shall have been paid, or as near thereto as may be. 40 & 41 Vict. c. 18, s. 37.

For an order as to the proceeds of leaseholds, see *Re Walsh* (7 L. R. Ir. 554).

38. The court shall be at liberty to exercise any of the powers conferred on it by this act, whether the court shall have already exercised any of the powers conferred by this act in respect of the same property or not; but no such powers shall be exercised if an express declaration that they shall not be exercised is contained in the settlement: Provided always, that the circumstance of the settlement containing powers to effect similar purposes shall not preclude the court from exercising any of the powers conferred by this act, if it shall think that the powers contained in the settlement ought to be extended.

Court may exercise powers repeatedly, but may not exercise them if expressly negatived.

An express declaration that the trusts for sale in a will should not be exercised during a certain period, was held not to prevent the court authorizing a sale (*Re Peake*, 1893, 3 Ch. 430; see *Re Williams*, 1878, W. N. 189; and also *Re Hurlle*, 2 H. & M. 196; *Re Cleveland*, 22 W. R. 818, decided under 19 & 20 Vict. c. 120, s. 26, which was in somewhat wider terms).

39. Nothing in this act shall be construed to empower the court to authorize any lease, sale or other act beyond the extent to which in the opinion of the court the same might have been authorized in and by the settlement by the settlor or settlors.

Court not to authorize any act which could not have been authorized by the settlor.

40. After the completion of any lease or sale or other act under the authority of the court, and purporting to be in pursuance of this act, the same shall not be invalidated on the ground that the court was not hereby empowered to authorize the same, except that no such lease, sale, or other act shall have any effect against such person as herein mentioned whose concurrence or consent ought to be obtained, or who ought to be served with notice, or in respect of whom an order dispensing with such service ought to be obtained in the case where such concurrence or consent has not been obtained and such service has not been made or dispensed with.

Acts of the court in professed pursuance of this act not to be invalidated.

Orders under this section are valid in favour of a purchaser, notwithstanding any want of jurisdiction, and notwithstanding the exception in this section (Conv. Act, 1881, s. 70, *ante*, p. 612); even if the irregularity appear on the face of the order (*Re Hall Dare*, 21 Ch. D. 41; see also *Beioley v. Carter*, 4 Ch. 232; *Re Shephard*, 8 Eq. 571; *Re Clough*, 15 Eq. 284, decided under 19 & 20 Vict. c. 120, s. 28).

41. It shall be lawful for the court, if it shall think fit, to order that all or any costs or expenses of all or any parties of and incident to any application under this act shall be a charge on the hereditaments which are the subject of the application, or on any other hereditaments included in the same settlement

Costs

40 & 41 Vict.
c. 18, s. 41.

and subject to the same limitations; and the court may also direct that such costs and expenses shall be raised by sale or mortgage of a sufficient part of such hereditaments, or out of the rents or profits thereof, such costs and expenses to be taxed as the court shall direct.

For form of order as to costs, see Seton, 6th ed. 1794, 1800; *Re Tunstall* (14 L. T. 352).

Rules and
orders.

42. General rules and orders of court for carrying into effect the purposes of this act, and for regulating the times and form and mode of procedure, and generally the practice of the court in respect of the matters to which this act relates, and for regulating the fees and allowances to all officers and solicitors of the court in respect to such matters, shall be made [*so far as relates to proceedings in England by any three or more of the following persons, of whom the Lord Chancellor shall be one, namely, the Lord Chancellor, the Lord Chief Justice of England, the Master of the Rolls, the Lord Chief Justice of the Common Pleas, the Lord Chief Baron of the Exchequer, and four other judges of the Supreme Court of Judicature to be from time to time appointed for the purpose by the Lord Chancellor in writing under his hand, such appointment to continue for such time as shall be specified therein, and*] so far as relates to proceedings in Ireland by any three or more of the following persons, of whom the Lord Chancellor of Ireland shall be one, namely, the Lord Chancellor of Ireland, the Lord Chief Justice of Ireland, the Master of the Rolls in Ireland, the Lord Chief Justice of the Common Pleas, and the Lord Chief Baron, and four other judges of the superior courts in Ireland to be from time to time appointed for the purpose by the Lord Chancellor of Ireland in writing under his hand, such appointment to continue for such time as shall be specified therein, and such rules and orders may from time to time be rescinded or altered by the like authorities respectively, and all such rules and orders shall take effect as general orders of the court.

See S. E. Act Orders (*post*). The part of this section relating to England has been repealed (42 & 43 Vict. c. 78, s. 29).

Rules and
orders to be
laid before
Parliament.

43. All general rules and orders made as aforesaid shall be laid before each House of Parliament within forty days after the making thereof if Parliament is then sitting, or if not, within forty days after the commencement of the then next ensuing session, and if an address is presented to her Majesty by either House of Parliament within the next subsequent forty days on which the said house shall have sat, praying that any such rule or order may be annulled, her Majesty may thereupon by order in council annul the same, and the rule or order so annulled shall thenceforth become void and of no effect, but without prejudice to the validity of any proceedings which may in the meantime have been taken under the same.

44. The powers vested in the High Court of Justice by this act may, so far as relates to estates within the County Palatine of Lancaster, be exercised also by the Court of Chancery of the said County Palatine; and general rules and orders of court for the purposes aforesaid, so far as relates to proceedings in the said court of the said County Palatine, shall be made by the Chancellor of the Duchy and County Palatine of Lancaster, with the advice and consent of any one or more of the persons authorized under this act to concur in the making of general rules and orders relating to proceedings in England, and also with the advice and consent of the Vice-Chancellor of the said County Palatine.

40 & 41 Vict.
c. 18, s. 44.

Concurrent
jurisdiction
of the Court
of Chancery
of the County
Palatine of
Lancaster.

As to lands within the County Palatine of Durham, see Palatine Court of Durham Act, 1889, s. 10.

45. It shall and may be lawful for any person who under the provisions of this act may make an application to the Court of Chancery in Ireland for the lease or sale of a settled estate, instead of making such application to the said Court of Chancery in Ireland to apply to the Landed Estates Court, Ireland, for the purpose of having the lease or sale of such settled estate under the said last-mentioned court; and thereupon it shall be lawful for the said Landed Estates Court, Ireland, to exercise all the powers conferred upon the Court of Chancery in Ireland in relation to leases or sales of such nature under the provisions of this act, save that the judge in the case of a sale shall himself execute the conveyance to the purchaser under such sale, and save that such conveyance shall have the like operation and effect, and confer such indefeasible title to the purchaser as if such sale had been made and such conveyance had been executed upon an application for the sale of an incumbered estate under the act of the twenty-first and the twenty-second years of her Majesty, chapter seventy-two: Provided always, that the Landed Estates Court, Ireland, shall make such investigation of the title and circumstances of the said estates as shall appear expedient, and also in cases of sales as in other cases preliminary to sales conducted in the said Landed Estates Court, Ireland: Provided also, that every decision and order in the course of such proceedings shall be subject to appeal to the Court of Appeal in Chancery as in other cases under the said act.

Application
for lease or
sale in Ire-
land may be
made to
Landed Es-
tates Court.

The Landed Estates Court jurisdiction is now transferred to the High Court of Justice of Ireland (40 & 41 Vict. c. 57, ss. 4, 7, 36).

46. It shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any settled estates for an estate for any life, or for a term of years determinable with any life or lives, or for any greater estate, either in his own right or in right of his wife, unless the settlement shall contain an express declaration that it shall not be lawful

Tenants for
life, &c. may
grant leases
for twenty-
one years.

40 & 41 Vict.
c. 18, s. 46.

for such person to make such demise; and also for any person entitled to the possession or to the receipt of the rents and profits of any unsettled estates as tenant by the curtesy, or in dower, or in right of a wife who is seised in fee, without any application to the court, to demise the same or any part thereof, except the principal mansion house and the demesnes thereof, and other lands usually occupied therewith, from time to time for any term not exceeding twenty-one years so far as relates to estates in England, and thirty five years so far as relates to estates in Ireland, to take effect in possession at or within one year next after the making thereof; provided that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and provided that such demise be not made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on nonpayment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf; and provided a counterpart of every deed of lease be executed by the lessee.

The above section is somewhat wider in terms than 19 & 20 Vict. c. 120, s. 32. Under the latter section it was held that a person entitled to part of the income of an estate absolutely, and to the rest after payment thereof of certain charges and expenses, was not "entitled to the receipt of the rents and profits" (*Taylor v. Taylor*, 20 Eq. 297). In a case under the present section, it was said that an improper motive would not invalidate a lease, if the terms of the section were strictly complied with (*Davies v. Davies*, 38 Ch. D. 502). The lessor has a discretion as to what are proper covenants, which cannot be controlled unless there be an outrageous omission in this respect (*Ib.*). A lease exempting the lessee from liability for "fair wear and tear and damage by tempest," was void as made without impeachment of waste" (*Ib.*). The appointment of a receiver will prevent the grant of a lease under this section, except with the leave of the court (*Vine v. Raleigh*, 24 Ch. D. 248). See, further, as to a tenant for life's power of leasing, S. L. Act, 1882, ss. 6 *et seq.* (*post*, p. 676 *et seq.*).

Against
whom such
leases shall
be valid.

47. Every demise authorized by the last preceding section shall be valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person, under or by virtue of the same settlement, if the estates be settled, and in the case of unsettled estates against the wife of any husband granting such demise of estates to which he is entitled in right of such wife, and against all persons claiming through or under the wife or husband (as the case may be) of the person granting the same.

Evidence of
execution of
counterpart
lease by
lessee.

48. The execution of any lease by the lessor or lessors shall be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee as required by this act.

49. All powers given by this act, and all applications to the court under this act, and consents to and notifications respecting such applications, may be executed, made, or given by, and all notices under this act may be given to guardians on behalf of infants, and by or to committees on behalf of lunatics, and by or to trustees or assignees of the property of bankrupts, debtors in liquidation, or insolvents: Provided nevertheless, that in the cases of infant or lunatic tenants-in-tail no application to the court or consent to or notification respecting any application may be made or given by any guardian or committee without the special direction of the court.

40 & 41 Vict.
c. 18, s. 49.

Provision as
to infants,
lunatics, &c.

Under sect. 36 of 19 & 20 Vict. c. 120, which was in similar terms, but referred to consents only, and not to notifications, the following cases were decided: That the consent of the father of an infant was not sufficient (*Re Chaddick*, 7 W. R. 334; see *Re Salisbury*, 2 Ch. Div. 39), nor the consent of a testamentary guardian (*Re James*, 5 Eq. 334); that an infant petitioner who was a married woman, must be examined (*Re Broadwood*, 7 Ch. 323; see now sect. 52, *post*, p. 656); that the court could not appoint a guardian to consent for a person of unsound mind (*Re Clough*, 15 Eq. 284; see, however, *Re Venner*, 6 Eq. 249); that the committee of a lunatic must obtain leave before consenting (*Re Woodcock*, 3 Ch. 229; see R. S. C. Ord. 16, r. 21; 53 Vict. c. 5, s. 120).

As to appointing a guardian to give consents, &c., under this section, see S. E. Act Orders, Nos. 5—12 (*post*). For form of order, see Seton, 6th ed. 1789.

50. Where a married woman shall apply to the court, or consent to an application to the court, under this act, she shall first be examined apart from her husband, touching her knowledge of the nature and effect of the application, and it shall be ascertained that she freely desires to make or consent to such application; and such examination shall be made whether the hereditaments which are the subject of the application shall be settled in trust for the separate use of such married woman independently of her husband or not; and no clause or provision in any settlement restraining anticipation shall prevent the court from exercising, if it shall think fit, any of the powers given by this act, and no such exercise shall occasion any forfeiture, anything in the settlement contained to the contrary notwithstanding.

A married woman applying to the court, or consenting to be examined apart from her husband.

This section is a re-enactment in similar terms of 19 & 20 Vict. c. 120, s. 37, the decisions under which appear to be applicable.

The examination is necessary in the case of a married woman who is an infant (*Re Broadwood*, 7 Ch. 323). It was required where she was entitled to a jointure charged on the estate (*Re Turbutt*, 2 N. R. 487); or had out of her separate estate purchased the interest of her husband, who was tenant for life (*Re Fowles*, 1887, W. N. 208). But it was dispensed with where the married woman's interest was remote, and was represented by trustees (*Re De Tabley*, 11 W. R. 936; *Re Tibbett*, 17 W. R. 394; *Re Kilmorey*, 26 W. R. 54); where her interest was small (*Re Cundee*, 37 L. T. 271); where she was an object of a discretionary trust as to income during her husband's life (*Re Tesseyman*, 1897, W. N. 167; 77 L. T. 484); where the court was satisfied that the order would be beneficial and that the delay necessary for her examination would be prejudicial (*Re Halliday*, 12 Eq. 199; *Re Thorne*,

40 & 41 Vict.
c. 18, s. 50.

20 W. R. 587; but see *Re Johnson*, 1869, W. N. 87; where she was married between the presentation of the petition and the hearing (*Re Marshall*, 15 Eq. 66); where she was married after 31st December, 1882 (*Riddell v. Errington*, 26 Ch. D. 220); where she was married before that date, but the application related to property acquired by her since that date (*Re Harris*, 28 Ch. D. 171; *Re Batt*, 1897, 2 Ch. 65); where she had given a notification in writing under sect. 26 (*ante*; *Re Stanley*, 1889, W. N. 164). In the case of applications under this act for sanction to the investment in land of funds in court, it seems that sect. 32 of the S. L. Act, 1882 (*post*), does not enable the examination to be dispensed with (*Re Arabin*, 52 L. T. 728); but where the money was to be paid to trustees examination was dispensed with (*Re Ward*, 1895, W. N. 41). In the last case the petition was ordered to be entitled under the S. L. Act, 1882.

As to when the examination may be taken, see S. E. Act Orders, No. 13 (*post*, *Re Foster*, 1 De G. & J. 386; *Re Packer*, 39 L. J. Ch. 220; *Re Turbutt*, 2 N. R. 487). It was taken in court at the hearing of the petition (*Re Taylor*, 14 Eq. 557).

An affidavit of no settlement is not necessary on an application under this act, unless it is for payment out of money (*Re Standish*, 25 W. R. 8).

Examination
of married
woman: how
to be made
when residing
within the
jurisdiction of
the court, and
how when
residing
without such
jurisdiction.

51. The examination of such married woman, when resident within the jurisdiction of the court to which such application is made, shall be made either by the court or by some solicitor duly appointed by the court for that purpose, who shall certify under his hand that he has examined her apart from her husband, and is satisfied that she is aware of the nature and effect of the intended application, and that she freely desires to make or consent to the same. And when the married woman is resident out of the jurisdiction of the court to which such application is made, her examination may be made by any person appointed for that purpose by the court, whether he is or is not a solicitor of the court, and such person shall certify under his hand to the effect hereinbefore provided in respect of the examination of a married woman resident within the jurisdiction. And the appointment of any such person not being a solicitor shall afford conclusive evidence that the married woman was at the time of such examination resident out of the jurisdiction of the court.

This section is a re-enactment in substantially similar terms of 19 & 20 Vict. c. 120, s. 38, and 21 & 22 Vict. c. 77, s. 6, the decisions under which appear to be applicable.

The solicitor appointed must be in actual practice in England (*Re Noyes*, 6 W. R. 7; *Turner v. Turner*, 2 De G. & J. 534), and not acting for the husband (*Re Noyes, sup.*), or any of the parties to the proceedings (*Re Brealty*, 24 Beav. 220). But the husband's solicitor may attest the signatures of the married woman and the commissioner (*Re Lewis*, 24 W. R. 103). A British consul abroad was appointed to take the examination (*Re Johnson*, 1869, W. N. 87). See S. E. Act Orders, No. 14 (*post*).

For form of order, see Seton, 6th ed. 1791.

As to appli-
cation by or
consent of
married
women,
whether of
full age or
under age.

52. Subject to such examination as aforesaid, married women may make or consent to any applications, whether they be of full age or infants.

53. Nothing in this act shall be construed to create any

obligation on any person to make or consent to any application to the court or to exercise any power. **40 & 41 Vict. c. 18, s. 53.**

54. For the purposes of this act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and profits of estates, although his estate may be charged or incumbered either by himself or by the settlor, or otherwise howsoever, to any extent; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid unless they shall concur therein. No obligation to make or consent to application, &c. Tenants for life, &c. to be deemed entitled notwithstanding incumbrances.

55. Provided always, that nothing in this act shall authorize any sale or lease beyond the term of twenty-one years of any settled estates in respect of which, under the act of the thirty-fourth and thirty-fifth years of King Henry the Eighth, chapter twenty, "to embar feigned recovery of lands wherein the King's Majesty is in reversion," or under any other act of parliament, the tenants in tail are restrained from barring or defeating their estates tail, or where the reversion is vested in the Crown. Exception as to entails created by act of parliament.

56. Nothing in this act shall authorize the granting of a lease of any copyhold or customary hereditaments not warranted by the custom of the manor without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor. Saving rights of lords of manors.

57. This act shall, except as hereinafter provided, apply to all matters existing at the time of the passing of this act, whether proceedings are actually pending or not, and any proceedings in any such matter may be continued or taken under this act as if the matter originated under this act, or may be continued or taken under the acts hereby repealed, or partly under this act and partly under the said repealed acts as occasion may require: Provided always, that the provisions in this act contained respecting demises to be made without application to the court shall extend only to settlements made after the first day of November one thousand eight hundred and fifty-six. To what settlements this act to extend.

58. The acts specified in the schedule to this act are hereby repealed: Provided always, that this repeal shall not affect anything done or any proceeding taken under any enactment hereby repealed. Repeal of acts specified in schedule.

59. Nothing in this act shall interfere with the exercise of any powers to authorize or grant leases conferred by any act of parliament not expressly repealed by this act. Saving.

60. This act shall not extend to Scotland. Extent of act.

61. This act shall commence on the first day of November one thousand eight hundred and seventy-seven. Commencement of act.

40 & 41 Vict.
c. 18.

SCHEDULE.

Session and Chapter.	Title or Short Title.
19 & 20 Vict. c. 120	An Act to facilitate leases and sales of Settled Estates.
21 & 22 Vict. c. 77 ...	An Act to amend and extend the Settled Estates Act of 1856.
27 & 28 Vict. c. 45 ...	An Act to further amend the Settled Estates Act of 1856.
37 & 38 Vict. c. 33 ...	The Leases and Sales of Settled Estates Amendment Act, 1874.
39 & 40 Vict. c. 30 ...	The Settled Estates Act, 1876.

ORDERS UNDER THE SETTLED ESTATES ACT, 1877.

1. The words "settlement," "settled estates," and "the court," in these orders shall have the same interpretation as in the act.

The words "the act" in these orders shall mean the Settled Estates Act, 1877, "the petition" shall mean a petition under the act, and "the judge" shall mean the judge of the court with whose name the petition shall be marked, or to whom the petition shall be transferred.

2. All petitions, notices, affidavits, and other proceedings under the act shall be entitled "In the matter of the estates settled" [by the settlor or settlors, naming one of them and referring to the instrument by which the settlement shall have been created, and mentioning the parish or place and county in which the lands, messuages, or tenements proposed to be dealt with are situate] "and in the matter of the Settled Estates Act, 1877," and every such petition shall be marked with the words "In the High Court of Justice, Chancery Division," and with the title of the judge before whom it is intended to be heard (see Form No. 1 in the Appendix hereto). Upon the presentation of the petition, a day shall be appointed for hearing not less (unless the judge gives special leave) than eight clear days after such presentation, and in the computation of such eight clear days, Sundays and other days on which the offices are closed shall not be reckoned; and every petition shall, in the body thereof, or in a schedule thereto, or by a plan thereto annexed, contain a detailed description of the property proposed to be dealt with by such petition sufficient to identify the same.

3. When a petition has been put into the paper for hearing, and by reason of the parties not being ready, or for any other cause, the judge allows it to stand over generally, it may be put into the paper for a subsequent day, without any application to the court or judge, on the petitioner or his solicitor applying for that purpose to the secretary of the Lord Chancellor or Master of the Rolls (as the case may be), and notice of the appointment of such subsequent day shall be given by the petitioner, or his solicitor, two clear days before the day fixed to the other parties entitled to appear on such petition.

4. The notice required to be given by the 26th section of the act if given before the hearing (or if given after the hearing, and the judge shall not otherwise direct) may, without any other direction of the court, be given within the jurisdiction of the court, except in the case of a person of unsound mind, not so found by inquisition, by delivering to the person to be served a notice (in the Form No. 3 in the Appendix hereto) with such variations as circumstances require, and the time to be specified in such notice for the person served to deliver or leave a notification shall—(a) in case the person to be served is a guardian of an infant, be such as shall be directed by the judge in the order appointing the guardian, and in case the person to be

served is a married woman, or a committee of a lunatic, not less than twenty-eight clear days after the service; (b) and in other cases not less than fourteen clear days after the service. In case the person to be served is of unsound mind, not so found by inquisition, or out of the jurisdiction of the court, or it is desired to serve such notice on any person within the jurisdiction of the court in any other manner than above provided, an application shall be made at chambers *ex parte* by the petitioner for directions as to the manner in which such notice shall be given, and as to the time to be specified in such notice within which the notification is to be made by the person served.

5. Where it is desired that any guardian of an infant shall make or consent to any application to the court under the act, or make any notification respecting any application to the court, or that notice may be given to any such guardian on behalf of an infant, the court may appoint a guardian to such infant for the purposes of the act, and an application for such appointment may, after the petition is presented, be made at chambers by the petitioner by summons. And if an infant is the petitioner the petition may be presented by the infant by his next friend, and after the petition has been presented and answered, and a guardian appointed, the word "guardian" shall be substituted in the petition for the words "next friend," and the name of the guardian (if the next friend and guardian shall not be the same person) for the name of the next friend.

6. In the case of a lunatic or infant tenant in tail by his committee or guardian applying or consenting to an application, or giving a notification respecting an application, an application may be made at chambers by the petitioner after the petition is presented that such committee or guardian may be directed to so apply or consent, or give a notification, and in the case of an infant such application may be combined with the application to appoint a guardian.

7. In cases where the committees or guardians of lunatic or infant tenants in tail shall be served with notice of the application in pursuance of the 26th section of the act, an application may be made at chambers by the petitioner, before the expiration of the time specified in such notice, that such committees or guardians may notify that they either assent to or dissent from such application, or submit their rights or interests so far as they may be affected by such application to be dealt with by the court.

8. Upon an application to appoint a guardian to an infant for any such purpose as aforesaid, the summons shall be served upon the parent, testamentary guardian, or guardian appointed by the Court of Chancery or the Chancery Division of the High Court of Justice, of the infant, if there be any such parent or guardian, unless the court or judge shall dispense therewith.

9. Upon any application that a committee or guardian of a lunatic or infant tenant in tail may be directed to make or consent to any application on behalf of such lunatic or infant, or to notify that the lunatic or infant assents to or dissents from such application, or submits his rights or interests so far as they are affected by such application to be dealt with by the court, the summons shall be served on the committee of such lunatic, or the guardian appointed or proposed to be appointed of such infant, for such purpose.

10. Upon an application to appoint a guardian of an infant the following facts shall be proved:—

1. The age of the infant.
2. Whether he has any parent, testamentary guardian, or guardian appointed by the Court of Chancery or the Chancery Division of the High Court of Justice, and, if so, whether such parent or guardian has any interest in the application, and if he has the nature of such interest, and whether or not adverse to the interest of the infant.
3. Where and under whose care the infant is residing, and at whose expense he is maintained.
4. In what way the proposed guardian is connected with the infant, and why proposed and how qualified to be appointed.

**Orders under
Settled
Estates Act,
1877.**

5. That the proposed guardian has no interest in the application, or if he has the nature of his interest, and that it is not adverse to the interest of the infant.

6. The consent of the guardian to act.

11. Upon an application that a committee of a lunatic tenant in tail may be directed to make or consent to any application, or to give any notification respecting any application, the authority of the judge or judges entrusted with the care and commitment of the custody of the persons and estates of lunatics to such committee to act on behalf of the lunatic shall be produced, and if it shall appear thereby that such judge or judges are of opinion that it is proper and consistent with a due regard for the interest of the lunatic that the committee shall make or consent to the application or give any specific notification respecting the application, such authority shall, unless the court or judge shall for any special reason require further evidence, be sufficient evidence upon which the court or judge may direct the committee to act in conformity with such authority.

12. Upon an application that a guardian of an infant tenant in tail may be directed to make or consent to any application or to give any notification respecting any application, evidence is to be produced to satisfy the judge that it is, and the guardian is to make an affidavit that he believes that it is, proper and consistent with a due regard for the interest of such infant that such direction shall be given.

13. The examination of a married woman under sects. 50 and 51 of the act may be taken at any time after the petition is presented and answered.

14. When it is desired that a married woman resident within the jurisdiction of the court shall be examined otherwise than by the court, a solicitor who is a perpetual commissioner to take acknowledgments of deeds by married women may be appointed for that purpose by the judge at chambers in the Form No. 7 in the Appendix hereto without summons or order, upon the request of the petitioner and a certificate of the solicitor for the petitioner in the Form No. 7 in the Appendix hereto that the person to be appointed is not a solicitor for the petitioner, or for any party whose concurrence or consent to the application is required, but where an examination by such solicitor will cause unreasonable expense, delay, or inconvenience, or where the married woman is resident out of the jurisdiction of the court, an application by summons may be made ex parte by the petitioner at chambers to appoint a solicitor if such woman is resident within the jurisdiction of the court, and if not so resident a person, whether a solicitor or not, to take such examination.

15. Upon every petition the court shall be satisfied by sufficient evidence that it is proper and consistent with a due regard for the interests of all parties entitled under the settlement that the powers should be exercised; and it shall be stated in the affidavit why and upon what ground it is deemed to be so.

16. Upon every petition where there are any trustees seised or possessed of any estate in trust for any of the persons whose consent or concurrence to or in the application is required, evidence is to be produced that notice of the application has been served on such trustees.

17. Upon every petition evidence shall be produced to satisfy the court that neither the applicant nor any party entitled has previously applied to either House of Parliament for a private act to effect the same or a similar object, or if any such application has been made that the same was not rejected on its merits or reported against by the judges to whom the bill may have been referred.

18. If upon the hearing of any petition the court shall be of opinion that notice ought to be served on any person who shall not have been served, or that notice of the application ought to be inserted in any newspaper, the court shall give directions accordingly, and the petition shall stand over generally or to such time as the court shall direct.

19. When the court shall at the hearing have directed notice of any application to be inserted in any newspapers, any person may, within the time

specified in the notice, apply to the court by motion, either *ex parte* or upon notice to the petitioner, for leave to be heard in opposition to or in support of the application, but if such motion shall be made *ex parte* and the court shall think fit to give such leave, it shall be subject to such order as the court shall think fit to make as to costs.

**Orders under
Settled
Estates Act,
1877.**

20. Any such person having obtained leave under the last preceding order shall be at liberty, upon reasonable notice, to inspect and peruse the petition at the office of the solicitor for the petitioner, upon payment of a fee of 13s. 4d. on each inspection, and shall be entitled (either without or after such inspection) to be furnished with a copy of such petition upon such application, terms, and conditions as are provided by Rules 8, 9, 12, and 13 of Order V. of the Additional Rules of Court, under the Supreme Court of Judicature Act, 1875, dated 12th August, 1875. [See R. S. C. Ord. 66, r. 7.]

21. Any order made on an *ex parte* motion giving leave to such person to be heard on any application shall be served on the solicitor for the petitioner.

22. Any person served with a notice, pursuant to the 26th section of the acts requiring him to notify whether he assents to or dissents from the application or submits his rights or interests so far as they may be affected by such application to be dealt with by the court, and any trustee or other person served with notice pursuant to the 30th section of the act, shall be at liberty, upon reasonable notice to the petitioner's solicitor, to inspect and peruse the petition without payment of any fee, and he shall be entitled to be furnished with a copy thereof upon such application, terms, and conditions as are provided by Rules 8, 9, 12, and 13 of Order V. of the Additional Rules of Court, under the Supreme Court of Judicature Act, 1875, dated 12th August, 1875. [See R. S. C. Ord. 66, r. 7.]

23. In all cases in which land in a register county or district is affected by the exercise of any powers conferred on the court by the act, and the court shall direct notice to be recorded, pursuant to the 33rd section of the act, such notice may be given by directing a memorial of the order to be registered. And in all cases in which the court shall not think it practicable or expedient that notice under the said section should be recorded as therein mentioned, the order shall state that no record of the order need be made.

24. Every order shall state, in addition to the names of the petitioners, the names of the persons other than the petitioners who concur or consent or to whom notice of the application has been given, or who (under Order 19) may have obtained leave to be heard in opposition to or in support of the application, and whether any notification was received from the persons to whom notice has been given, and if any has been received the purport thereof, and also the names of the persons, if any, notice to whom has been dispensed with, and whether the order is made subject to any and what rights, estate, or interest of any person whose concurrence or consent has been refused, or who shall or shall not be deemed to have submitted his rights or interests to be dealt with by the court, or whose rights or interests ought, in the opinion of the court, to be excepted.

25. In cases where the court authorizes a lease the order shall direct that the lease shall contain such conditions as are required by the act, and such other covenants, conditions, and stipulations as the court shall deem expedient with reference to the special circumstances, or may direct the same to contain such covenants, conditions, and stipulations as may be approved by the judge at chambers without directing the lease to be settled by the judge.

26. The Rules 1, 2, 3, and 6 of Order 57 (as to time) in the schedule to the Supreme Court of Judicature Act, 1875, shall be applicable to these orders, and to all proceedings under the act. [See R. S. C. Ord. 64, rr. 1, 2, 3, and 7.]

27. The forms set forth in the Appendix hereto shall be adhered to, subject

Orders under Settled Estates Act, 1877. only to such variations as may be necessary to meet the circumstances of the case or direction of the court.

28. In all cases not provided for by the act, or these orders, the existing forms and mode of procedure and general practice of the court on similar proceeding shall apply to proceedings under the act.

29. The fees and allowances to solicitors of the court in respect to proceedings under the act shall be such as are provided by Order 6 of the Additional Rules of Court under the Supreme Court of Judicature Act, 1875, dated 12th August, 1875, and are applicable to such proceedings, and solicitors shall be entitled to charge and be allowed for a request and certificate under the 14th Order (of these Orders), and for attendances at the judges' chambers to procure the appointment of an examiner thereon, a fee of 13s. 4d. if the lower scale of fees is applicable, and 17. 1s. 0d. in other cases. [See R. S. C. Ord. 65, r. 27.]

30. The fees to be taken by the officers of the court in respect to proceedings under the act shall be such as are provided by the orders under the Supreme Court of Judicature Act, 1875, dated 28th October, 1875, and are applicable to such proceedings; and every request under the 14th Order (of these Orders) shall bear a stamp of 2s. if the lower scale of fees is applicable, and 3s. in other cases.

31. Every petition under the act shall set forth the name, address, and description of the petitioner, and also a place within three miles from the site of Temple Bar, London, where he may be served with any order of the court or of the judge in chambers, or notice relating to the subject of such petition.

32. The judge in person sitting in court or in chambers in the case of any petition may by special order dispense with all or any of the preceding orders so far as they are applicable to such petition in any case in which he shall think fit, and upon such terms and conditions (if any) as he may deem proper.

33. These orders shall come into operation on the 7th day of January, 1879, and shall apply to any petition presented on or after that date.

34. These orders may be cited as "The Settled Estates Act Orders, 1878."

APPENDIX.

No. 1.—Form of Title of Petition and other proceedings.

In the High Court of Justice, Chancery Division,

The Master of the Rolls (*or* the Vice-Chancellor Malins, *or* other Vice-Chancellor).

In the matter of estates settled by *A. B.* (*or A. B. and others*)
by will dated (*or* deed dated) consisting of
certain lands (*or* messuages or tenements) in in the
parish of in the county of .

And in the matter of the Settled Estates Act, 1877.

No. 2.—Form of Summons for directions as to service of notice pursuant to the 26th section of the act.

(*Title same as petition.*)

Let all parties concerned attend at my chambers at on
at o'clock on the hearing of an application on the part of [the

petitioners] that notice of the application intended to be made by a petition presented in the above matters on the day of requiring *A. B. and C. D.* severally to notify whether he assents to or dissents from such application, or submits his rights and interests so far as they may be affected by such application to be dealt with by the court, may be given by [state the manner in which it is proposed to give the notice, and the time within which the notification is to be required] or in such other manner as the judge may think fit.

Orders under
Settled
Estates Act,
1877.

Dated this day of .
This summons was taken out by of , solicitors for the applicant.

No. 3.—Form of Notice pursuant to section 26 of the act.

In the High Court of Justice, Chancery Division,
The Master of the Rolls (or the Vice-Chancellor Malins or other Vice-Chancellor).

(Title same as petition.)

Take notice that [name petitioners and their addressees as in petition] have presented a petition in the above matters praying that [as in petition, but describing the lands, messuages, or tenements as in the petition], and it is intended to apply to the said court for an order in accordance with such prayer, and you are [severally] hereby required to notify in writing within after the service hereof whether you assent to or dissent from such application, or submit your rights or interests so far as they may be affected by such application to be dealt with by the court, such notification is to be delivered to the petitioners' solicitors, or left for them at the address specified at the foot hereof, and may be so delivered by transmitting the same to them by post at such address.

If no notification shall be so delivered or left within the time above limited, you will be deemed to have submitted your rights and interests to be dealt with by the court.

In the event of your dissenting from such application and desiring to be heard in opposition to the application you are by your notification to require notice to be given to or left for you or your solicitor at a place to be specified within three miles from the site of Temple Bar, London, of the day on which the petition is fixed for hearing.

You or your solicitor can upon reasonable notice to the under-named *A. & B.* inspect and peruse the petition without payment of any fee, and you are entitled at your own expense to have a copy of such petition furnished to you.

Dated the day of .
A. & B.

[Address within three miles of the site of Temple Bar, London.]
Petitioners' Solicitors.

To [name the person or all persons to be served pursuant to the above section.]

NOTE.—A copy of the above notice, with a notification at the foot thereof to be filled up by you, is sent herewith.

No. 4.—Form to accompany Notice pursuant to section 26 of the act.

Copy Notice.

In pursuance of a notice, of which the above is a copy, served on me on the day of , I hereby notify that I *

Dated this day of .
To Messrs. .†

Orders under
Settled
Estates Act,
1877.

* Here insert "assent to the application," or "dissent from the application," or "submit my rights and interests so far as they may be affected by the application to be dealt with by the court."

And if you dissent and desire to be heard in opposition thereto, add "And I desire to be heard in opposition to the application, and require notice to be given to _____ at [naming a place within three miles of the site of Temple Bar, London] of the day fixed for the hearing of the petition."

† Signature and address.

No. 5.—Form of Summons for Appointment of a Guardian of an Infant, and for leave for the Guardian to make or consent to an Application.

(Title same as petition.)

Let all parties concerned attend at my chambers at _____, on _____ at _____ o'clock, on the hearing of an application on the part of [the petitioners].

That *A. B.* or some other proper person may be appointed guardian of *C. D.*, an infant, and that *E. F.* or some other proper person may be appointed guardian of *G. H.*, an infant, for the purpose of making on behalf of such infants (or consenting on behalf of such infants to) an application proposed to be made by a petition presented on the _____ day of _____, by the above-named applicants for an order in accordance with the prayer of such petition, and (in case the infants are tenants-in-tail) that such guardians may be directed to make (or consent to) such application.

Dated this _____

This summons was taken out by _____, of _____, solicitors for the applicants.

No. 6.—Form of Summons for Appointment of a Guardian of an Infant to be served with notice of an Application, and for leave for the Guardian to deliver a notification pursuant to such Notice.

(Title same as petition.)

Let all parties concerned attend at my chambers at _____, on _____ at _____ o'clock, on the hearing of an application on the part of [the petitioners].

That *A. B.* or some other proper person may be appointed guardian of *C. D.*, an infant, and that *E. F.* or some other proper person may be appointed guardian of *G. H.*, an infant, for the purpose of being served with a notice requiring them on behalf of such infants, within _____ clear days after service thereof, to notify whether they assent to or dissent from an application proposed to be made by a petition presented on the _____ day of _____ by the above-named applicants for an order in accordance with the prayer of such petition, or submit the infant's rights or interests so far as they may be affected by such application to be dealt with by the court, and (in case the infants are tenants-in-tail) that such guardians may be directed to notify that they, on behalf of such infants, assent to (or dissent from) such application (or submit the infant's rights or interests, so far as they may be affected by such application to be dealt with by the court).

Dated this _____ day of _____

This summons was taken out by _____, of _____, solicitors for the applicants.

No. 7.—Form of Request to appoint a person to examine a Married Woman.Orders under
Settled
Estates Act,
1877.*(Title same as petition.)*

The petitioners , in a petition presented in these matters on the day of , request that *A. B.* of, &c. [*C. D.* of, &c., and *E. F.* of, &c.], being a solicitor [*or* solicitors], and a perpetual commissioner [*or* perpetual commissioners] to take the acknowledgment of deeds by married women, may be appointed for the purpose of any or either of them examining the petitioners *G.* the wife of *H. I.*, and *K.* the wife of *L. M.*, and *N.* the wife of *O. P.*, of, &c., respectively touching their knowledge of the nature and effect of the application intended to be made by the petition, and to ascertain whether they the said *G. I.* and *K. M.* respectively freely desire to make such application, and whether she the said *N. P.* freely desires to consent to such application.

Name such
as may be
required to
examine all
the married
women who
are to be
examined.

We, the solicitors for the petitioners, hereby certify that neither of them, the said *A. B.*, *C. D.* and *E. F.* is the solicitor for the petitioner, or for any party whose concurrence or consent to the application is required.

Dated this day of

A. and B. solicitors for the petitioners.

Address.

The Master of the Rolls [*or* the Vice-Chancellor] appoints the said for the purposes mentioned in the above request.

E. F.,

Chief Clerk.

No. 8.—Form of Summons to appoint persons to examine Married Women.

Let all parties concerned attend at my chambers at on , at o'clock, on the hearing of an application on the part of , the petitioners in a petition presented in this matter on the day of , that *A. B.* of, &c., and *C. D.* of, &c. [*and if the married women are within the jurisdiction, add being solicitors*] be appointed for the purpose of any or either of them examining the petitioners *G.* the wife of *H. I.*, and *K.* the wife of *L. M.*, and *N.* the wife of *O. P.*, of, &c., respectively touching their knowledge of the nature and effect of the application intended to be made by the said petition, and to ascertain whether they the said *G. I.* and *K. M.* freely desire to make such application, and whether she the said *N. P.* freely desires to consent to such application.

Dated this day of

This summons was taken out by , of , solicitors for the applicant.

No. 9.—Form of Examination of a Married Woman making or assenting to an Application.*(Title same as petition.)*

The examination of the petitioner *G.* the wife of *H. J.*, and *K.* the wife of *L. M.*, and of *N.* the wife of *O. P.* of* .

* Insert the
names of all
who can be
conveniently
examined by
the same per-
son and at the
same time.

We, the said *G. J.*, *K. M.*, and *N. P.*, having been this day respectively examined apart from our respective husbands touching our knowledge of the nature and effect of an application intended to be made to the High Court of Justice by a petition presented in this matter on the day of by us the said *G. J.* and *K. M.* and others, for answer thereto severally say that we are aware of the nature and effect of the said intended application, and we the said *G. J.* and *K. M.* severally freely desire to make

Orders under Settled Estates Act, 1877. such application, and I, the said *N. P.*, freely desire to consent to such application. As witness our hands this day of .
 Witness to the signature of the }
 said *G. J., K. M., and N. P.* }
Q. R., }
 address. }

[To be at the foot of the above Examination.]

No. 10.—Form of Certificate of Examination of Married Women making or assenting to an Application.

I, the undersigned *A. B.*, being the person appointed by the Master of the Rolls or the Vice-Chancellor for the purpose of examining the above-named *G.* the wife of *H. I.*, *K.* the wife of *L. M.*, and *N.* the wife of *O. P.*, hereby certify that I have this day of examined the said *G. I., K. M., and N. P.* apart from their respective husbands touching their knowledge of the nature and effect of the application intended to be made by the petition above referred to, and I have taken such examination in writing as above set forth, and I further certify that at the time of such examination I explained to them the nature and effect of the said application, and I am satisfied that they were aware of the nature and effect of such application, and that they the said *G. I.* and *K. M.* freely desire to make the said application, and that the said *N. P.* freely desires to consent to the said application.

No. 11.—Form of Affidavit verifying Examination.

(Title as in petition.)

I, *Q. R.* of , make oath and say that I was present and did see *G. I., K. M., and N. P.* respectively named in the above petition, sign the examination or paper writing annexed hereto and now produced and shown to me marked A, and that the signatures *G. I., K. M., and N. P.* attached thereto are respectively the proper handwritings of *G.* the wife of *H. I.* of , *K.* the wife of *L. M.* of , and *N.* the wife of *O. P.* of . And I further say that I was present and did see *A. B.* sign the certificate or paper writing annexed hereto and now produced and shown to me marked B, and that the signature *A. B.* attached thereto is the proper handwriting of *A. B.* of &c. And I say that the signature *Q. R.* attached to the said paper writings as a witness is my handwriting.

No. 12.—Form of Notice pursuant to the 30th section of the Act.

(Title same as petition.)

In the High Court of Justice, Chancery Division,
 Master of the Rolls [or the Vice-Chancellor Malins or other Vice-Chancellor].

Take notice that [name petitioners and their addresses as in petition] have presented a petition in the above matters praying that [as in petition, but describing the lands, messuages, or tenements, as in the petition], and it is intended to apply to the said court for an order in accordance with such prayer. This notice is given to you in pursuance of the above act because you are seised or possessed of an estate in trust for , whose consent or concurrence to or in the application is required by the act. You or your solicitors can upon reasonable notice to the under-named *A.* and *B.* inspect

and peruse the petition at the address specified at the foot hereof without payment of any fee, and you are entitled at your expense to have a copy of such petition furnished to you.

Dated this day of

A. & B.

Address.

Solicitors for the petitioners.

To [name the persons to be served pursuant to the above section].

Orders under
Settled
Estates Act,
1877.

No. 13.—Form of Notice to be inserted in newspapers if directed pursuant to the 31st section.

(Title as in petition.)

By direction of the Master of the Rolls (or the Vice-Chancellor) notice is hereby given that an application by petition has been made to the court of the said judge for a sale or for powers to grant leases of the above-mentioned hereditaments (or otherwise according to the circumstances), and the court has directed the application to be adjourned (or adjourned till), and any person, whether interested in the estate or not, may on or before apply to the said court by motion for leave to be heard in opposition to or in support of such application. The petition may be inspected on application to Messrs. A. and B. of , the solicitors for the petitioners.

II.—THE SETTLED LAND ACT, 1882.

45 & 46 VICT. C. 38.

An Act for facilitating Sales, Leases, and other dispositions of Settled Land, and for promoting the execution of Improvements thereon.
[10th August, 1882.]

I.—PRELIMINARY.

1.—(1.) This act may be cited as the Settled Land Act, 1882. 45 & 46 Vict.
c. 38, s. 1.

(2.) This act, except where it is otherwise expressed, shall commence and take effect from and immediately after the thirty-first day of December one thousand eight hundred and eighty-two, which time is in this act referred to as the commencement of this act. Short title;
commence-
ment;

(3.) This act does not extend to Scotland. extent.

The paramount object of the Legislature in the S. L. Acts was the well-being of settled land (*Bruce v. Ailesbury*, 1892, A. C. 365), and of all persons interested therein including the tenants, not merely of persons taking under the settlement (*Re Mundy and Roper*, 1899, 1 Ch. 288). An obstacle to such well-being consists in incumbrances which prevent a tenant for life from properly keeping up the estate (*Re Richardson, R. v. R.*, 1900, 2 Ch. 793). Again, it has been said that the object of the Act was to render land marketable notwithstanding settlement (*Re Mundy and Roper, sup.*; *Cardigan v. Curzon-Howe*, 30 Ch. D. 536). The class of persons coming within "tenant for life" should not be cut down (*Re Llanover, Herbert v. Freshfield*, 1903, 2 Ch. 24). And the provisions as to dealing with land by way of sale, exchange, or lease should be construed

45 & 46 Vict. c. 38, s. 1. liberally (*Re Mundy and Roper*, 1899, 1 Ch. 289). But the provisions as to the raising or investing of capital moneys are construed more strictly (*Re Bruce, Halsey v. Bruce*, 1905, 2 Ch. 375). The S. E. Act, 1877, has little bearing on the construction of the S. L. Act, 1882, which rests on a different principle (*Re Aldam*, 1902, 2 Ch. 46; a decision as to mining leases). As regards the L. C. C. Act, 1845, decisions thereunder were held applicable on a question under sect. 34 of the S. L. Act, 1882 (*Cottrell v. C.*, 28 Ch. D. 628); but not on a question under sects. 21 and 25 (*Re Gerard*, 1893, 3 Ch. 257). Generally speaking, cases decided before the present act may have no application to questions thereunder (*Re Gladstone, G. v. G.*, 1900, 2 Ch. 105; *Re Aldam*, 1902, 2 Ch. 53).

II.—DEFINITIONS.

Definition of
settlement,
tenant for
life, &c.

2.—(1.) Any deed, will, agreement for a settlement, or other agreement, covenant to surrender, copy of court roll, Act of Parliament, or other instrument, or any number of instruments, whether made or passed before or after, or partly before and partly after, the commencement of this act, under or by virtue of which instrument or instruments any land, or any estate or interest in land, stands for the time being limited to or in trust for any persons by way of succession, creates or is for purposes of this act a settlement, and is in this act referred to as a settlement, or as the settlement, as the case requires (*i*).

(2.) An estate or interest in remainder or reversion not disposed of by a settlement, and reverting to the settlor or descending to the testator's heir, is for purposes of this act an estate or interest coming to the settlor or heir under or by virtue of the settlement, and comprised in the subject of the settlement (*ii*).

(3.) Land, and any estate or interest therein, which is the subject of a settlement, is for purposes of this act settled land, and is, in relation to the settlement, referred to in this act as the settled land (*k*).

(4.) The determination of the question whether land is settled land, for purposes of this act, or not, is governed by the state of facts, and the limitations of the settlement, at the time of the settlement taking effect (*l*).

(5.) The person who is for the time being, under a settlement, beneficially entitled to possession of settled land, for his life, is for purposes of this act the tenant for life of that land, and the tenant for life under that settlement (*m*).

(6.) If, in any case, there are two or more persons so entitled (*n*) as tenants in common, or as joint tenants, or for other concurrent estates or interests, they together constitute the tenant for life for purposes of this act.

(7.) A person being tenant for life within the foregoing definitions shall be deemed to be such notwithstanding that, under the settlement or otherwise, the settled land, or his estate or interest therein, is encumbered or charged in any manner or to any extent (*o*).

(8.) The persons, if any, who are for the time being, under a

settlement, trustees with power of sale of settled land, or with power of consent to or approval of the exercise of such a power of sale, or if under a settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this act, are for purposes of this act trustees of the settlement (*p*).

45 & 46 Vict.
c. 38, s. 2.

(9.) Capital money arising under this act, and receivable for the trusts and purposes of the settlement, is in this act referred to as capital money arising under this act (*q*).

(10.) In this act—

(i.) Land includes incorporeal hereditaments, also an undivided share in land (*r*); income includes rents and profits; and possession includes receipt of income :

(ii.) Rent includes yearly or other rent, and toll, duty, royalty, or other reservation, by the acre, or the ton, or otherwise; and, in relation to rent, payment includes delivery; and fine includes premium or fore-gift, and any payment, consideration, or benefit in the nature of a fine, premium, or fore-gift (*rr*) :

(iii.) Building purposes include the erecting and the improving of, and the adding to, and the repairing of buildings : and a building lease is a lease for any building purposes or purposes connected therewith (*s*) :

(iv.) Mines and minerals mean mines and minerals whether already opened or in work or not, and include all minerals and substances in, on, or under the land, obtainable by underground or by surface working; and mining purposes include the sinking and searching for, winning, working, getting, making merchantable, smelting or otherwise converting or working for the purposes of any manufacture, carrying away, and disposing of mines and minerals, in or under the settled land, or any other land, and the erection of buildings, and the execution of engineering and other works, suitable for those purposes; and a mining lease is a lease for any mining purposes or purposes connected therewith, and includes a grant or licence for any mining purposes (*ss*) :

(v.) Manor includes lordship, and reputed manor or lordship :

(vi.) Steward includes deputy steward, or other proper officer, of a manor :

(vii.) Will includes codicil, and other testamentary instrument, and a writing in the nature of a will :

(viii.) Securities include stocks, funds, and shares (*t*) :

(ix.) Her Majesty's High Court of Justice is referred to as the court :

(x.) The Land Commissioners for England as constituted by this act are referred to as the Land Commissioners (*tt*) :

(xi.) Person includes corporation.

(i) An award of land to a vicar "and his successors" does not constitute a settlement within the act (*Ex p. Castle Bytham*, 1895, 1 Ch. 348). It has been held that the S. L. Acts do not apply to ecclesiastical property

Sub-sect. (1).
Settlement :

45 & 46 Vict.
c. 38, s. 2.

consisting of houses in a cathedral city (*Re Bath and Wells*, 1899, 2 Ch. 138). But the acts apply to the sale by an incumbent of glebe lands (Glebe Lands Act, 1888, sect. 8, sub-s. 4).

A "settlement" need not be in its inception a settlement of land, but will include a settlement of personalty where there is power to invest in land, and the investment is made (*Re Child*, 1907, 2 Ch. 352).

by one instrument.

The settlement may consist of one instrument. But a succession must take place under that instrument. And where land was devised to a married woman in fee, the mere fact that her husband might under the general law take an estate by the courtesy did not make the devise a settlement (*Bates v. Kesterton*, 1896, 1 Ch. 159). Nor did the imposition of a restraint on anticipation make the married woman a tenant for life (*ib.*; see sect. 61, *post*). Where land was limited to a married woman for life without power of anticipation, with remainder as she should by will appoint, and in default to herself in fee, it was doubted whether the instrument was a settlement within the section (*Re Pocock and Pranker*, 1896, 1 Ch. 302). The last case, however, was held to fall within sect. 58, sub-s. (1) (ix) (*ib.*). The mere fact that by failure of a contingent remainder in part of the land, which occurred after the death of the tenant for life, that part devolved differently from the rest, did not prevent the settlement from being one settlement during the tenancy for life (*Re Freme, Freme v. Logan*, 1894, 1 Ch. 1). One instrument may create several settlements requiring separate sets of trustees (see *Re Skerrett*, 1899, W. N. 240).

Case where there are successive instruments.

Where family estates have been dealt with by successive instruments, questions have arisen as to what is "the settlement." In the earlier cases (when it may have been supposed that for the purposes of the act there could not be at the same time more than one settlement) it was decided that "the settlement" did not necessarily include either (1) every derivative settlement, whether made by a remainderman (*Re Knowles*, 27 Ch. D. 707), or by the tenant for life of his life interest (*Re Du Cane and Nettlefold*, 1898, 2 Ch. 96; see sect. 50, *post*, and S. L. Act, 1890, sect. 4); or (2) a jointure deed under a power in an original settlement (*Re Keck and Hart*, 1898, 1 Ch. 617; see *Re Meade*, 1897, 1 I. R. 121; *Re Tibbits*, 1897, 2 Ch. 149; *Re Hayes*, 1907, 1 I. R. 88). Later it was laid down by C. A. that for the purposes of the act there might be co-existing at the same time (1) a more comprehensive settlement consisting of several deeds, and (2) a less comprehensive settlement constituted by one of the deeds only (*Re Mundy and Roper*, 1899, 1 Ch. 295; see *Re Du Cane and Nettlefold*, *sup.*).

Co-existence of (1) settlement consisting of several instruments, and (2) settlement consisting of one instrument.

Compound settlements.

It is clear that limitations of a jointure and portions to arise on the death of a tenant for life may be treated as part of a "more comprehensive settlement," as being limitations by way of succession (*Re Mundy and Roper*, 1899, 1 Ch. 290; *Re Marshall, M. v. M.*, 1905, 2 Ch. 329; *A.-G. v. Owen*, 1899, 2 Q. B. 253). And instances of such a "more comprehensive settlement" (referred to in recent cases as a "compound settlement") have been found in the following, viz.: in a series of resettlements and jointure deeds (*Re Ailesbury and Iveagh*, 1893, 2 Ch. 345); in a settlement, a deed charging a jointure and portions, a disentailing deed and a resettlement (*Re Mundy and Roper*, 1899, 1 Ch. 275); and in a deed whereby an owner in fee declared trusts of freeholds for himself for life with remainder to pay annuities and subject thereto for himself absolutely, and a will disposing of his absolute interest (*Re Phillimore, Phillimore v. Milnes*, 1904, 2 Ch. 460; see *Re Marshall, M. v. M.*, 1905, 2 Ch. 325).

Sale by life tenant where there is resettlement.

Where land comprised in an original settlement under which A. was tenant for life is resettled, A. being still life tenant, questions have arisen as to how a title should be made to a purchaser by A. The following distinctions have been taken:—

(1.) While the original settlement subsists A. can sell by virtue of his statutory power treated as arising under the original settlement alone (*Re Mundy and Roper*, 1899, 1 Ch. 296; *Re Wimborne and Browne*, 1904, 1 Ch. 541; but see *Re Domville and Calwell*, 1908, 1 I. R. 475). This being in effect a sale under the "less comprehensive settlement."

(2.) A. can also sell by virtue of his statutory power treated as arising under the compound settlement constituted by the original settlement and the resettlement; new trustees of the compound settlement being appointed (*Re Ailesbury and Iveagh*, 1893, 2 Ch. 345; see *Re Mundy and Roper*, 1899, 1 Ch. 294). This is in effect a sale under the "more comprehensive settlement."

45 & 46 Vict.
c. 38, s. 2.

(3.) Sometimes A. has claimed to sell by virtue of his statutory power treated as arising under the resettlement alone. Resettlements have taken two forms. In one form the resettlement limits to A. a life estate "in restoration" of his original life estate. In this case A. cannot sell under the resettlement alone (*Re Cornwallis-West and Munro*, 1903, 2 Ch. 150; *Re Wimborne and Browne*, 1904, 1 Ch. 542). In another form, the resettlement limits to A. a new life estate, not in restoration of his original life estate. In this case A. can sell under the resettlement alone, subject, however, to any charges created by the original settlement (see *Re Mundy and Roper*, 1899, 1 Ch. 295).

As regards the duration of the original settlement, where such settlement creates no charges but limits land to A. for life with remainder to B. in fee, and A. conveys to B. his life estate in the whole land, it has been suggested that there would be merger, and the settlement being brought to an end A.'s power of sale would be gone (*Re Mundy and Roper*, 1899, 1 Ch. 297). In one case where A. conveyed his life estate in a divided share of the settled land, the court considered that there was no merger on the ground that it was for the benefit of the parties that A.'s life estate should continue. A.'s power of selling the divided share accordingly remained (*Re Barry R. Co. and Wimborne*, 76 L. T. 489). In another case where A. conveyed to B. his life estate in an undivided share of the settled land, A.'s power of selling the entire settled land was held to continue, subject to B.'s consent (*Re Barlow*, 1903, 1 Ch. 382).

Duration of
original
settlement.
Merger.

As regards an express appointment of trustees of a compound settlement, it has been held that where on a resettlement, limited owners who have joint absolute dominion over the settled land keep the original settlement alive by a sufficient restoration of the subsisting uses they can appoint trustees of the compound settlement (*Re Spearman*, 1906, 2 Ch. 502). *Secus* where the parties resettling have not joint absolute dominion (*Re Spencer*, 1903, 1 Ch. 75). Trustees of compound settlements have frequently been appointed by the court (*Re Ailesbury and Iveagh*, 1893, 2 Ch. 345; *Re Mundy and Roper*, *sup.*; *Re Coull*, 1905, 1 Ch. 712).

Trustees of
compound
settlement.

The expression "compound settlement" has been applied by the courts not only where there have been resettlements of family estates, but also where property has been settled by one instrument by reference to the trusts or uses of another instrument (*Re Stafford*, 1904, 2 Ch. 72; *Re Coull*, 1905, 1 Ch. 712). As where a will directed property to be held on the trusts of a pre-existing settlement (*Re Mundy*, 1891, 1 Ch. 399). So where similar limitations were created by a deed and by a will, there being no reference in the one to the other, the two documents constituted a compound settlement (*Re Byng*, 1892, 2 Ch. 219). Where an estate was settled by one instrument and afterwards by a separate instrument the equity of redemption in another estate was settled on like trusts, the two instruments formed one settlement within the section (*Re Monson*, 1898, 1 Ch. 427). Where a direction in the will to accumulate was void under the Thellusson Act and the accumulations went to the next of kin, the will and the act constituted the settlement (*Vine v. Raleigh*, 1896, 1 Ch. 37). But where land was settled by will and a private act was passed which gave power to the will trustees, but did not incorporate the will, or contain any limitations to persons in succession, the act did not form part of the settlement (*Talbot v. Scarisbrick*, 1908, 1 Ch. 812; see *Wheeler v. Tootel*, 51 W. R. 693).

Other in-
stances of
compound
settlements.

By sect. 22, sub-sect. (1) (i) of the Finance Act, 1894, a settlement in that act means any instrument relating to real or personal property which is a settlement within sect. 2 of the present act, or if it related to real property would be such a settlement. Duty has been held payable in respect of

45 & 46 Vict. c. 38, s. 2. property contingently settled (*A.-G. v. Fairley*, 1897, 1 Q. B. 698; *A.-G. v. Clarkson*, 1900, 1 Q. B. 156), and in respect of a fund held in trust to provide an annuity and subject thereto in trust for A. (*A.-G. v. Owen*, 1899, 2 Q. B. 253; *Re Campbell*, 1902, 1 K. B. 113).

See, further in connection with the definition of "settlement" in sub-sect. (1), the cases under S. E. Act, 1877, *ante*, p. 636.

Sub-sect. (2). (ii) Sub-sect. (2) should be compared with the narrower language of sect. 2, sub-s. (3) of the S. E. Act, 1877 (*ante*, p. 635). By virtue of the present sub-section a tenant for life made title to the fee where the settlement trustees had only taken life estates and a reversion had been left in the settlor (*Re Hunter and Hewlett*, 1907, 1 Ch. 46; see *Re Bond, Panes v. A.-G.*, 1901, 1 Ch. 15). As to the distinction between "remainders" and "reversions," see *ante*, p. 386.

Sub-sect. (3). (k) Where two properties are limited by the same instrument to the same uses, except that one is subject to a term, they together form one settled estate (*Re Stamford*, 43 Ch. D. 84). It is doubtful whether properties limited by the same instrument to the same tenant for life and after his death to different remaindermen constituted one settled estate (*Id.*, 43 Ch. D. 91; see *Re Freme, Freme v. Logan*, 1894, 1 Ch. 1).

Sub-sect. (4). (l) The time of the settlement taking effect is, in the case of a will, the death of the testator (*Re Stamford*, 43 Ch. D. 90; see also *Re Ailesbury and Iveagh*, 1893, 2 Ch. 345; *Re Bective*, 27 L. R. Ir. 364).

Sub-sect. (5). (m) "Beneficially entitled" means entitled for his own benefit, if there is anything to be derived from the estate, and not simply as trustee for others (*Re Jones*, 26 Ch. Div. 743; *Re Llanover, Herbert v. Freshfield*, 1903, 2 Ch. 24; see, however, *Vine v. Raleigh*, 1896, 1 Ch. 41). A person may be "beneficially entitled" even though he actually receives nothing (*Re Jones*, 26 Ch. Div. 743; *Re Atkinson, Atkinson v. Bruce*, 30 Ch. D. 612; see sect. 2, sub-sect. (7)). A trust to pay rents during a person's life to him, his wife and children, or one or more of them, does not make him a tenant for life (*Re Atkinson*, 31 Ch. Div. 577). Where land was limited to trustees during the life of A. on trust to sell the life estate and hand over the proceeds to A. and B., and A. covenanted not to take the life estate *in specie*, it was held that A. and B. could together sell as the tenant for life (*Re Hale and Smyth*, 55 L. T. 151). Where there was a trust in a will for accumulation of rents during the life of the testator's son, who was his heir, such heir was on the expiration of the period allowed by the Thellusson Act held to be a tenant for life or person having the powers of a tenant for life (*Re Atherton*, 1891, W. N. 85; *Vine v. Raleigh*, 1896, 1 Ch. 37). "Entitled to possession" means possession as contradistinguished from reversion (*Re Atkinson, Atkinson v. Bruce*, 30 Ch. D. 612; compare *Re Petre, Legh v. Petre*, 1910, 1 Ch. 290). A trust to permit a lady during her life to reside at certain mansion houses and grounds was held, notwithstanding powers of management in the trustees, to constitute her a tenant for life (*Re Llanover, Herbert v. Freshfield*, 1903, 2 Ch. 16; *Re Carne*, 1899, 1 Ch. 324). As to persons who have the same powers as a tenant for life, see sects. 58—63, *post*, p. 713 *et seq.*, and cases there quoted.

Sub-sect. (6). (n) "So entitled" in this sub-section means entitled for life (*Re Atkinson, Atkinson v. Bruce*, 31 Ch. Div. 577; *Re Collinge*, 36 Ch. D. 516). Several persons constituted under this sub-section the tenant for life (*Smith v. Lancaster*, 1894, 3 Ch. 439); but not where the shares were separate (*Re Osborne and Bright*, 1902, 1 Ch. 335). Where trustees have power to distribute rents between one or more of several persons during the life of one of them, these persons do not together constitute a tenant for life (*Re Atkinson, sup.*). A jointress has not a "concurrent estate or interest" with the tenant for life (*Re Ailesbury*, 1893, 2 Ch. 357). When one undivided moiety is vested in A. in fee, the tenant for life of the other moiety can sell such moiety alone (*Cooper v. Belsey*, 1899, 1 Ch. 639; overruling *Re Collinge*, 36 Ch. D. 516; see also *Williams v. Jenkins*, 1894, W. N. 176; *Smith v. Lancaster*, 1894, 3 Ch. 439); see further the cases quoted under sect. 58, sub-s. (1), *ix. post*.

Sub-sect. (7). (o) Even if the incumbrances exceed the income (*Re Jones*, 26 Ch. Div. 740; *Williams v. Jenkins*, 1893, 1 Ch. 704). A disposition of the entire

rent is not an incumbrance within this sub-section (*Re Strangways, Hickley* 45 & 46 Vict. v. *Strangways*, 34 Ch. D. 427). See sect. 50 (*post*, p. 708); sect. 58, sub-
sect. (1), vi., ix., *post*, p. 714, and cases there quoted. c. 38, s. 2.

(p) See S. L. Act, 1890, s. 16, *post*, p. 732. Trustees with a power of Sub-sect. (8).
sale subject to the consent of another are trustees for the purposes of this Trustees of
act (*Constable v. C.*, 32 Ch. D. 233), unless that consent cannot be obtained the settle-
(*Re Johnston*, 17 L. R. Ir. 172); and will be such trustees for the purposes ment.
of a sale of heirlooms, though the power of sale does not extend to the
heirlooms (*Constable v. C.*, *sup.*). A general power of sale, not a limited one,
is intended (*Re Coull*, 1905, 1 Ch. 724). Such a power was inferred from
power being given to trustees to vary securities (*Re Tapp and London Docks*,
92 L. T. 829). So trustees holding realty on trusts declared of personality,
which included a power to call in and vary investments, were held trustees
for the purposes of this act (*Re Garnett Orme and Hargreaves*, 25 Ch. D.
595). Trustees of a term of a thousand years limited immediately before
the life estate on trusts *inter alia* by mortgage, or out of rents, or by other
reasonable means, to raise large sums, are not trustees within this definition
(*Re Carne*, 1899, 1 Ch. 324).

(q) The following sections refer expressly to sources from which capital Sub-sect. (9).
money may be derived, viz., S. L. Act, 1882, ss. 11, 18, 22 (7), 31 (1) (ii.), Capital
34, 35 (2), 37 (2); S. L. Act, 1884, s. 4; S. L. Act, 1889, s. 3; S. L. Act, money.
1890, s. 11 (1). As to moneys which may be treated as capital moneys, see
sects. 32, 33 (*post*, p. 697); *Re Mackenzie* (23 Ch. D. 750); *Re Tennant* (40
Ch. D. 594); *Re Mundy* (1891, 1 Ch. 406); *Clarke v. Thornton* (35 Ch. D.
314); *Re Rosher, Briant v. Rosher* (1899, W. N. 134). Moneys arising from
an exercise of the powers of a tenant for life under sect. 3 are capital
moneys (*Cardigan v. Curzon-Howe*, 41 Ch. Div. 375).

(r) Land includes copyholds (*Re Price, Leighton v. Price*, 27 Ch. D. 552), Sub-sect. (10)
a dignity which descends to heirs, such as a baronetcy (*Re Rivett-Carnac*, 30 (i).
Ch. D. 136; see *Re Aylesford*, 32 Ch. D. 162), tithes (*Re Esdaile, E. v. E.*,
54 L. T. 637), and a perpetual rent-charge (*Re Bective*, 27 L. R. Ir. 364).
The question whether an easement (which has been said to be an incorporeal
hereditament, *ante*, p. 5) is included in "land," was raised in *Re Brotherton*,
B. v. B., 1907, W. N. 230; 1908, W. N. 56. As to an undivided share, see
Cooper v. Belsey (1899, 1 Ch. 639). As to the concluding words of the clause,
see *Re Jones* (26 Ch. Div. 740).

(rr) As to fines, see note to sect. 3 of Conv. Act, 1892 (*ante*, p. 627); and
Chandler v. Bradley, 1897, 1 Ch. 315.

(s) See *Re Ellesmere*, 1898, W. N. 18.

(ss) A grant to lessees of minerals of the right to let down the surface is Sub-sect. (10)
a grant for mining purposes within the sub-sect. (*Sitwell v. Londesborough*, Sub-sect. (10)
1905, 1 Ch. 464). See as to a mining lease, *Re Revely*, quoted *ante*, p. 638. (iv.).
And as to the meaning of mines and minerals, see *ante*, p. 96.

(t) As to the meaning of "securities" generally, see *Re Rayner, R. v. R*, Sub-sect. (10)
1904, 1 Ch. 176; *Re Gent and Eason*, 1905, 1 Ch. 386, quoted, *post*, p. 762. (viii.).

(tt) The powers and duties of the Land Commissioners are now vested Sub-sect. (10)
in the Board of Agriculture and Fisheries (Board of Agriculture and (x).
Fisheries Acts, 1889 and 1903).

III.—SALE; ENFRANCHISEMENT; EXCHANGE; PARTITION.

General Powers and Regulations.

3. A tenant for life—

(i.) May sell the settled land, or any part thereof, or any Powers to
easement, right, or privilege of any kind, over or in tenant for life
relation to the same; and to sell, &c.

(ii.) Where the settlement comprises a manor, may sell the
seignory of any freehold land within the manor, or
the freehold and inheritance of any copyhold or

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c. 38, s. 3.

customary land, parcel of the manor, with or without any exception or reservation of all or any mines or minerals, or of any rights or powers relative to mining purposes, so as in every such case to affect an enfranchisement; and

- (iii.) May make an exchange of the settled land, or any part thereof, for other land, including an exchange in consideration of money paid for equality of exchange; and
- (iv.) Where the settlement comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares,—may concur in making partition of the entirety, including a partition in consideration of money paid for equality of partition.

In addition to the above powers the acts confer on tenants for life powers of leasing (sect. 6), and limited powers of mortgaging (sect. 18; S. L. Act, 1890, sect. 11, *post*).

As regards the power of sale, the acts do not make saleable what is in its nature inalienable, as a dignity (*Re Rivett-Carnac*, 30 Ch. D. 140). A sale to a railway company of the right to construct and use tunnels was within this section, as being a sale, not of an easement, but of part of the settled land (*Re Pearson*, 83 L. T. 626). Cross sales of easements are within the section (*Re Brotherton*, B. v. B., 1908, W. N. 56; see S. L. Act, 1890, sect. 5; *Re Bracken*, 1903, 1 Ch. 265). In selling the tenant for life is a trustee for all parties (sect. 53); but he may sell to increase his own income (*Wheelwright v. Walker*, 23 Ch. D. 769; *Re Sebright*, 33 Ch. D. 436; see *Cardigan v. Curzon-Howe*, 30 Ch. D. 539). It has been said that he may sell from ill-will, or caprice, or because the remainderman is disliked (*Cardigan v. Curzon-Howe*, 30 Ch. D. 540; *Wheelwright v. Walker*, *sup.*; *Re Choytor*, 25 Ch. D. 654; see, however, the cases quoted under sect. 53, *post*, p. 710). The tenant for life may sell, notwithstanding that he has assigned his own interest (sect. 50, *post*, p. 708; *Re Sebright*, 33 Ch. D. 429; *Re Ailesbury*, 1892, 1 Ch. 506; see *Re Mundy and Roper*, 1899, 1 Ch. 296; *Re Barry Rail. and Wimborne*, 76 L. T. 489); but in such case the sale is without prejudice to the assignee's rights (*Cardigan v. Curzon-Howe*, 40 Ch. D. 341); and may sell, notwithstanding that the remainderman has assigned his interest (*Wheelwright v. Walker*, 23 Ch. D. 752).

A remainderman cannot restrain the tenant for life from selling on the ground that the property may increase in value (*Thomas v. Williams*, 24 Ch. D. 558). But he may restrain him from selling until trustees under the act have been appointed (*Wheelwright v. Walker*, 23 Ch. D. 752; see *Mogridge v. Clapp*, 1892, 3 Ch. 395, 400). As between the tenant for life and a purchaser from him, however, the fact that there were no trustees at the time of the contract, or that (if there were any) no notice (see sect. 45, *post*) had been given to them, is not a defect of the title of the tenant for life to sell (*Hatten v. Russell*, 38 Ch. D. 344; *Marlborough v. Sartoris*, 32 Ch. D. 616; *Mogridge v. Clapp*, *sup.*). It would seem that a purchaser may require the appointment of trustees before completion (*Hatten v. Russell*, 38 Ch. D. 345; see *Re Fisher and Grazebrook*, 1898, 2 Ch. 661). As to the result where a purchaser completes with knowledge that there are no trustees, see *Mogridge v. Clapp*, 1892, 3 Ch. 396, 401. Where persons have been appointed under sect. 60 (*post*, p. 716) to exercise a tenant for life's powers, no trustee need ever be appointed (*Re Dudley*, 35 Ch. D. 338). The restrictions imposed by a private act on a sale by trustees do not affect a sale by the tenant for life under this section (*Re Chaytor*, 25 Ch. D. 651; compare *Talbot v. Scarsbrick*, 1908, 1 Ch. 812). A decree for the execution of the trusts of the settlement does not prevent the tenant for life from selling

without the sanction of the court (*Cardigan v. Curzon-Howe*, 30 Ch. D. 45 & 46 Vict. 531). For the case where an order for sale has been previously made in an action, see *Taylor v. Poncia* (25 Ch. D. 646); or under the S. E. Act, 1877, *Re Barrs-Haden* (49 L. T. 661; 32 W. R. 194); *Re Poole* (50 L. T. 585; 32 W. R. 956).

Where trustees had contracted for an immediate sale, but, in consequence of their power of sale not arising till after the death of a tenant for life, could not make a good title, they could not force the purchaser to accept a conveyance from the tenant for life under this act (*Re Bryant and Barningham*, 44 Ch. Div. 218; see *Re Baker and Salmon*, 1907, 1 Ch. 238).

Semble, a sale under the act is good as against the Crown claiming in Crown remainder in default of heirs (*Re Bond, Panes v. Att.-Gen.*, 1901, 1 Ch. 20).

Before this act the court had a discretion to put an equitable tenant for life into possession (*Tidd v. Lister*, 5 Madd. 429; *Taylor v. Taylor*, 20 Eq. 303). Since the act, and having regard to the powers thereby conferred on a tenant for life, the court has exercised this discretion more freely in his favour (*Re Bagot, Bagot v. Kittoe*, 1894, 1 Ch. 182; *Re Richardson, R. v. R.*, 1900, 2 Ch. 784); and has let into possession equitable tenants for life, even where the trustees had powers of management (*Re Bagot, sup.*; *Re Wythes, West v. Wythes*, 1893, 2 Ch. 369; see *Re Wilkinson, Lloyd v. Steel*, 85 L. T. 43, the case of a tenant for life of ground rents subject to a mortgage); and where the property was leasehold (*Re Newen, Newen v. Barnes*, 1894, 2 Ch. 297); and has let into possession legal tenants for life subject to terms for securing incumbrances (*Re Richardson, sup.*; *Re Money Kyrle, M. v. M.*, 1900, 2 Ch. 839). The orders have been made on terms protecting the trustees, in the form of undertakings (*Re Wythes, sup.*; *Re Bagot, sup.*; *Re Newen, sup.*), and the giving of security (*Re Money Kyrle, sup.*). As to letting into possession the assignee of an equitable life interest, see *Re Hunt, Pollard v. Geake*, 1901, W. N. 144.

Since the S. L. Act, 1882, the court has also ordered the title-deeds to be delivered to an equitable tenant for life (*Re Burnaby*, 42 Ch. D. 621; *Re Richardson, sup.*; *Re Money Kyrle, sup.*; *Re Wilkinson, Lloyd v. Steel, sup.*); but not where he had mortgaged his interest (*Re Newen, sup.*; see *Wheeler v. Tootell*, 51 W. R. 693). See as to the custody of deeds by trustees having legal estate (*Re Sisson, Jones v. Trapper*, 1903, 1 Ch. 262; *Tendring Co. v. Jones*, 1903, 2 Ch. 615).

4.—(1.) Every sale shall be made at the best price that can reasonably be obtained.

(2.) Every exchange and every partition shall be made for the best consideration in land or in land and money that can reasonably be obtained.

(3.) A sale may be made in one lot or in several lots, and either by auction or by private contract.

(4.) On a sale the tenant for life may fix reserve biddings and buy in at an auction.

(5.) A sale, exchange, or partition may be made subject to any stipulations respecting title, or evidence of title, or other things.

(6.) On a sale, exchange, or partition, any restriction or reservation with respect to building on or other user of land, or with respect to mines and minerals, or with respect to or for the purpose of the more beneficial working thereof, or with respect to any other thing, may be imposed or reserved and made binding, as far as the law permits, by covenant, condition, or otherwise, on the tenant for life, and the settled land, or any part

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thereof, or on the other party and any land sold or given in exchange or on partition to him.

(7.) An enfranchisement may be made with or without a regrant of any right of common or other right, easement, or privilege theretofore appendant or appurtenant to be held or enjoyed with the land enfranchised, or reputed so to be.

(8.) Settled land in England shall not be given in exchange for land out of England.

As to the best price, etc., see the presumptions applicable under sect. 54, *post*, and cases there quoted. Having regard to sub-sect. (1), a tenant for life was restrained from selling at a less price than that offered by the remainderman (*Wheelwright v. Walker*, 48 L. T. 867). A sale which involved the taking by the trustees of fully paid shares in a water company was sanctioned under the circumstances (*Re Orwell Park Estate*, 1894, W. N. 135). A tenant for life cannot sell at a price to be fixed by arbitration (*Re Wilton*, 1907, 1 Ch. 55). When the sale or exchange is made for the erection of dwellings for the working classes, see S. L. Act, 1890, s. 18 (*post*, p. 732); and Housing of the Working Classes Act, 1890, s. 74; and is made for small holdings, see 8 Edw. 7, c. 36, s. 40. As to granting and reserving easements on an exchange or partition, see S. L. Act, 1890, s. 5 (*post*, p. 727).

Special Powers.

Transfer of
incum-
brances on
land sold, &c.

5. Where on a sale, exchange, or partition there is an incumbrance affecting land sold or given in exchange or on partition, the tenant for life, with the consent of the incumbrancer, may charge that incumbrance on any other part of the settled land, whether already charged therewith or not, in exoneration of the part sold or so given, and, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, make provision accordingly.

"Incumbrance" in this section includes a rentcharge under the Improvement of Land Act, 1864, and upon the terms of the section being complied with the land sold will be completely exonerated (*Re Strafford and Maples*, 1896, 1 Ch. 235).

IV.—LEASES.

General Powers and Regulations.

Power for
tenant for life
to lease for
ordinary or
building or
mining pur-
poses.

6. A tenant for life may lease the settled land, or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—

(i.) In case of a building lease, ninety-nine years:

(ii.) In case of a mining lease, sixty years:

(iii.) In case of any other lease, twenty-one years.

The court refused to narrow the leasing powers of the present act by reference either to previous decisions on powers of leasing or to the S. E. Act (*Re Aldam*, 1902, 2 Ch. 62, 64). Compare the words as to waste in the above section with S. E. Act, 1877, s. 46 (*Davies v. D.*, 38 Ch. D. 499).

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c. 38, s. 6.

Where under the S. E. Act, 1877, trustees have been given a power of leasing, a tenant for life cannot lease under this section until that order is stayed (*Re Poole*, 50 L. T. 585). A tenant for life can under this section grant a lease of a right to work mines so as to let down the surface, as being a lease of an "easement" (*Sitwell v. Londesborough*, 1905, 1 Ch. 460); and can grant a wayleave for foreign minerals (*Re Aldam*, 1902, 2 Ch. 46), and can grant a lease of the surface reserving the minerals (*Re Gladstone, G. v. G.*, 1900, 2 Ch. 101; overruling *Re Newell and Nevill*, 1900, 1 Ch. 90; see *Scott v. Moxon*, 1900, W. N. 14; and compare *Re Rutland, Rutland v. Bristol*, 1900, 2 Ch. 206). But he cannot grant a lease to himself (*Boyce v. Edbrooke*, 1903, 1 Ch. 844), or *semble* to a trustee for himself (*Ib.* p. 847). Nor can he grant a lease to himself and others, for the reversioners do not obtain binding legal covenants by all the lessees (*Ib.*).

A lease may be granted by a tenant for life to his wife (*Gilbey v. Rush*, 1906, 1 Ch. 11), but leases granted by a tenant for life to his wife solely for her benefit were void as not a *bonâ fide* exercise of his powers (*Sutherland v. S.*, 1893, 3 Ch. 169; *Middlemas v. Stevens* (1901, 1 Ch. 574)). As to granting a lease to a married woman, see *Sutherland v. S.*, *sup.* As to a tenant for life refusing to lease, see *Re Mansel* (1884, W. N. 209).

The tenant for life must give notice to the trustees before granting a lease (sect. 45 (1), *post*, p. 704); but where the lessee deals with the tenant for life in good faith the lease will be valid even if there are no trustees (*Mogridge v. Clapp*, 1892, 3 Ch. 382).

Further provisions as to leases by a tenant for life are contained in sects. 7, 8, and 10 of the S. L. Act, 1890, *post*, p. 727.

7.—(1.) Every lease shall be by deed, and be made to take effect in possession not later than twelve months after its date (*u*). Regulations respecting leases generally.

(2.) Every lease shall reserve the best rent that can reasonably be obtained, regard being had to any fine taken, and to any money laid out or to be laid out for the benefit of the settled land, and generally to the circumstances of the case (*x*).

(3.) Every lease shall contain a covenant by the lessee for payment of the rent, and a condition of re-entry on the rent not being paid within a time therein specified, not exceeding thirty days.

(4.) A counterpart of every lease shall be executed by the lessee and delivered to the tenant for life; of which execution and delivery the execution of the lease by the tenant for life shall be sufficient evidence.

(5.) A statement, contained in a lease or in an indorsement thereon, signed by the tenant for life, respecting any matter of fact or of calculation under this act in relation to the lease, shall, in favour of the lessee and of those claiming under him, be sufficient evidence of the matter stated (*y*).

(*u*) A writing is sufficient where the term does not extend beyond three years (S. L. Act, 1890, s. 7, sub-s. (iii), *post*, p. 727). Compare note to Real Prop. Act, 1845, s. 3 (*ante*, p. 521). As to a lease "taking effect in possession" see *Sutherland v. S.* (1893, 3 Ch. 169, 192); note (*d*), *ante*, p. 638.

(*x*) The application of sub-sect. (2) to mining leases was discussed in *Re*

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c. 38, s. 7.

Aldam, 1902, 2 Ch. 59, 62. As to what is "the best rent," see the presumptions applicable under sect. 54 (*post*), and *Sutherland v. S.*, 1893, 3 Ch. 195. The test is whether the man who makes the lease had got as much for others as he has for himself (*Chandler v. Bradley*, 1897, 1 Ch. 324). In the last case a lease granted by a tenant for life in consideration of a money payment was declared void (*ib.*). It seems doubtful whether a lease granted at a rent not the best is void or voidable (*Re Handman and Wilcox*, 1902, 1 Ch. 599; see *Mogridge v. Clapp*, 1892, 3 Ch. 398). The fine will be capital money (S. L. Act, 1884, s. 4, *post*, p. 722). See, as to money paid on the surrender of a lease, sect. 13, *post*. The words "any money laid out" do not include a past voluntary expenditure (*Re Chawner*, 1892, 2 Ch. 196). As to the necessity of proper covenants, see *Boyce v. Edbrooke*, 1903, 1 Ch. 836.

(y) See further S. L. Act, 1890, s. 7 (*post*, p. 727). As to renewable leases, see *Re Farnell* (33 Ch. D. 599). When a lease is made for the erection of dwellings for the working classes, see S. L. Act, 1890, s. 18 (*post*, p. 732), and Housing of the Working Classes Act, 1890, sect. 74; and is made for small holdings, see 8 Edw. 7, cap. 35, sect. 40, sub-ss. 4 and 5.

Building and Mining Leases.

Regulations
respecting
building
leases.

8.—(1.) Every building lease shall be made partly in consideration of the lessee, or some person by whose direction the lease is granted, or some other person, having erected, or agreeing to erect, buildings, new or additional, or having improved or repaired, or agreeing to improve or repair, buildings, or having executed, or agreeing to execute, on the land leased, an improvement authorized by this act, for or in connexion with building purposes.

(2.) A peppercorn rent or a nominal or other rent less than the rent ultimately payable, may be made payable for the first five years or any less part of the term.

(3.) Where the land is contracted to be leased in lots, the entire amount of rent to be ultimately payable may be apportioned among the lots in any manner; save that—

(i.) The annual rent reserved by any lease shall not be less than ten shillings; and

(ii.) The total amount of the rents reserved on all leases for the time being granted shall not be less than the total amount of the rents which, in order that the leases may be in conformity with this act, ought to be reserved in respect of the whole land for the time being leased; and

(iii.) The rent reserved by any lease shall not exceed one fifth part of the full annual value of the land comprised in that lease with the buildings thereon when completed.

See the definition of building lease and building purposes in sect. 2, sub-sect. (10), *ante*, p. 669; and *Re Ellesmere* (1898, W. N. 18). The words in sub-sect. (1), "in consideration of the lessee having erected buildings," do not include the case of past voluntary expenditure (*Re Chawner*, 1892, 2 Ch. 195). A lease partly in consideration of the expenditure of money on specified improvements and repairs is within the section; but the court will not sanction a lease where the repairs agreed to be done are such as a landlord is usually

expected to do (*Re Daniell*, 1894, 3 Ch. 503; compare *Truscott v. Diamond, &c., Co.*, 20 Ch. Div. 251). As to whether a lease of land let in connection with building land, but not itself built upon, is a building lease, see *Re Sabin* (1885, W. N. 197).

As to inserting an option of purchase in a building lease under this section, see S. L. Act, 1889 (*post*, p. 725). And as to a building grant in perpetuity subject to a rent-charge, see sect. 10, *post*, and sect. 9 of S. L. Act, 1890.

9.—(1.) In a mining lease—

- (i.) The rent may be made to be ascertainable by or to vary according to the acreage worked, or by or according to the quantities of any mineral or substance gotten, made merchantable, converted, carried away, or disposed of, in or from the settled land, or any other land, or by or according to any facilities given in that behalf (z); and

Regulations
respecting
mining leases.

- (ii.) A fixed or minimum rent may be made payable, with or without power for the lessee, in case the rent, according to acreage or quantity, in any specified period does not produce an amount equal to the fixed or minimum rent, to make up the deficiency in any subsequent specified period, free of rent other than the fixed or minimum rent.

(2.) A lease may be made partly in consideration of the lessee having executed, or his agreeing to execute, on the land leased, an improvement authorized by this act, for or in connexion with mining purposes.

(z) See the definition of mining lease and mining purposes (sect. 2, sub-sect. (10), *ante*, p. 669). The rent may vary according to the price of the minerals (S. L. Act, 1890, s. 8, *post*, p. 727; compare *Lonsdale v. Lowther*, 1900, 2 Ch. 687, a lease under a power). See also sect. 2, sub-sect. (10), (ii), (iv), *ante*, p. 669. A varying rent may be reserved without the addition of a fixed or minimum rent. Such fixed or minimum rent, if reserved, need not be uniform, but may vary; and in a particular year, *e.g.*, the first of the term, it may be *nil*. It may also cease when all the coal has been paid for at the acreage rent reserved (*Re Aldam*, 1902, 2 Ch. 59, 60).

10.—(1.) Where it is shown to the court with respect to the district in which any settled land is situate, either—

- (i.) That it is the custom for land therein to be leased or granted for building or mining purposes for a longer term or on other conditions than the term or conditions specified in that behalf in this act, or in perpetuity; or
- (ii.) That it is difficult to make leases or grants for building or mining purposes of land therein, except for a longer term or on other conditions than the term and conditions specified in that behalf in this act, or except in perpetuity;

Variation of
building or
mining lease
according to
circum-
stances of
district.

the court may, if it thinks fit, authorize generally the tenant for life to make from time to time leases or grants of or affecting

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c. 38, s. 10.

the settled land in that district, or parts thereof, for any term or in perpetuity, at fee-farm or other rents, secured by condition of re-entry, or otherwise, as in the order of the court expressed, or may, if it thinks fit, authorize the tenant for life to make any such lease or grant in any particular case.

(2.) Thereupon the tenant for life, and, subject to any direction in the order of the court to the contrary, each of his successors in title being a tenant for life, or having the powers of a tenant for life under this act, may make in any case, or in the particular case, a lease or grant of or affecting the settled land, or part thereof, in conformity with the order.

When the tenant for life was an infant of eighteen, and the trustees asked for power to grant building leases for 200 years, power was only given subject to the approval of the court in each case (*Cecil v. Langdon*, 51 L. T. 618; 54 L. J. Ch. 313). A mining lease for ninety-nine years has been sanctioned under this section (*Re Powell, Allaway v. Oakeley*, 1884, W. N. 67), and a building lease for 500 years (*Re O'Connell*, 1903, 1 I. R. 154). As to reserving a rent charge in a conveyance in fee for building, see S. L. Act, 1890, s. 9, *post*, p. 728. For forms of summons under this section, see *post*, p. 736.

Part of
mining rent
to be set
aside.

11. Under a mining lease, whether the mines or minerals leased are already opened or in work or not, unless a contrary intention is expressed in the settlement, there shall be from time to time set aside, as capital money arising under this act, part of the rent as follows, namely,—where the tenant for life is impeachable for waste in respect of minerals, three-fourth parts of the rent, and otherwise one-fourth part thereof, and in every such case the residue of the rent shall go as rents and profits.

Compare the corresponding provision of the S. E. Act, 1877, s. 4 (*ante*, p. 637). Rent in a mining lease is really purchase money for coal worked (*Re Aldam*, 1902, 2 Ch. 63). In the case of open mines, it has been held under the present section that a tenant for life even though not declared unimpeachable for waste by the settlement is still not “impeachable for waste in respect of minerals” and only one-fourth of the rent need be set aside (*Re Chaytor*, 1900, 2 Ch. 804). A person deemed, under sect. 63 (*post*, p. 718), to be a tenant for life is to be treated as impeachable for waste (*Re Ridge, Hellard v. Moody*, 31 Ch. Div. 504). For an instance of contrary intention, see *Re Newcastle* (24 Ch. D. 129); *Re Bagot* (1894, 1 Ch. 184). For form of summons for payment into court of rent set aside, see R. S. L. Act, Form 10 (*post*).

Where a lease of mines is granted by the tenant for life under sect. 12, sub-sect. (i.), to give effect to a contract of the settlor, the right of the tenant for life to rents is the same as if the lease had been granted by the settlor, sect. 11 not applying (*Re Kemeys-Tynte*, 1892, 2 Ch. 211).

Special Powers.

Leasing
powers for
special
objects.

12. The leasing power of a tenant for life extends to the making of—

(i.) A lease for giving effect to a contract entered into by any of his predecessors in title for making a lease, which,

if made by the predecessor, would have been binding on the successors in title; and

- (ii.) A lease for giving effect to a covenant of renewal, performance whereof could be enforced against the owner for the time being of the settled land; and
- (iii.) A lease for confirming, as far as may be, a previous lease, being void or voidable; but so that every lease, as and when confirmed, shall be such a lease as might at the date of the original lease have been lawfully granted, under this act, or otherwise, as the case may require.

45 & 46 Vict.
c. 38, s. 12.

See *Re Kemeys-Tynte* (1892, 2 Ch. 211). Before the act trustees who were donees of leasing powers could effectuate a previous tenant for life's contract (*Davis v. Harford*, 22 Ch. D. 128).

Surrenders.

13.—(1.) A tenant for life may accept, with or without consideration, a surrender of any lease of settled land, whether made under this act or not, in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and minerals, or any of them.

Surrender
and new grant
of leases.

(2.) On a surrender of a lease in respect of part only of the land or mines and minerals leased, the rent may be apportioned.

(3.) On a surrender, the tenant for life may make of the land or mines and minerals surrendered, or of any part thereof, a new or other lease, or new or other leases in lots.

(4.) A new or other lease may comprise additional land or mines and minerals, and may reserve any apportioned or other rent.

(5.) On a surrender, and the making of a new or other lease, whether for the same or for any extended or other term, and whether or not subject to the same or to any other covenants, provisions, or conditions, the value of the lessee's interest in the lease surrendered may be taken into account in the determination of the amount of the rent to be reserved, and of any fine to be taken, and of the nature of the covenants, provisions, and conditions to be inserted in the new or other lease.

(6.) Every new or other lease shall be in conformity with this act.

Where a lease granted under a power by a legal tenant for life enabled the tenant to surrender on payment of money to the lessor, and the tenant for life apart from the powers of S. L. Acts accepted a surrender accordingly, the money belonged to the tenant for life (*Re Hunloke, Fitzroy v. Hunloke*, 1902, 1 Ch. 941; see *Re Guthrie, Ib.*, 942, n.). But where an equitable tenant for life under the powers of S. L. Acts accepted a surrender, money paid as a consideration was distributed between the tenant for life and remaindermen (*Re Rodes, Sanders v. Hobson*, 1909, 1 Ch. 815).

Apart from the powers of the S. L. Acts, a surrender cannot be accepted by a person not having the legal reversion (*Robbins v. Whyte*, 1906, 1 K. B. 125).

45 & 46 Vict.
c. 38, s. 14.

Copyholds.

Power to
grant to
copyholders
licences for
leasing.

14.—(1.) A tenant for life may grant to a tenant of copyhold or customary land, parcel of a manor comprised in the settlement, a licence to make any such lease of that land, or of a specified part thereof, as the tenant for life is by this act empowered to make of freehold land.

(2.) The licence may fix the annual value whereon fines, fees, or other customary payments are to be assessed, or the amount of those fines, fees, or payments.

(3.) The licence shall be entered on the court rolls of the manor, of which entry a certificate in writing of the steward shall be sufficient evidence.

As to the meaning of "steward," see sect. 2, sub-sect. (10) (vi.).

V.—SALES, LEASES, AND OTHER DISPOSITIONS.

[*Sect. 15 was repealed and other provisions substituted by S. L. Act, 1890, s. 10, post, p. 728.*]

Streets and Open Spaces.

Dedication
for streets,
open spaces,
&c.

16. On or in connexion with a sale or grant for building purposes, or a building lease, the tenant for life, for the general benefit of the residents of the settled land, or on any part thereof,—

(i.) May cause or require any parts of the settled land to be appropriated and laid out for streets, roads, paths, squares, gardens, or other open spaces, for the use, gratuitously or on payment, of the public or of individuals, with sewers, drains, watercourses, fencing, paving, or other works necessary or proper in connexion therewith; and

(ii.) May provide that the parts so appropriated shall be conveyed to or vested in the trustees of the settlement, or other trustees, or any company or public body, on trusts or subject to provisions for securing the continued appropriation thereof to the purposes aforesaid, and the continued repair or maintenance of streets and other places and works aforesaid, with or without provision for appointment of new trustees when required; and

(iii.) May execute any general or other deed necessary or proper for giving effect to the provisions of this section (which deed may be inrolled in the Central Office of the Supreme Court of Judicature), and thereby

declare the mode, terms, and conditions of the appropriation, and the manner in which and the persons by whom the benefit thereof is to be enjoyed, and the nature and extent of the privileges and conveniences granted.

45 & 46 Vict.
c. 38, s. 16.

Surface and Minerals apart.

17.—(1.) A sale, exchange, partition, or mining lease, may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals, and in any such case with or without a grant or reservation of powers of working, wayleaves or rights of way, rights of water and drainage, and other powers, easements, rights, and privileges for or incident to or connected with mining purposes, in relation to the settled land, or any part thereof, or any other land.

Separate dealing with surface and minerals, with or without wayleaves, &c.

(2.) An exchange or partition may be made subject to and in consideration of the reservation of an undivided share in mines or minerals.

In the following cases land has been sold separately from the minerals: *Re Newcastle*, 24 Ch. D. 129; *Re Brown*, 27 Ch. D. 179. This section does not prevent the reservation of minerals in a building lease of the surface by a tenant for life (*Re Gladstone*, *G. v. G.*, 1900, 2 Ch. 105). The lease may grant a wayleave for foreign coal without reserving a separate rent therefor; and such wayleave may continue after the cesser of the minimum rent (*Re Aldam*, 1902, 2 Ch. 46). See, as to the power of trustees to dispose, with the sanction of the court, of land and minerals separately, Trustee Act, 1893, s. 44, *post*.

Mortgage.

18. Where money is required for enfranchisement, or for equality of exchange or partition, the tenant for life may raise the same on mortgage of the settled land, or of any part thereof, by conveyance of the fee simple, or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or otherwise, and the money raised shall be capital money arising under this act.

Mortgage for equality money, &c.

Enfranchisement includes the conversion of a leasehold interest into a fee simple by the purchase of the reversion (*Re Bruce*, *Halsey v. Bruce*, 1905, 2 Ch. 372). For form of summons, see R. S. L. Act, Form 11, *post*. See further powers of raising money S. L. Act, 1890, s. 11, *post*.

Undivided Share.

19. Where the settled land comprises an undivided share in land, or, under the settlement, the settled land has come to be held in undivided shares, the tenant for life of an undivided

Concurrence in exercise of powers as to undivided share.

45 & 46 Vict.
c. 38, s. 19.

share may join or concur, in any manner and to any extent necessary or proper for any purpose of this act, with any person entitled to or having power or right of disposition of or over another undivided share.

An undivided share can be sold alone under the act (*Cooper v. Belsey*, 1899, 1 Ch. 639). See *Williams v. Jenkins*, 1894, W. N. 176; *Re Powell, Allaway v. Oakeley*, 1884, W. N. 67; *Re Barlow*, 1903, 1 Ch. 382.

Conveyance.

Completion
of sale, lease,
&c. by con-
veyance.

20.—(1.) On a sale, exchange, partition, lease, mortgage, or charge, the tenant for life may, as regards land sold, given in exchange or on partition, leased, mortgaged, or charged, or intended so to be, including copyhold or customary or leasehold land vested in trustees, or as regards easements or other rights or privileges sold or leased, or intended so to be, convey or create the same by deed, for the estate or interest the subject of the settlement, or for any less estate or interest, to the uses and in the manner requisite for giving effect to the sale, exchange, partition, lease, mortgage, or charge (*a*).

(2.) Such a deed, to the extent and in the manner to and in which it is expressed or intended to operate and can operate under this act, is effectual to pass the land conveyed, or the easements, rights, or privileges created, discharged from all the limitations, powers, and provisions of the settlement, and from all estates, interests, and charges subsisting or to arise thereunder (*b*), but subject to and with the exception of—

- (i.) All estates, interests, and charges having priority to the settlement; and
- (ii.) All such other, if any, estates, interests, and charges as have been conveyed or created for securing money actually raised at the date of the deed (*c*); and
- (iii.) All leases and grants at fee-farm rents or otherwise, and all grants of easements, rights of common, or other rights or privileges granted or made for value in money or money's worth, or agreed so to be, before the date of the deed, by the tenant for life, or by any of his predecessors in title, or by any trustees for him or them, under the settlement, or under any statutory power, or being otherwise binding on the successors in title of the tenant for life.

(3.) In case of a deed relating to copyhold or customary land, it is sufficient that the deed be entered on the court rolls of the manor, and the steward is hereby required, on production to him of the deed to make the proper entry; and on that production, and on payment of customary fines, fees, and other dues or payments, any person whose title under the deed requires to be perfected by admittance shall be admitted accordingly; but if the steward so requires, there shall also be produced to him

so much of the settlement as may be necessary to show the title of the person executing the deed; and the same may, if the steward thinks fit, be also entered on the court rolls (*d*). 45 & 46 Vict.
c. 38, s. 20.

(*a*) The tenant for life may properly convey "as beneficial owner" (*Re Ray*, 1896, 1 Ch. 474, 475; see *ante*, p. 565). In practice a provision is usually inserted restricting his liability on the implied covenants to the acts and defaults of himself and persons claiming through or in trust for him. Before the act covenants for title could be required from a tenant for life assenting to a sale by his trustees (*Poulett v. Hood*, 5 Eq. 115; *Re Sawyer and Baring*, 1884, W. N. 192).

(*b*) A building lease granted by a tenant by the curtesy as absolute owner was held by virtue of this sub-section to operate as a good lease under the act (*Mogridge v. Clapp*, 1892, 3 Ch. 382).

(*c*) Sub-sect. 2 (ii.) includes all estates and interests created subsequently to the settlement to secure money; and includes charges for portions, or charges created under a power to mortgage in the settlement, when the money has been "actually raised"; but not a mortgage of his life interest by the tenant for life (*Re Dickin and Kelsall*, 1908, 1 Ch. 221). Such a mortgagee need not concur in the conveyance (*Ib.*). Clause ii. prevents a tenant for life from conveying free from the mortgages of mortgagees who have actually lent their money (*Re Mundy and Roper*, 1899, 1 Ch. 289). But a tenant for life can convey free from jointures created under the settlement (*Re Keck and Hart*, 1898, 1 Ch. 617; *Re Ailesbury and Iveagh*, 1893, 2 Ch. 357), and from portions not actually raised (*Re Ducane and Nettlefold*, 1898, 2 Ch. 108). Where no money had been actually raised between the settlement and the conveyance, but a charge had been created in respect of a debt earlier than the settlement the tenant for life could convey free from the charge (*Connolly v. Keating*, 1903, 1 I. R. 353).

(*d*) Where copyholds are devised to trustees, and the tenant for life sells before they have been admitted, only one fine is payable (*Re Naylor and Spendla*, 34 Ch. Div. 217).

VI.—INVESTMENT OR OTHER APPLICATION OF CAPITAL TRUST MONEY.

21. Capital money arising under this act, subject to payment of claims properly payable thereout, and to application thereof for any special authorized object for which the same was raised, shall, when received, be invested or otherwise applied wholly in one, or partly in one and partly in another or others of the following modes (namely) (*e*): Capital money under act; investment, &c. by trustees or court.

(i.) In investment on government securities, or on other securities on which the trustees of the settlement are by the settlement or by law authorized to invest trust money of the settlement, or on the security of the bonds, mortgages, or debentures, or in the purchase of the debenture stock of any railway company in Great Britain or Ireland incorporated by special act of parliament, and having for ten years next before the date of investment paid a dividend on its ordinary stock or shares, with power to vary the investment into or for any other such securities (*f*):

(ii.) In discharge, purchase, or redemption of incumbrances

45 & 46 Vict.
c. 38, s. 21.

affecting the inheritance of the settled land, or other the whole estate the subject of the settlement, or of land tax, rentcharge in lieu of tithe, Crown rent, chief rent, or quit rent, charged on or payable out of the settled land (*g*):

- (iii.) In payment for any improvement authorized by this act (*h*):
- (iv.) In payment for equality of exchange or partition of settled land:
- (v.) In purchase of the seignory of any part of the settled land, being freehold land, or in purchase of the fee simple of any part of the settled land, being copyhold or customary land:
- (vi.) In purchase of the reversion or freehold in fee of any part of the settled land, being leasehold land held for years, or life, or years determinable on life:
- (vii.) In purchase of land in fee simple, or of copyhold or customary land, or of leasehold land held for sixty years or more unexpired at the time of purchase, subject or not to any exception or reservation of or in respect of mines or minerals therein, or of or in respect of rights or powers relative to the working of mines or minerals therein, or in other land (*i*):
- (viii.) In purchase, either in fee simple, or for a term of sixty years or more, of mines and minerals convenient to be held or worked with the settled land, or of any easement, right, or privilege convenient to be held with the settled land for mining or other purposes:
- (ix.) In payment to any person becoming absolutely entitled or empowered to give an absolute discharge (*k*):
- (x.) In payment of costs, charges, and expenses of or incidental to the exercise of any of the powers or the execution of any of the provisions of this act (*l*):
- (xi.) In any other mode in which money produced by the exercise of a power of sale in the settlement is applicable thereunder.

(*e*) Where capital money was applied in discharge of an incumbrance prior to the settlement, it was held that the receipt of the prior incumbrancer was not sufficient, but that the money must in the first instance be paid to the trustees or into court (*Re Norton and Las Casas*, 1909, 2 Ch. 59). Sect. 21 states what is to be done with capital moneys "when received"; and the court cannot previously charge them (*Round v. Turner*, 60 L. T. 379). Money bequeathed to trustees to be laid out in a new purchase of land to be settled has been applied under this section as capital money (*Re Mackenzie*, 23 Ch. D. 750); and where such new land was to be settled on the trusts of an existing settlement, the money was applicable in improving land originally comprised in the settlement (*Re Mundy*, 1891, 1 Ch. 399; *Re Byng*, 1892, 2 Ch. 219). Purchase-money arising from a sale under the S. E. Act, 1877, and ordered to be applied under sect. 34 of that act (*ante*, p. 648), has been applied under this section (*Re Tennant*, 40 Ch. D. 594). As to the application of purchase-money of interests in land less than fee simple, see sect. 34, *post*, p. 698. The court will not allow trustees to retain, as representing

trust funds other than capital money, investments unauthorized by the trust, even though such investments are authorized by this section for capital money (*Fox v. Dolby*, 1883, W. N. 29). 45 & 46 Vict.
c. 38, s. 21.

(f) As to what investments are by law authorized for trust money, see Trustee Act, 1893, ss. 1—7 (*post*); which authorizes (amongst other investments) any stocks, funds, or securities authorized for the investment of cash under the control of the court (as to which see p. 762, *post*), and also real securities, including long terms, and land improvement charges (sect. 5, sub-sect. (i.)). The tenant for life can select the particular investment (*Re Coleridge*, 1895, 2 Ch. 704). Sub-sect. (i.).

(g) The word "incumbrances," as used in sub-sect. (ii.), includes a mortgage of a long term (*Re Frewen, Frewen v. James*, 38 Ch. D. 383); an annuity charged on tithes (*Re Esdaile, Esdaile v. Esdaile*, 54 L. T. 637); a temporary rent-charge for improvements authorized by this act (S. L. Act, 1887, *post*, p. 725; *Re Sudeley*, 37 Ch. D. 123; *Ex parte, Dyas*, 21 L. R. Ir. 369; see *Re Knatchbull*, 29 Ch. Div. 588; *Re Dalison*, 1892, 3 Ch. 525); sewerage expenses of a local authority, charged under statute on settled land and payable by instalments (*Re Legh*, 1902, 2 Ch. 274); a charge under 46 & 47 Vict. c. 61, s. 29. Tenants for life who had paid instalments of an instalment mortgage were held entitled to be recouped out of the proceeds of the sale of the property (*Re Nepean*, 1900, 1 Ir. R. 298; compare *Re Dalison*, 1892, 3 Ch. 522; *Re Legh, sup.*). The word would not include a jointure (*Re Knatchbull*, 27 Ch. D. 353). Sub-sect. (ii.).

Capital money may be applied in the discharge of an incumbrance on part of the settled land (*Re Chaytor*, 25 Ch. D. 651; but see *Re Sebright*, 33 Ch. D. 437); and may be raised out of one part to pay off incumbrances on another part, though the two parts were settled by different instruments (*Re Monson*, 1898, 1 Ch. 427; *Re Stafford, Gerard v. Stafford*, 1904, 2 Ch. 72); or, by reason of the subsequent failure of some of the limitations in one case, devolve ultimately to different persons (*Re Freme, Freme v. Logan*, 1894, 1 Ch. 1; see also *Re Coote, Coote v. Cadogan*, 81 L. T. 535). Compare *Hampden v. Buckinghamshire*, 1893, 2 Ch. 531. Money arising from heirlooms may be applied in discharge of incumbrances on the land (*Re Marlborough, M. v. Marjoribanks*, 32 Ch. Div. 1; *Re Stafford, Gerard v. Stafford, sup.*). As to whether capital money arising from a portion of the settled estate exclusively subject to a charge can be applied in discharge of incumbrances affecting the other portion, see *Re Stamford* (43 Ch. D. 95). Where under a settlement a term was created for the purpose (subject to an annuity to the life tenant) of discharging incumbrances, but to cease on their discharge, the purchase-money on a sale under the act was applied in discharging the incumbrances, the court holding that they ought not to be kept on foot and that the term ceased (*Re Richardson, R. v. R.*, 1900, 2 Ch. 778).

(h) Under sub-sect. (iii.) the works in payment for which capital money may be applied are works within sect. 25, and they do not include ordinary repairs (*Clarke v. Thornton*, 35 Ch. D. 311; *Re Tucker*, 1895, 2 Ch. 469; but see *Re Houghton*, 30 Ch. D. 101). Capital money was applied for improvements which the settlement had given the trustees power to make, but if made had thrown upon income (*Clarke v. Thornton, sup.*; *Re Stamford*, 56 L. T. 484; compare the trust created in *Re Partington, Reigh v. Kane*, 1902, 1 Ch. 711). Capital money arising from settled land exclusively subject to a charge was under the circumstances applied for the improvement of the remainder of the settled land (*Re Stamford*, 43 Ch. D. 84). Where the settlement was composed of two instruments, evidence was required that the proposed improvements were proper under both instruments (*Re Byng*, 1892, 2 Ch. 228). Capital money settled by an English settlement was applied in payment for improvements on land comprised in the settlement and situate in Scotland (*Re Gurney, Sullivan v. Gurney*, 1907, 2 Ch. 496); or in Ireland (*Re Dunraven, ib.*, 417; see *Re Coote, Coote v. Cadogan*, 81 L. T. 535). Sub-sect. (iii.).

(i) As to the settlement of land purchased, see sect. 24, *post*. The Sub-sect. (vii.).

45 & 46 Vict.
c. 38, s. 21.

decisions on the Lands Clauses Act are not applicable in construing this sub-section (*Re Gerard*, 1893, 3 Ch. 252). This sub-section does not authorize the purchase of an equity of redemption (*Re Radnor*, 1898, W. N. 174). Where rents of leaseholds were directed to be accumulated and become capital money, but to be primarily liable to be laid out in land, the directions did not fall within the Accumulation Act, 1892 (*Re Danson*, *Bell v. Danson*, 1895, W. N. 102).

Sub-sect.
(viii.).

Under sub-sect. (viii.) cross sales of easements were authorized (*Re Brotherton*, *B. v. B.*, 1908, W. N. 56).

Sub-sect.
(ix.).

(k) Compare sect. 34 of S. E. Act, 1877, and cases thereunder, *ante*, p. 648. Under the present sub-section payment has been made to two persons who had a joint general power of appointment (*Re Winstanley*, 54 L. T. 840). When the purchase-money of settled land has been paid into court under the L. C. C. Act, 1845, the court (sect. 32, *post*, p. 697, applying) has ordered payment out to trustees for sale as being persons empowered to give an absolute discharge (*Re Rutland*, 31 W. R. 947; 49 L. T. 196; *Re Rathmines*, 15 L. R. Ir. 576); and also to trustees appointed under sect. 38 of this act (*Re Wright*, 24 Ch. D. 662; *Re Harrop*, *id.* 717; *Re Bolton*, 52 L. T. 728; *Re Wootton*, 1890, W. N. 158; *Re Torry Hill*, *Pemberton v. P.*, 1909, 1 Ch. 470). But the power is discretionary, and the court may refuse to allow it (*Re Smith*, *Ex p. L. & N. W. R. Co.*, 40 Ch. Div. 386). See also sect. 14 of the S. L. Act, 1890.

Sub-sect. (x.).

(l) As to the meaning of the words "incidental to" in sub-sect. (x.), see *Cardigan v. Curzon-Howe* (41 Ch. Div. 375); *Re Stamford* (43 Ch. D. 90). The tenant for life's costs of defending an action to restrain him from selling which was dismissed with costs were allowed, so far as not recovered from the plaintiff, out of capital money (*Re Llewellyn*, *Llewellyn v. Williams*, 37 Ch. Div. 317). So also the proper costs of an unsuccessful attempt by a tenant for life to sell (*Re Smith*, 1891, 3 Ch. 65). Where four persons, out of twenty-five who together constituted the tenant for life, employed separate solicitors for the purposes of a sale, their respective costs were paid out of the purchase money (*Smith v. Lancaster*, 1894, 3 Ch. 439). So also the commission charged by an estate agent for procuring a long building lease (*Re Maryon Wilson*, 1901, 1 Ch. 934), but not a short occupation lease (*Re Leveson Gower*, 1905, 2 Ch. 95). As a general rule the cost of obtaining concurrence of mortgagees of the life estate cannot be paid out of capital money (*Curdigan v. Curzon-Howe*, 41 Ch. Div. 375; *Re Peel*, 1910, W. N. 16); nor the costs of appointing a guardian to an infant tenant for life to act in a sale (*Re Rudd*, 1887, W. N. 251). As to surveyor's costs, see *Re Stamford* (43 Ch. D. 89); *Re Eyton* (1888, W. N. 254). See further as to costs, sect. 46, *post*.

Costs.

Compare with the above section the more limited sect. 34 of the S. E. Act, 1877 (*ante*, p. 648).

Regulations
respecting
investment,
devolution,
and income of
securities, &c.

22.—(1.) Capital money arising under this act shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into court, at the option of the tenant for life, and shall be invested or applied by the trustees, or under the direction of the court, as the case may be, accordingly.

(2.) The investment or other application by the trustees shall be made according to the direction of the tenant for life, and in default thereof, according to the discretion of the trustees, but in the last-mentioned case subject to any consent required or direction given by the settlement with respect to the investment or other application by the trustees of trust money of the settlement; and any investment shall be in the names or under the control of the trustees.

(3.) The investment or other application under the direction of the court shall be made on the application of the tenant for life, or of the trustees. 45 & 46 Vict.
c. 38, s. 22.

(4.) Any investment or other application shall not during the life of the tenant for life be altered without his consent.

(5.) Capital money arising under this act while remaining uninvested or unapplied, and securities on which an investment of any such capital money is made, shall, for all purposes of disposition, transmission, and devolution, be considered as land, and the same shall be held for and go to the same persons successively, in the same manner and for and on the same estates, interests, and trusts, as the land wherefrom the money arises would, if not disposed of, have been held and have gone under the settlement.

(6.) The income of those securities shall be paid or applied as the income of that land, if not disposed of, would have been payable or applicable under the settlement.

(7.) Those securities may be converted into money, which shall be capital money arising under this act.

The option referred to in sub-sect. 1 cannot be exercised by the tenant for life unless there are trustees, who must accordingly be appointed before completion (*Hatten v. Russell*, 38 Ch. D. 345; *Mogridge v. Clapp*, 1892, 3 Ch. 400; *Re Fisher and Grazebrook*, 1898, 2 Ch. 660).

The discretion of the tenant for life as to what investments should be made of capital money, if exercised *bonâ fide*, cannot in general be controlled by the trustees or the court (*Re Coleridge*, 1895, 2 Ch. 704). But where the tenant for life directed an investment which was improper though within the act, the trustees were not bound to invest (*Re Hunt, Bulteel v. Lawdeshayne*, 1905, 2 Ch. 418). Nor are they bound to invest on mortgage until they are themselves satisfied that the "direction" of the tenant for life has been given upon proper (1) report as to value, (2) investigation of title, and (3) advice as to the form of mortgage (*Re Hotham, Hotham v. Doughty*, 1902, 2 Ch. 575). Compare the position of trustees purchasing freeholds, *Re Theobald*, 19 T. L. R. 536, *post*, p. 703. They are entitled to select their own brokers (*Re Cleveland*, 1902, 2 Ch. 350).

Where money has been paid into court, it may be paid out to the trustees (S. L. Act, 1890, s. 14, *post*). See previously *Cookes v. Cookes*, 34 Ch. D. 498.

Trustees will not be authorized to transmit capital money abroad for investment without the consent of all interested (*Re Lloyd, Edwards v. Lloyd*, 54 L. T. 643).

Under sub-sect. 5, money arising from heirlooms devolves as the heirlooms would have (*Re Marlborough, Marlborough v. Marjoribanks*, 32 Ch. Div. 1). And if invested in land, such land will not be subject to the charges to which the other settled land is subject (*Re Marlborough and Queen Anne's Bounty*, 1897, 1 Ch. 712). Where money arising from sale of part of estate A was applied by a tenant for life in discharge of a mortgage on estate B settled on the same trusts, and on his death the estates devolved on different persons, the owners of estate A had no claim to a charge on estate B (*Re Freme, Freme v. Logan*, 1894, 1 Ch. 1). Where a tenant for life of freeholds, with testamentary power of appointment among children, made a will in exercise of the power, and subsequently granted a lease in consideration of a premium (which was capital money under sect. 4 of the S. L. Act, 1884), the premium did not pass under the appointment, the will not being part of the settlement mentioned in sub-sect. 5 (*Beddington v. Baumann*, 1903, A. C. 13).

Where proceeds of sale of land in the hands of trustees on the death of Crown.

45 & 46 Vict.
c. 38, s. 22.

the tenant for life reverted to the settlor, who died without an heir, the Crown was held entitled to such proceeds as *bona vacantia* (*Re Bond, Panes v. A.-G.*, 1901, 1 Ch. 15).

Apart from the statutory operation of sub-sect. 5, it has been laid down that to make personalty passing under a will devolve as realty, the will must contain an imperative trust for conversion (*Re Walker, Macintosh-Walker v. Walker*, 1908, 2 Ch. 712).

For form of summons under the section, see R. S. L. Act, Forms 9—11, *post*.

Investment
in land in
England.

23. Capital money arising under this act from settled land in England shall not be applied in the purchase of land out of England, unless the settlement expressly authorizes the same.

Improvements were authorized on settled land situate in Scotland (*Re Gurney, Sullivan v. Gurney*, 1907, 2 Ch. 496), or Ireland (*Re Dunraven, ib.*, 417).

Settlement of
land pur-
chased, taken
in exchange,
&c.

24.—(1.) Land acquired by purchase, or in exchange, or on partition shall be made subject to the settlement in manner directed in this section.

(2.) Freehold land shall be conveyed to the uses, on the trusts, and subject to the powers and provisions which, under the settlement, or by reason of the exercise of any power of charging therein contained, are subsisting with respect to the settled land, or as near thereto as circumstances permit, but not so as to increase or multiply charges or powers of charging.

(3.) Copyhold, customary, or leasehold land shall be conveyed to and vested in the trustees of the settlement on trusts and subject to powers and provisions corresponding, as nearly as the law and circumstances permit, with the uses, trusts, powers, and provisions to on and subject to which freehold land is to be conveyed as aforesaid; so nevertheless that the beneficial interest in land held by lease for years shall not vest absolutely in a person who is by the settlement made by purchase tenant in tail, or in tail male, or in tail female, and who dies under the age of twenty-one years, but shall, on the death of that person under that age, go as freehold land conveyed as aforesaid would go.

(4.) Land acquired as aforesaid may be made a substituted security for any charge in respect of money actually raised, and remaining unpaid, from which the settled land, or any part thereof, or any undivided share therein, has theretofore been released on the occasion and in order to the completion of a sale, exchange, or partition.

(5.) Where a charge does not affect the whole of the settled land, then the land acquired shall not be subjected thereto, unless the land is acquired either by purchase with money arising from sale of land which was before the sale subject to the charge, or by an exchange or partition of land which, or an undivided share wherein, was before the exchange or partition subject to the charge (*m*).

(6.) On land being so acquired, any person who, by the direction of the tenant for life, so conveys the land as to subject it to any charge, is not concerned to inquire whether or not it is proper that the land should be subjected to the charge.

45 & 46 Vict.
c. 38, s. 24.

(7.) The provisions of this section referring to land extend and apply, as far as may be, to mines and minerals, and to easements, rights, and privileges over and in relation to land.

(*m*) Sub-sect. 5 includes not only charges taking priority over the settlement, but also charges created by the settlement itself (*Re Stamford*, 43 Ch. D. 93). Where the purchase-money of heirlooms was invested in land, it was not subject to charges subsisting on the other settled land (*Re Marlborough and Queen Anne's Bounty*, 1897, 1 Ch. 712).

VII.—IMPROVEMENTS.

Improvements with Capital Trust Money.

25. Improvements authorized by this act are the making or execution on, or in connection with, and for the benefit of settled land, of any of the following works, or of any works for any of the following purposes, and any operation incident to or necessary or proper in the execution of any of those works, or necessary or proper for carrying into effect any of those purposes, or for securing the full benefit of any of those works or purposes (namely):

Description of
improvements
authorized by
act.

- (i.) Drainage, including the straightening, widening, or deepening of drains, streams, and watercourses:
- (ii.) Irrigation; warping:
- (iii.) Drains, pipes, and machinery for supply and distribution of sewage as manure:
- (iv.) Embanking or weiring from a river or lake, or from the sea, or a tidal water:
- (v.) Groyne; sea walls; defences against water:
- (vi.) Inclosing; straightening of fences; re-division of fields:
- (vii.) Reclamation; dry warping:
- (viii.) Farm roads; private roads; roads or streets in villages or towns:
- (ix.) Clearing; trenching; planting:
- (x.) Cottages for labourers, farm-servants, and artizans, employed on the settled land or not:
- (xi.) Farmhouses, offices, and out-buildings, and other buildings for farm purposes:
- (xii.) Saw-mills, scutch-mills, and other mills, water-wheels, engine-houses, and kilns, which will increase the value of the settled land for agricultural purposes or as woodland or otherwise:
- (xiii.) Reservoirs, tanks, conduits, watercourses, pipes, wells, ponds, shafts, dams, weirs, sluices, and other works and machinery for supply and distribution of water

45 & 46 Vict.
c. 38, s. 25.

- for agricultural, manufacturing, or other purposes, or for domestic or other consumption :
- (xiv.) Tramways; railways; canals; docks :
 - (xv.) Jetties, piers, and landing-places on rivers, lakes, the sea, or tidal waters, for facilitating transport of persons and of agricultural stock and produce, and of manure and other things required for agricultural purposes, and of minerals, and of things required for mining purposes :
 - (xvi.) Markets and market-places :
 - (xvii.) Streets, roads, paths, squares, gardens, or other open spaces for the use, gratuitously or on payment, of the public or of individuals, or for dedication to the public, the same being necessary or proper in connection with the conversion of land into building land :
 - (xviii.) Sewers, drains, watercourses, pipe-making, fencing, paving, brick-making, tile-making, and other works necessary or proper in connexion with any of the objects aforesaid :
 - (xix.) Trial pits for mines, and other preliminary works necessary or proper in connexion with development of mines :
 - (xx.) Reconstruction, enlargement, or improvement of any of those works.

For other authorized improvements, see S. L. Act, 1890, s. 13, *post*, p. 730; Housing of the Working Classes Act, 1890, s. 74; see *Re Calverley*, 1904, 1 Ch. 150; Agricultural Holdings (England) Acts, 1883, s. 29; and 1908, sect. 20. The improvements authorized by the S. L. Acts were intended to be improvements calculated to render the land more remunerative (*Re Gerard*, 1893, 3 Ch. 262). Under sect. 25 of S. L. Act, 1882, the following improvements have been held authorized. A sea wall (*Re Bethlehem Hospitals*, 30 Ch. D. 541, sub-sect. iv.); garden wall (*Re Dunraven*, 1907, 2 Ch. 417, sub-sect. vi.); fencing (*Re Verney*, 1898, 1 Ch. 508, sub-sect. vi.); farm buildings (*Re Newton*, 1890, W. N. 24; 61 L. T. 787, sub-sect. xi.); re-roofing farm buildings (*Re Verney*, 1898, 1 Ch. 512, sub-sects. xi., xx.; see, however, *Re Newton*, *sup.*); fire extinguishment apparatus (*Re Dunraven*, 1907, 2 Ch. 417, sub-sect. xiii.); water supply works (*Re Lytton*, 38 Ch. Div. 20, sub-sect. xiii.; see, however, *Re Tucker*, 1895, 2 Ch. 468); improvements at a mineral spring (*Re Hotchkiss*, 35 Ch. D. 41, sub-sects. xiii., xx.); pumps for mines (*Re Mundy*, 1891, 1 Ch. 399, sub-sects. xix., xx.); reconstructing the drainage of leasehold houses (*Re Thomas, Weatherall v. Thomas*, 1900, 1 Ch. 319, sub-sects. i., xx.); the complete drainage of a mansion-house (*Re Leconfield*, 1907, 2 Ch. 340; see *Re Houghton*, 30 Ch. D. 102; *Re Tucker*, 1895, 2 Ch. 468). See also as to drainage works executed under Public Health Acts upon freeholds, *Re Barney, Harrison v. Barney* (1894, 3 Ch. 562); and upon leaseholds, *Re Lever, Cordwell v. Lever* (1897, 1 Ch. 32); *Re Copland, Johns v. Carden* (1900, 1 Ch. 326).

The following works were held not within sect. 25:—Ordinary repairs (*Clark v. Thornton*, 35 Ch. D. 307); partial drainage of mansion house (*Re Tucker*, 1895, 2 Ch. 468); additions to a mansion to improve its appearance (*Re Gerard*, 1893, 3 Ch. 252); the building of stables (*ib.*); a private chapel (*ib.*); an agent's house (*ib.*); heating apparatus for a mansion (*Re Gaskell*, 1894, 1 Ch. 485); engine-house for electric light (*Re Leconfield*, 1907, 2 Ch. 340); silos (*Re Broadwater*, 53 L. T. 745). See now S. L. Act, 1890, sect. 13, *post*.

The making of an absolute order under sect. 55 of the Improvement of Land Act, 1864, is not alone sufficient to show that the particular works are improvements within this section (*Re Newton*, 61 L. T. 787); but the Commissioners' sanction may be evidence of this (*Re Verney*, 1898, 1 Ch. 508).

Even where the settlement authorized the application of income for the purpose, capital money was allowed to be applied for improvements (*Clarke v. Thornton*, 35 Ch. D. 307; *Re Stamford*, 56 L. T. 484; *Re Thomas, Weatherall v. Thomas*, 1900, 1 Ch. 323). But where improvement powers in a settlement differed from those in the S. L. Acts, and the tenant for life resorted to the settlement powers, he was bound to continue payments prescribed by them (*Re Sudbury*, *Vernon v. Vernon*, 1893, 3 Ch. 74; see *Vine v. Raleigh*, 1891, 2 Ch. 25).

As to the application of capital money in building in particular, the general jurisdiction of the court as to the expenditure of money on land has not been ousted by the S. L. Acts (*Re Montagu, Derbyshire v. Montagu*, 1897, 1 Ch. 685). But they afford a guide as to what expenditure should be allowed (*Re De Teissier*, 1893, 1 Ch. 153). As regards the general jurisdiction, the C. A. has laid down that in cases not amounting to salvage the court cannot order money to be raised out of a settled estate and applied in pulling down and rebuilding houses on the estate (*Re Montagu, Derbyshire v. Montagu*, 1897, 2 Ch. 8). Orders have been made where a case of salvage was established (*Conway v. Fenton*, 40 Ch. D. 512; *Re Jackson, Jackson v. Talbot*, 21 Ch. D. 786; *Neill v. N.*, 1904, 1 L. R. 513; see *Hibbert v. Cooke*, 1 Sim. & Stu. 552; *Frith v. Cameron*, 12 Eq. 169; *Re Household*, 27 Ch. D. 553); and otherwise refused (*Re De Teissier*, *sup.*; *Re De Tabley, Leighton v. Leighton*, 1896, W. N. 162; *Re Montagu*, *sup.*; *Re Willis, W. v. W.*, 1902, 1 Ch. 15; *Re Legh*, 1902, 2 Ch. 274; *Re Hawker*, 66 L. J. Ch. 341). Compare also the decisions as to the expenditure on building, &c., of money paid into court under the Settled Estates Act, 1877, *ante*, p. 649. Questions, however, as to the application of capital money under the S. L. Acts must be determined entirely by those acts (*Re Gerard*, 1893, 3 Ch. 257; *Re Aldam*, 1902, 2 Ch. 56).

26.—(1.) Where the tenant for life is desirous that capital money arising under this act shall be applied in or towards payment for an improvement authorized by this act, he may submit for approval to the trustees of the settlement, or to the court, as the case may require, a scheme for the execution of the improvement, showing the proposed expenditure thereon.

Approval by Land Commissioners of scheme for improvement and payment thereon.

(2.) Where the capital money to be expended is in the hands of trustees, then, after a scheme is approved by them, the trustees may apply that money in or towards payment for the whole or part of any work or operation comprised in the improvement, on—

- (i.) A certificate of the Land Commissioners (*n*) certifying that the work or operation, or some specified part thereof, has been properly executed, and what amount is properly payable by the trustees in respect thereof, which certificate shall be conclusive in favour of the trustees as an authority and discharge for any payment made by them in pursuance thereof; or on
- (ii.) A like certificate of a competent engineer or able practical surveyor nominated by the trustees and approved by the Commissioners, or by the court, which certificate shall be conclusive as aforesaid; or on

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c. 38, s. 26.

- (iii.) An order of the court directing or authorizing the trustees to so apply a specified portion of the capital money.

(3.) Where the capital money to be expended is in court, then, after a scheme is approved by the court, the court may, if it thinks fit, on a report or certificate of the Commissioners, or of a competent engineer or able practical surveyor, approved by the court, or on such other evidence as the court thinks sufficient, make such order and give such directions as it thinks fit for the application of that money, or any part thereof, in or towards payment for the whole or part of any work or operation comprised in the improvement (o).

(n) Now the Board of Agriculture and Fisheries (Board of Agriculture and Fisheries Acts, 1889 and 1903).

Capital
money in the
hands of
Trustees.
Trustees'
action.

In the case of capital money in the hands of the trustees the above section contemplates (1) a scheme by tenant for life, (2) the trustees' approval thereof, and (3) either (α) a certificate of the Board, or (β) a certificate of a surveyor, or (γ) an order of court.

In considering a scheme the trustees are not concerned with the general policy of the tenant for life; but should see (1) that the particular improvement is within the act, (2) that it will be properly carried out by the scheme, and (3) that the tenant for life is acting *bonâ fide* on proper advice (*Re Egmont, Lefroy v. Egmont*, 1906, 2 Ch. 151). The trustees may approve although they have no capital money in hand, and may out of subsequent capital money re-imburse the tenant for life for works properly executed (*Re Norfolk, Norfolk v. Herries*, 1900, 1 Ch. 461; compare *Re Lisburne*, 1901, W. N. 91). During a tenant for life's minority, the trustees may prepare and approve their own schemes (*Re Greys Court*, 1901, W. N. 60).

Court's
action.

The matter may come before the court after the trustees' approval; or, where the trustees do not approve, the court may, on the scheme being submitted to it, authorize the trustees to comply (*Clarke v. Thornton*, 35 Ch. D. 313). As regards the court's action, it must exercise its discretion and consider whether the scheme is compatible with the interests of all parties (*Re Keck*, 1904, 2 Ch. 29). Before the execution of the works, the court will not make a prospective order, authorizing future capital money to be applied (*Re Millard*, 1893, 3 Ch. 116); but will decide a legal question, *e.g.* whether the work is within the act (*Re Calverley*, 1904, 1 Ch. 152). It may authorize payment for executed improvements (S. L. Act, 1890, s. 15; see note thereon, p. 731, *post*, and see before this Act, *Re Hodgkin*, 35 Ch. D. 41; *Re Broadwater*, 53 L. T. 745). Where a scheme had been previously approved the court has allowed payment of additional expenditure properly incurred (*Re Lytton*, 38 Ch. D. 20; *Re Egmont*, 1908, W. N. 176).

Capital
money in
court.

(o) In the case of capital money in court, the section contemplates (1) a scheme by tenant for life, (2) the court's approval thereof, (3) a certificate of the Board or surveyor, and (4) an order of court. Where there were no trustees but the infant tenant in tail appeared, the court authorized payment under the above section (*Clarke v. Thornton*, 35 Ch. D. 316). See, further, the above decisions as to the action of the court.

As regards land improvement charges, see S. L. Act, 1887, *post*. For forms under this section, see R. S. L. Act, Forms 12—16 (*post*).

Concurrence
in improve-
ments.

27. The tenant for life may join or concur with any other person interested in executing any improvement authorized by this act, or in contributing to the cost thereof.

Obligation on
tenant for life

28.—(1.) The tenant for life, and each of his successors in

title having, under the settlement, a limited estate or interest only in the settled land, shall, during such period, if any, as the Land Commissioners by certificate in any case prescribe, maintain and repair, at his own expense, every improvement executed under the foregoing provisions of this act, and where a building or work in its nature insurable against damage by fire is comprised in the improvement, shall insure and keep insured the same, at his own expense, in such amount, if any, as the Commissioners by certificate in any case prescribe.

45 & 46 Vict.
c. 38, s. 28.

and suc-
cessors to
maintain,
insure, &c.

(2.) The tenant for life, or any of his successors as aforesaid, shall not cut down or knowingly permit to be cut down, except in proper thinning, any trees planted as an improvement under the foregoing provisions of this act.

(3.) The tenant for life, and each of his successors as aforesaid, shall from time to time, if required by the Commissioners, on or without the suggestion of any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or otherwise, report to the Commissioners the state of every improvement executed under this act, and the fact and particulars of fire insurance, if any.

(4.) The Commissioners may vary any certificate made by them under this section, in such manner or to such extent as circumstances appear to them to require, but not so as to increase the liabilities of the tenant for life, or any of his successors as aforesaid.

(5.) If the tenant for life, or any of his successors as aforesaid, fails in any respect to comply with the requisitions of this section, or does any act in contravention thereof, any person having, under the settlement, any estate or interest in the settled land in possession, remainder, or reversion, shall have a right of action, in respect of that default or act, against the tenant for life; and the estate of the tenant for life, after his death, shall be liable to make good to the persons entitled under the settlement any damages occasioned by that default or act.

Improvements effected by means of land improvement charges are within this section (S. L. Act, 1887, s. 2, *post*).

Execution and Repair of Improvements.

29. The tenant for life, and each of his successors in title having, under the settlement, a limited estate or interest only in the settled land, and all persons employed by or under contract with the tenant for life, or any such successor, may from time to time enter on the settled land, and, without impeachment of waste by any remainderman or reversioner, thereon execute any improvement authorized by this act, or inspect, maintain, and repair the same, and, for the purposes thereof, on the settled land, do, make, and use all acts, works, and conveniences proper

Protection as
regards waste
in execution
and repair
of improve-
ments.

45 & 46 Vict. c. 38, s. 29. for the execution, maintenance, repair, and use thereof, and get and work freestone, limestone, clay, sand, and other substances, and make tramways and other ways, and burn and make bricks, tiles, and other things, and cut down and use timber and other trees not planted or left standing for shelter or ornament.

Improvement of Land Act, 1864.

Extension of
27 & 28 Vict.
c. 114, s. 9.

30. The enumeration of improvements contained in section nine of the Improvement of Land Act, 1864, is hereby extended so as to comprise, subject and according to the provisions of that act, but only as regards applications made to the Land Commissioners after the commencement of this act, all improvements authorized by this act.

VIII.—CONTRACTS.

Power for
tenant for life
to enter into
contracts.

31.—(1.) A tenant for life—

- (i.) May contract to make any sale, exchange, partition, mortgage, or charge; and
- (ii.) May vary or rescind, with or without consideration, the contract, in the like cases and manner in which, if he were absolute owner of the settled land, he might lawfully vary or rescind the same, but so that the contract as varied be in conformity with this act; and any such consideration, if paid in money, shall be capital money arising under this act; and
- (iii.) May contract to make any lease; and in making the lease may vary the terms, with or without consideration, but so that the lease be in conformity with this act; and
- (iv.) May accept a surrender of a contract for a lease, in like manner and on the like terms in and on which he might accept a surrender of a lease; and thereupon may make a new or other contract, or new or other contracts, for or relative to a lease or leases, in like manner and on the like terms in and on which he might make a new or other lease, or new or other leases, where a lease had been granted; and
- (v.) May enter into a contract for or relating to the execution of any improvement authorized by this act, and may vary or rescind the same; and
- (vi.) May, in any other case, enter into a contract to do any act for carrying into effect any of the purposes of this act, and may vary or rescind the same.

(2.) Every contract shall be binding on and shall enure for the benefit of the settled land, and shall be enforceable against

and by every successor in title for the time being of the tenant for life, and may be carried into effect by any such successor ; but so that it may be varied or rescinded by any such successor, in the like case and manner, if any, as if it had been made by himself.

(3.) The court may, on the application of the tenant for life, or of any such successor, or of any person interested in any contract, give directions respecting the enforcing, carrying into effect, varying, or rescinding thereof.

(4.) Any preliminary contract under this act for or relating to a lease shall not form part of the title or evidence of the title of any person to the lease, or to the benefit thereof.

On a summons under this section nothing can be decided against persons not parties to the contract (*Re Ailesbury*, 1893, W. N. 140).

A tenant for life may convey so as to effectuate a contract made by his predecessor (S. L. Act, 1890, s. 6, *post*, p. 727). In connection with sub-sect. (4), see Conv. Act, 1882, s. 4 (*ante*, p. 623); and in connection with sub-sects. (5) and (6), see *Re Cleveland* (1902, 2 Ch. 352).

Where an order of court has to be obtained in relation to an improvement (see sect. 26) any contract for the execution of such improvement must be entered into by the tenant for life at his own risk (*Re Keck*, 1904, 2 Ch. 29).

For form of summons, see R. S. L. Act, Form 17 (*post*).

IX.—MISCELLANEOUS PROVISIONS.

32. Where, under an act incorporating or applying, wholly or in part, the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, or under the Settled Estates Act, 1877, or under any other act, public, local, personal, or private, money is at the commencement of this act in court, or is afterwards paid into court, and is liable to be laid out in the purchase of land to be made subject to a settlement, then, in addition to any mode of dealing therewith authorized by the act under which the money is in court, that money may be invested or applied as capital money arising under this act, on the like terms, if any, respecting costs and other things, as nearly as circumstances admit, and (notwithstanding anything in this act) according to the same procedure, as if the modes of investment or application authorized by this act were authorized by the act under which the money is in court.

Application of money in court under Lands Clauses and other acts.
8 & 9 Vict. c. 18.
23 & 24 Vict. c. 106.
32 & 33 Vict. c. 18.
40 & 41 Vict. c. 18.

Orders have been made under this section for payment out to trustees of money which was in court under the Lands Clauses Act (*Re Harrop*, 24 Ch. D. 717; *Re Rutland*, 31 W. R. 947); under a local act (*Re Wright*, 24 Ch. D. 662; *Re Rathmines*, 15 L. R. Ir. 576); or under a private estates act (*Re Bolton*, 52 L. T. 728). Compare the cases quoted, *ante*, pp. 649, 688. In the last case the court declined to direct the trustees to give notice of the investments to the remaindermen. Purchase-money of lands belonging absolutely to a charity, in court under the Lands Clauses Act, was held within this section (*Re Byron's Charity*, 23 Ch. D. 171; *Re Bethlehem Hospitals*, 30 Ch. D. 541). Similarly purchase money of glebe land (*Ex p. Castile Bytham*, 1895, 1 Ch. 348). Money which under a power may be laid

45 & 46 Vict. out in the purchase of land is within the section (*Re Soltau*, 1898, 2 Ch. 629).
c. 38, s. 32. The court has under this section absolute discretion as to costs (*Re Hanbury*, 31 W. R. 784; 52 L. J. Ch. 687), and the costs will in general be paid by the corporation taking the land (*Ib.*; *Re Harrop*, 24 Ch. D. 717).

As to the bearing of this section on the procedure under the S. E. Act, 1877, relating to the examination of married women, see *Re Arabin* (52 L. T. 728).

Application
of money in
hands of
trustees
under powers
of settlement.

33. Where, under a settlement, money is in the hands of trustees, and is liable to be laid out in the purchase of land to be made subject to the settlement, then, in addition to such powers of dealing therewith as the trustees have independently of this act, they may, at the option of the tenant for life, invest or apply the same as capital money arising under this act.

This section has been held to apply to money bequeathed to trustees in trust to lay out the same in land to be settled (*Re Mackenzie*, 23 Ch. D. 750; *Re Maberly*, *M. v. M.*, 33 Ch. D. 455; *Re Mundy*, 1891, 1 Ch. 399; see *Re Byng*, 1892, 2 Ch. 219; *Re Stafford*, *Gerard v. Stafford*, 1904, 2 Ch. 81). The words "money liable to be laid out in the purchase of land," mean money subject to some disposition under which it may be laid out in the purchase of land (*Re Soltau*, 1898, 2 Ch. 632). And the section has been held to apply to money which, under a power, might be applied in the purchase of land generally (*Ib.*; see *Re Child*, 1907, 2 Ch. 348); or of particular land (*Re Hill*, *Hill v. Pilcher*, 1896, 1 Ch. 962); or of freehold ground rents (*Re Thomas*, *Weatherall v. Thomas*, 1900, 1 Ch. 319). Also to a sinking fund formed by the tenant for life under a provision in the settlement to repay money raised for improvements (*Re Sudbury*, *Vernon v. Vernon*, 1893, 3 Ch. 74). Also to money ordered to be applied under sect. 34 of the S. E. Act, 1877 (*Re Tennant*, 40 Ch. D. 594; see *Re Tesseyman*, 1897, W. N. 168; 77 L. T. 484); and to money in court in an administration action, liable under the settlement to be laid out in land (*Clarke v. Thornton*, 35 Ch. D. 312; *Re Torry Hill*, *Pemberton v. P.*, 1909, 1 Ch. 470; see *contra*, *Burke v. Gore*, 13 L. R. Ir. 367).

When the tenant for life is an infant the trustees may, under sect. 60 (*post*, p. 716), exercise the option given by this section to the tenant for life (*Re Newcastle*, 24 Ch. D. 140). Where there was no tenant for life, purchase-money arising under the S. E. Act, 1877, was ordered by the court to be applied as capital money (*Re Tesseyman*, 1897, W. N. 168; 77 L. T. 484). The tenant for life can direct how the moneys are to be invested or applied (*Re Gee*, *Pearson-Gee v. Pearson*, 1895, W. N. 90; 64 L. J. Ch. 606).

Application
of money
paid for lease
or reversion.

34. Where capital money arising under this act is purchase money paid in respect of a lease for years, or life, or years determinable on life, or in respect of any other estate or interest in land less than the fee simple, or in respect of a reversion dependent on any such lease, estate, or interest, the trustees of the settlement or the court, as the case may be, and in the case of the court on the application of any party interested in that money, may, notwithstanding anything in this act, require and cause the same to be laid out, invested, accumulated, and paid in such manner as, in the judgment of the trustees or of the court, as the case may be, will give to the parties interested in that money the like benefit therefrom as they might lawfully have had from the lease, estate, interest, or reversion in respect whereof the money was paid, or as near thereto as may be.

This section is substantially identical with sect. 74 of the Lands Clauses Act, 1845, and decisions under that act have been treated as authorities on this section (*Cottrell v. C.*, 28 Ch. D. 628). On a sale of leaseholds the tenant for life was only allowed during the leasehold term an income equal to the rent previously received by him (*Ib.*; see *Re Griffith*, 49 L. T. 161). So in the case of a sale of ground rents (*Re Bowyer*, 1892, W. N. 48; and see *Askeu v. Woodhead*, 14 Ch. D. 27). This section does not apply to chattels which are sold under sect. 37 (*Re Marlborough, Marlborough v. Majoribanks*, 30 Ch. D. 133).

45 & 46 Vict.
c. 38, s. 34.

For form of summons, see R. S. L. Act, Form 18 (*post*).'

35.—(1.) Where a tenant for life is impeachable for waste in respect of timber, and there is on the settled land timber ripe and fit for cutting, the tenant for life, on obtaining the consent of the trustees of the settlement or an order of the court, may cut and sell that timber, or any part thereof.

Cutting and sale of timber, and part of proceeds to be set aside.

(2.) Three fourth parts of the net proceeds of the sale shall be set aside as and be capital money arising under this act, and the other fourth part shall go as rents and profits.

Proceeds of sale of timber were applied as directed by this section (*Re Newcastle*, 1883, W. N. 99). Where, however, a tenant for life had obtained the consent of the trustees to a sale of the settled land with the timber, but not any consent to cutting the timber, he was not entitled to any part of the purchase-money of the timber (*Re Llewellyn, Llewellyn v. Williams*, 37 Ch. D. 317).

As between the real and personal representatives of the remainderman there is no equity for re-conversion in the case of proceeds of timber cut under order of the court (*Hartley v. Pendarves*, 1901, 2 Ch. 498; see *Burgess v. Booth*, 1908, 2 Ch. 648).

For form of summons, see R. S. L. Act, Forms 6, 7 (*post*).

36. The court may, if it thinks fit, approve of any action, defence, petition to Parliament, parliamentary opposition, or other proceeding taken or proposed to be taken for protection of settled land, or of any action or proceeding taken or proposed to be taken for recovery of land being or alleged to be subject to a settlement, and may direct that any costs, charges, or expenses incurred or to be incurred in relation thereto, or any part thereof, be paid out of property subject to the settlement.

Proceedings for protection or recovery of land settled or claimed as settled.

Under this section the costs of proceedings before H. L. to establish a claim to an earldom were paid out of the settled property (*Re Aylesford*, 32 Ch. D. 162); also, under the general jurisdiction of the court, the costs of parliamentary opposition previous to 1883 (*Re Ormrod*, 1892, 2 Ch. 318), or of legal proceedings (*Hamilton v. Tighe*, 1898, 1 I. R. 123).

The above section is somewhat wider than sect. 17 of the S. E. Act, 1877, which is now repealed (S. L. Act, 1882, s. 64, *post*, p. 721). As to the repealed section, see *Re Willan* (45 L. T. 745); *Re De la Warr* (16 Ch. D. 589).

37.—(1.) Where personal chattels are settled on trust so as to devolve with land until a tenant in tail by purchase is born or attains the age of twenty-one years, or so as otherwise to vest in some person becoming entitled to an estate of freehold or inheritance in the land, a tenant for life of the land may sell the chattels or any of them.

Heirlooms.

45 & 46 Vict.
c. 38, s. 37.

(2.) The money arising by the sale shall be capital money arising under this act, and shall be paid, invested, or applied and otherwise dealt with in like manner in all respects as by this act directed with respect to other capital money arising under this act, or may be invested in the purchase of other chattels, of the same or any other nature, which, when purchased, shall be settled and held on the same trusts, and shall devolve in the same manner as the chattels sold.

(3.) A sale or purchase of chattels under this section shall not be made without an order of the court.

In selling under this section a tenant for life is a trustee, and regard must be had to the interests of all entitled (*Re Radnor*, 45 Ch. Div. 402). The interest, however, of any one liable to be cut off by a tenant in tail is entitled to little weight (*Ib.* 424); all the circumstances must be considered (*Ib.* 416; *Re Beaumont*, 58 L. T. 916); including the intention of the settlor, and the wishes of the remaindermen (*Re Hope, De Cetto v. Hope*, 1899, 2 Ch. 691; see as to "sentiment," *Ib.* 688). The tenant for life must make out a case for the sale (*Ib.* 689). The court would not sanction a sale proposed wantonly or maliciously (*Re Radnor*, 45 Ch. D. 413); nor a sale without any colour of necessity (*Re Marlborough, Marlborough v. Marjoribanks*, 32 Ch. Div. 4); but sanctioned a sale to produce income for a tenant for life impecunious through no fault of his own (*Re Townshend*, 89 L. T. 691). Incumbrances created by the tenant for life on his interest should not, as a rule, be taken into account (*Re Radnor*, 45 Ch. D. 410; *Re Beaumont*, 58 L. T. 918; see *Re Hope, De Cetto v. Hope*, 1899, 2 Ch. 679).

A sale of heirlooms cannot be sanctioned *ex post facto* (*Re Ames, A. v. A.*, 1893, 2 Ch. 479). Chattels settled to devolve with a title were ordered to be sold where they were useless and a cause of expense (*Re Rivett-Carnac*, 30 Ch. D. 136; see *Re Houghton, Ib.* 102). Where heirlooms were directed to be kept in a certain house, an order for sale of the house was refused, without some direction as to the disposal of these heirlooms. These were subsequently ordered to be sold (*Re Brown*, 27 Ch. D. 179; see *Re Wortham*, 75 L. T. 293). An order has been made for sale of some chattels, and removal of the remainder to another mansion (*Browne v. Collins*, 62 L. T. 566). On a sale of heirlooms a tenant for life may be given leave to bid (*Re Brown, sup.*).

Trustees with a power of sale over land are trustees for the purposes of this act, including the sale of heirlooms (*Constable v. Constable*, 32 Ch. D. 233). Moneys arising from the sale of heirlooms may be applied in discharge of incumbrances on the settled land (*Re Marlborough, sup.*); even where the heirlooms were vested in an infant tenant in tail (*Re Stafford, Gerard v. Stafford*, 1904, 2 Ch. 72); or such money may be applied in payment for improvements (*Re Houghton*, 30 Ch. D. 102); or in payment for repair of other heirlooms (*Re Waldegrave, Waldegrave v. Selborne*, 81 L. T. 632). They were placed to a separate account (*Browne v. Collins, sup.*). Land purchased with the proceeds of heirlooms was not subject to the charges subsisting on the other settled land (*Re Marlborough and Queen Anne's Bounty*, 1897, 1 Ch. 712).

For form of summons, see R. S. L. Act, Forms 6 and 7 (*post*).

X.—TRUSTEES.

Appointment
of trustees by
court.

38.—(1.) If at any time there are no trustees of a settlement within the definition in this act, or where in any other case it is expedient, for purposes of this act, that new trustees of a

settlement be appointed, the court may, if it thinks fit, on the application of the tenant for life or of any other person having, under the settlement, an estate or interest in the settled land, in possession, remainder, or otherwise, or, in the case of an infant, of his testamentary or other guardian, or next friend, appoint fit persons to be trustees under the settlement for the purposes of this act (p). 45 & 46 Vict.
c. 38, s. 38.

(2.) The persons so appointed, and the survivors and survivor of them, while continuing to be trustees or trustee, and, until the appointment of new trustees, the personal representatives or representative for the time being of the last surviving or continuing trustee, shall for purposes of this act become and be the trustees or trustee of the settlement (q).

(p) The provisions as to the appointment of new trustees contained in the Conv. Act, 1881, ss. 31 *et seq.* (see now Trustee Act, 1893, ss. 10, 47, *post*), apply to trustees for the purposes of the S. L. Acts (S. L. Act, 1890, s. 17; see before that act, *Re Wilcock*, 34 Ch. D. 508; *Re Kane*, 21 L. R. Ir. 112).

As to who are "trustees, &c.," see sect. 2 (8) (*ante*, p. 669) and S. L. Act, 1890, s. 16 (*post*, p. 732). The trustees are intended to be a check on the tenant for life; and accordingly the solicitor of the tenant for life will not be appointed (*Re Kemp*, 24 Ch. Div. 485; *Wheelwright v. Walker*, 23 Ch. D. 763; *Re Stamford, Payne v. Stamford*, 1896, 1 Ch. 288); unless as a matter of convenience, as where he is already one of the trustees of a deed forming part of the settlement (*Re Ailesbury and Iveagh*, 1893, 2 Ch. 360); nor will the tenant for life himself be appointed, nor a person who may become a tenant for life (*Re Harrop*, 24 Ch. D. 719; see *Re Jackson*, 1902, 1 Ch. 258; *Re Davies and Kent*, 1910, W. N. 61). The court refused to appoint two persons related to each other (*Re Knowles*, 27 Ch. D. 707; see, however, *Re Wells*, 48 L. T. 859; 31 W. R. 764). The existing trustees of the instrument creating the settlement were appointed (*Re Morgan*, 24 Ch. D. 114; see *Re Harrop*, *id.* 717; *Re Kemp*, *id.* 487); but they will not necessarily be appointed (*Re Nicholas*, 1894, W. N. 165).

Where an infant domiciled in a British colony was deemed to be tenant for life (sect. 59, *post*, p. 716), persons domiciled in the same colony were appointed trustees (*Re Simpson*, 1897, 1 Ch. 256; see *Re Lloyd, Edwards v. Lloyd*, 54 L. T. 643).

It would seem that on an appointment of trustees under this section the court has no jurisdiction to place restrictions on the exercise of their powers (*Re Dudley*, 35 Ch. D. 343; see note to sect. 60, *post*, p. 716). Trustees have been appointed under the following circumstances:—Where they were required for the purpose of receiving notices under sect. 45 (*Wheelwright v. Walker*, 23 Ch. D. 763; *Re Taylor*, 49 L. T. 420; see *Re Bentley, Wade v. Wilson*, 33 W. R. 610; *Williams v. Jenkins*, 1894, W. N. 176); or for receiving out under sect. 21 (ix.), money paid into court under the Lands Clauses Act (*Re Wright*, 24 Ch. D. 662; *Re Belfast Improvement Acts, Ex p. Reid*, 1898, 1 L. R. 1); or when the tenant for life was an infant, see sect. 60 (*Re Morgan*, 24 Ch. D. 114; *Re Price, Leighton v. Price*, 27 Ch. D. 552). As to the appointment of trustees of a compound settlement, see the note to sect. 2, *ante*, p. 671. The court is not bound to appoint trustees if satisfied that a sale is impossible (*Williams v. Jenkins*, 1894, W. N. 176). And the court has refused to appoint trustees to enable an investment to be made under sect. 33, which was not authorized by the will and might interfere with its objects (*Burke v. Gore*, 13 L. R. Ir. 367). A reference to chambers was directed (*Re Carne*, 1899, 1 Ch. 330).

(q) Trustees appointed under this section can, under sect. 40, give a good discharge for money paid to them (*Cookes v. C.*, 34 Ch. D. 502).

45 & 46 Vict.
c. 38, s. 38.

On an original appointment of trustees under this section no duty is chargeable (*Re Potter*, 1889, W. N. 69; see *Re Kennaway*, *id.* p. 70).

For form of summons, see R. S. L. Act, Form 19 (*post*, p. 740). As to the form of order generally, see *Re Harrop* (24 Ch. D. 719); *Re Simpson* (1897, 1 Ch. 256); Seton, 6th ed. 1825; and in the case of separate trustees of several settlements created by one will, *Re Skerrett* (1899, W. N. 240). An order appointing new trustees was drawn up *nunc pro tunc* where a trustee died before the drawing up (*Re Jones, Bullis v. Jones*, 1891, W. N. 114).

Number of
trustees to
act.

39.—(1.) Notwithstanding anything in this act, capital money arising under this act shall not be paid to fewer than two persons as trustees of a settlement, unless the settlement authorizes the receipt of capital trust money of the settlement by one trustee.

(2.) Subject thereto, the provisions of this act referring to the trustees of a settlement apply to the surviving or continuing trustees or trustee of the settlement for the time being.

A power in a settlement to "the trustees or trustee" to receive and give receipts was held to authorize a sole surviving trustee to receive capital money (*Re Garnett Orme and Hargreave*, 25 Ch. D. 595).

Trustees'
receipts.

40. The receipt in writing of the trustees of a settlement, or where one trustee is empowered to act, of one trustee, or of the personal representatives or representative of the last surviving or continuing trustee, for any money or securities, paid or transferred to the trustees, trustee, representatives, or representative, as the case may be, effectually discharges the payer or transferor therefrom, and from being bound to see to the application or being answerable for any loss or misapplication thereof, and, in case of a mortgagee or other person advancing money, from being concerned to see that any money advanced by him is wanted for any purpose of this act, or that no more than is wanted is raised.

Under this section, trustees appointed under sect. 38 can give a good discharge (*Cookes v. C.*, 34 Ch. D. 498; *Hatten v. Russell*, 38 Ch. D. 342; *Pyne v. Phillips*, 1895, W. N. 8). Compare the provision as to trustees' receipts, Trustee Act, 1893, s. 20 (*post*).

Protection of
each trustee
individually.

41. Each person who is for the time being trustee of a settlement is answerable for what he actually receives only, notwithstanding his signing any receipt for conformity, and in respect of his own acts, receipts, and defaults only, and is not answerable in respect of those of any other trustee, or of any banker, broker, or other person, or for the insufficiency or deficiency of any securities, or for any loss not happening through his own wilful default.

As to the indemnity of trustees generally, see note to Trustee Act, 1893, s. 24, *post*, p. 775.

42. The trustees of a settlement, or any of them, are not liable for giving any consent, or for not making, bringing, taking, or doing any such application, action, proceeding, or thing, as they might make, bring, take, or do; and in case of purchase of land with capital money arising under this act, or of an exchange, partition, or lease, are not liable for adopting any contract made by the tenant for life, or bound to inquire as to the propriety of the purchase, exchange, partition, or lease, or answerable as regards any price, consideration, or fine, and are not liable to see to or answerable for the investigation of the title, or answerable for a conveyance of land, if the conveyance purports to convey the land in the proper mode, or liable in respect of purchase-money paid by them by direction of the tenant for life to any person joining in the conveyance as a conveying party, or as giving a receipt for the purchase-money, or in any other character, or in respect of any other money paid by them by direction of the tenant for life on the purchase, exchange, partition, or lease.

45 & 46 Vict.
c. 38, s. 42.

Protection of
trustees
generally.

The trustees have no such duty to control the tenant for life in the case of a sale as would make them liable if it was an improper one. But they may properly commence proceedings in the case of a sale they think improvident (*Hatten v. Russell*, 38 Ch. D. 344); and ought to do so in the case of a fraudulent sale (*Wheelwright v. Walker*, 23 Ch. D. 762). They were intended to impose a check upon the powers conferred on the tenant for life (*Re Kemp*, 24 Ch. Div. 487; *Re Hotchkin*, 35 Ch. D. 44). And where the tenant for life directs an investment of capital money which is improper, they may submit it to the court (*Re Hunt, Bulteel v. Lawdeshayne*, 1906, 2 Ch. 11). On a summons by the tenant for life desiring to exercise some power, they should not as a rule support the application, but hold an even hand (*Re Hotchkin*, 35 Ch. Div. 43; *Re Broadwater*, 53 L. T. 745). When they appeared by the same counsel as the tenant for life on an appeal which was dismissed, they were not given their costs out of the estate (*Re Broadwater, sup.*). A trustee, who is respondent to an appeal by a tenant for life, may be heard in support of the appeal (*Re Ailesbury*, 1892, 1 Ch. 526).

In the case of a purchase, exchange, partition, or lease of land, trustees have a special protection under the above section. They may, however, be entitled, or bound, to inquire into title and value, upon a purchase with capital money of freeholds (*Re Theobald*, 19 Times L. R. 536); or of leaseholds (*Re Hunt, Bulteel v. Lawdeshayne*, 1905, 2 Ch. 418; 1906, 2 Ch. 11). As to their position where a tenant for life requires an investment on mortgage of capital money, see *Re Hotham, Hotham v. Doughty*, 1902, 2 Ch. 575, quoted *ante*, p. 689.

43. The trustees of a settlement may reimburse themselves or pay and discharge out of the trust property all expenses properly incurred by them.

Trustees' re-
imburse-
ment.

See Trustee Act, 1893, s. 24 (*post*), and note thereto.

44. If at any time a difference arises between a tenant for life and the trustees of the settlement, respecting the exercise of any of the powers of this act, or respecting any matter relating thereto, the court may, on the application of either party, give

Reference of
differences to
court.

45 & 46 Vict. c. 38, s. 44. such directions respecting the matter in difference, and respecting the costs of the application, as the court thinks fit.

See the cases quoted under sect. 42, *sup.*; and, as to costs, the note to sect. 46, *post*, p. 705. For form of summons, see R. S. L. Act, Form 20, *post*.

Notice to trustees.

45.—(1.) A tenant for life when intending to make a sale, exchange, partition, lease, mortgage, or charge, shall give notice of his intention in that behalf to each of the trustees of the settlement, by posting registered letters, containing the notice, addressed to the trustees, severally, each at his usual or last known place of abode in the United Kingdom, and shall give like notice to the solicitor for the trustees, if any such solicitor is known to the tenant for life, by posting a registered letter, containing the notice, addressed to the solicitor at his place of business in the United Kingdom, every letter under this section being posted not less than one month before the making by the tenant for life of the sale, exchange, partition, lease, mortgage, or charge, or of a contract for the same.

(2.) Provided that at the date of notice given the number of trustees shall not be less than two, unless a contrary intention is expressed in the settlement.

(3.) A person dealing in good faith with the tenant for life is not concerned to inquire respecting the giving of any such notice as is required by this section.

No notice need be given in respect of a lease not exceeding twenty-one years (S. L. Act, 1890, s. 7, *post*, p. 727). As to the nature of the notice and as to waiver of it, see S. L. Act, 1884, s. 5 (*post*, p. 722), which section, however, does not in terms apply to a mortgage or charge. As to notice in cases to which the section does not apply, see *Re Ray* (25 Ch. D. 464).

A notice under this section is good if given before completion (*Marlborough v. Sartoris*, 32 Ch. D. 621). No notice need be given where persons have been appointed under sect. 60 to carry out a sale (*Re Dudley*, 35 Ch. D. 338). The committee of a lunatic cannot give a notice without leave of the court (*Re Ray*, 25 Ch. D. 464).

As between the tenant for life and a purchaser from him, the notice is a matter with which the purchaser is not concerned (*Marlborough v. Sartoris*, 32 Ch. D. 623; *Mogridge v. Clapp*, 1892, 3 Ch. 395; see *Re Fisher and Grazebrook*, 1898, 2 Ch. 661). As to whether a purchaser can safely complete who has actual knowledge that no notice has been given, see *Hatten v. Russell* (38 Ch. D. 344); *Mogridge v. Clapp* (1892, 3 Ch. 396, 401; *Re Fisher and Grazebrook*, *sup.*). Where a tenant by the curtesy granted a building lease, as absolute owner, there being no trustees for the purpose of the S. L. Act, the lessee got a good selling title, being protected by sub-sect. 3 of this section (*Mogridge v. Clapp*, 1892, 3 Ch. 382; see *Chandler v. Bradley*, 1897, 1 Ch. 315).

As between the tenant for life and a remainderman, the tenant for life has been restrained from selling until proper notices has been given (*Wheelwright v. Walker*, 23 Ch. D. 752; *Re Bentley*, *Wade v. Wilson*, 33 W. R. 610).

XI.—COURT; LAND COMMISSIONERS; PROCEDURE.

45 & 46 Vict.
c. 38, s. 46.

46.—(1.) All matters within the jurisdiction of the court under this act, shall, subject to the acts regulating the court, be assigned to the Chancery Division of the court.

(2.) Payment of money into court effectually exonerates therefrom the person making the payment.

(3.) Every application to the court shall be by petition, or by summons at chambers.

(4.) On an application by the trustees of a settlement notice shall be served in the first instance on the tenant for life (*r*).

(5.) On any application notice shall be served on such persons, if any, as the court thinks fit.

(6.) The court shall have full power and discretion to make such order as it thinks fit respecting the costs, charges, or expenses of all or any of the parties to any application, and may, if it thinks fit, order that all or any of those costs, charges, or expenses be paid out of property subject to the settlement (*s*).

(7.) General rules for purposes of this act shall be deemed rules of court within section seventeen of the Appellate Jurisdiction Act, 1876, as altered by section nineteen of the Supreme Court of Judicature Act, 1881, and may be made accordingly.

(8.) The powers of the court may, as regards land in the County Palatine of Lancaster, be exercised also by the Court of Chancery of the County Palatine; and rules for regulating proceedings in that court shall be from time to time made by the Chancellor of the Duchy of Lancaster, with the advice and consent of a Judge of the High Court acting in the Chancery Division, and of the Vice-Chancellor of the County Palatine (*t*).

(9.) General rules, and rules for the Court of Chancery of the County Palatine, may be made at any time after the passing of this act, to take effect on or after the commencement of this act (*u*).

(10.) The powers of the court may, as regards land not exceeding in capital value five hundred pounds, or in annual rateable value thirty pounds, and, as regards capital money arising under this act, and securities in which the same is invested, not exceeding in amount or value five hundred pounds, and as regards personal chattels settled or to be settled, as in this act mentioned, not exceeding in value five hundred pounds, be exercised by any county court within the district whereof is situate any part of the land which is to be dealt with in the court, or from which the capital money to be dealt with in the court arises under this act, or in connexion with which the personal chattels to be dealt with in the court are settled (*x*).

(*r*) As to service, see R. S. L. Act, Nos. 4, 5, and 6, *post*.

(*s*) Sub-sect. 6 gives the court discretion as to costs of parties to applications under the act; and sect. 47 (*post*) mentions the sources from which

Regulations
respecting
payments
into court,
applications,
&c.39 & 40 Vict.
c. 59.
44 & 45 Vict.
c. 68.Sub-sect. (6).
Costs.

45 & 46 Vict.
c. 38, s. 46.

such costs may be paid. There are also special provisions as to costs in sect. 32, *ante*, p. 697 (see *Re Hanbury*, 31 W. R. 784), sect. 36, *ante*, p. 699, and sect. 44, *ante*, p. 703. In all cases not provided for by the act or rules, the existing practice of the court as to costs applies to proceedings under the act (S. L. Act Rules, No. 15, *post*, p. 734). Questions under the act have been decided in specific performance actions, where the rules as to costs in those actions have been followed (*Hatten v. Russell*, 38 Ch. D. 334; *Marlborough v. Sartoris*, 32 Ch. D. 616). In one case an action was brought by a tenant for life against trustees and others to determine questions as to his title to sell under this act, in which he was given party and party costs (*Sebright v. Thornton*, 1885, W. N. 176; where see as to costs of mortgagees). As to costs of actions commenced by originating summons, in which questions under the act were determined, see *Re Atkinson*, *Atkinson v. Bruce* (30 Ch. D. 613); *Re Strangways*, *Hickley v. Strangways* (34 Ch. D. 433); *Re Llewellyn*, *Llewellyn v. Williams* (37 Ch. D. 328); *Re Powell*, *Allaway v. Oakley* (1884, W. N. 67).

The costs of a summons taken out in an administration action to decide questions under this act may be made costs in that action (*Constable v. Constable*, 54 L. T. 610; see *Cardigan v. Curzon-Howe*, 30 Ch. D. 540), or may be paid out of the estate (*Taylor v. Poncia*, 25 Ch. D. 651).

In the case of ordinary applications under the act, only the costs of a summons are to be allowed unless a petition be directed by the judge (S. L. Act Rules, No. 2, *post*, p. 733). The costs of petitions were allowed in *Re Houghton* (30 Ch. D. 102); *Re Bethlehem Hospitals* (30 Ch. D. 541, where see judgment).

As regards summonses, the costs of all parties of a summons by tenant for life, either wholly or partially successful, were paid out of the settled estate (*Re Morgan*, 24 Ch. D. 117; *Re Paget*, 30 Ch. D. 165; see *Re Ailesbury*, 1892, 1 Ch. 548). For form of usual order in such cases, see S. L. Act Rules, Form 3, *post*, p. 736. The tenant for life, however, may have to pay his own costs (*Re Tucker*, 1895, 2 Ch. 468), or the costs of the mortgagees of his life estate (*Re Smith*, 1891, 3 Ch. 76; *Sebright v. Thornton*, 1885, W. N. 176; compare *Cardigan v. Curzon-Howe*, 41 Ch. Div. 375; *Re Peel*, 1910, W. N. 16). The costs of an unsuccessful summons by tenant for life may be paid out of the estate (*Re Knatchbull*, 27 Ch. D. 349; see *Re James*, 51 L. T. 596; *Re Sebright*, 33 Ch. D. 442); but the tenant for life may, if not successful, have to pay all the costs, if there is no fund available for the purpose (*Re Beaumont*, 58 L. T. 916; see *Re Bristol*, 1893, 3 Ch. 161); or if the fund is held not within the S. L. Acts (*Re Bath and Wells*, 1899, 2 Ch. 138). The costs of an unsuccessful summons by persons claiming to be tenant for life were paid out of the estate (*Re Horne*, 39 Ch. D. 84; see *Re Atkinson*, *Atkinson v. Bruce*, 30 Ch. D. 613).

Where on a summons taken out by the trustees it was decided that a tenant for life could not sell under the act, the tenant for life had to pay his own costs (*Re Collinge*, 36 Ch. D. 519). Where two trustees appeared by different counsel on opposite sides, both, having acted reasonably, were given costs out of the estate (*Re Ailesbury*, 1892, 1 Ch. 548). Trustees, however, who appeared by the same counsel as the tenant for life, on an application by him, had to pay their own costs (*Re Broadwater*, 53 L. T. 745).

Under S. L. Act Rules, No. 14, *post*, p. 734, a person paying capital money into court may deduct costs of paying in (see Form 10). A purchaser taking out a summons in an action for leave to pay the purchase-money into court was allowed to deduct his costs (*Cardigan v. Curzon-Howe*, 30 Ch. D. 540).

All the costs of an appeal were given out of the estate when it was a case proper to be decided by the Appeal Court (*Re Jones*, 26 Ch. Div. 744; see *Re Ailesbury*, 1892, 1 Ch. 548). A person claiming to be tenant for life had to pay all the costs of an unsuccessful appeal (*Re Strangways*, *Hickley v. Strangways*, 34 Ch. Div. 433). A tenant for life paid his own costs of an unsuccessful appeal, and a remainderman paid his own costs, the trustees

being given costs out of the estate (*Re Sebright*, 33 Ch. D. 445). An unsuccessful appeal by a tenant for life was dismissed with costs (*Re Hope, De Cetto v. Hope*, 1899, 2 Ch. 679). And where the trustees and remainderman appealed against an order sanctioning a sale under sect. 37, the appeal was dismissed with costs (*Re Radnor*, 45 Ch. Div. 423). 45 & 46 Vict. c. 38, s. 46.

A tenant for life successfully applying to be let into possession was, in one case, not ordered to pay the costs of remaindermen (*Re Newen, Newen v. Barnes*, 1894, 2 Ch. 297; see, however, *Re Hunt, Pollard v. Geake*, 1900, W. N. 65; 1901, W. N. 144). In another case where no complaint was made against the trustees he had to pay their costs as well as his own (*Re Bagot, Bagot v. Kittoe*, 1894, 1 Ch. 177).

Costs were allowed on the higher scale in *Re Chaytor* (25 Ch. D. 651). Scale.

Under the words "charges and expenses," the expenses of an abortive attempt to sell have been ordered to be paid out of the settled property (*Re Smith*, 1891, 3 Ch. 65). Charges and expenses.

(t) The powers of the High Court may, as regards land and estates in the County Palatine of Durham, be exercised by the Palatine Court (52 & 53 Vict. c. 47, s. 10).

(u) General rules as to applications in the High Court made under this section are given p. 733, *post*.

(x) As to applications in the county court, see County Court Rules, 1889, Ord. 38.

47. Where the court directs that any costs, charges, or expenses be paid out of property subject to a settlement, the same shall, subject and according to the directions of the court, be raised and paid out of capital money arising under this act, or other money liable to be laid out in the purchase of land to be made subject to the settlement, or out of investments representing such money, or out of income of any such money or investments, or out of any accumulations of income of land, money, or investments, or by means of a sale of part of the settled land in respect whereof the costs, charges, or expenses are incurred, or of other settled land comprised in the same settlement and subject to the same limitations, or by means of a mortgage of the settled land or any part thereof, to be made by such person as the court directs, and either by conveyance of the fee simple or other estate or interest the subject of the settlement, or by creation of a term, or otherwise, or by means of a charge on the settled land or any part thereof, or partly in one of those modes and partly in another or others, or in any such other mode as the court thinks fit. Payment of costs out of settled property.

See general note as to costs under sect. 46 (*ante*, p. 705), *Re Smith* (1891, 3 Ch. 165), *Williams v. Jenkins* (1894, W. N. 176; 13 R. 92); and see form of summons in *Re Aylesford* (32 Ch. D. 163). See also *Hamilton v. Tighe* (1898, 1 I. R. 123).

48.—(6.) The Land Commissioners shall, by virtue of this act, have, for the purposes of any act, public, local, personal, or private, passed or to be passed, making provision for the execution of improvements on settled land, all such powers and authorities as they have for the purposes of the Improvement of Land Act, 1864; and the provisions of the last-mentioned act relating to their proceedings and inquiries, and to authentication of instruments, and to declarations, statements, notices, Constitution of land Commissioners; their powers, &c.

27 & 28 Vict. c. 114.

45 & 46 Vict.
c. 38, s. 48.

applications, forms, security for expenses, inspections, and examinations, shall extend and apply, as far as the nature and circumstances of the case admit, to acts and proceedings done or taken by or in relation to the Land Commissioners under any act making provision as last aforesaid; and the provisions of any act relating to fees or to security for costs to be taken in respect of the business transacted under the acts administered by the three several bodies of commissioners aforesaid shall extend and apply to the business transacted by or under the direction of the Land Commissioners under any act, public, local, personal, or private, passed or to be passed, by which any power or duty is conferred or imposed on them.

Sub-sects. 1—5 inclusive, constituting the Land Commissioners for England, were repealed by 52 & 53 Vict. c. 30, s. 13, the powers and duties of the Land Commissioners for England under this act have been transferred to the Board of Agriculture and Fisheries (Board of Agriculture and Fisheries Acts, 1889 and 1903).

Filing of
certificates,
&c. of com-
missioners.

49.—(1.) Every certificate and report approved and made by the Land Commissioners under this act shall be filed in their office.

(2.) An office copy of any certificate or report so filed shall be delivered out of their office to any person requiring the same, on payment of the proper fee, and shall be sufficient evidence of the certificate or report whereof it purports to be a copy.

XII.—RESTRICTIONS, SAVINGS, AND GENERAL PROVISIONS.

Powers not
assignable;
contract not
to exercise
powers void.

50.—(1.) The powers under this act of a tenant for life are not capable of assignment or release, and do not pass to a person as being, by operation of law or otherwise, an assignee of a tenant for life, and remain exerciseable by the tenant for life after and notwithstanding any assignment, by operation of law or otherwise, of his estate or interest under the settlement.

(2.) A contract by a tenant for life not to exercise any of his powers under this act is void.

(3.) But this section shall operate without prejudice to the rights of any person being an assignee for value of the estate or interest of the tenant for life; and in that case the assignee's rights shall not be affected without his consent, except that, unless the assignee is actually in possession of the settled land or part thereof, his consent shall not be requisite for the making of leases thereof by the tenant for life, provided the leases are made at the best rent that can reasonably be obtained, without fine, and in other respects are in conformity with this act.

(4.) This section extends to assignments made or coming into operation before or after and to acts done before or after the commencement of this act; and in this section assignment

includes assignment by way of mortgage, and any partial or qualified assignment, and any charge or incumbrance; and assignee has a meaning corresponding with that of assignment. 45 & 46 Vict.
c. 38, s. 50.

As to assignments or charges in consideration of marriage, or by way of family arrangement, see S. L. Act, 1890, s. 4, *post*, p. 726. The complete destruction of a life estate, as on a disentailment and resettlement where the old life estate is not restored, does not destroy the powers of the tenant for life as tenant for life under the original settlement (*Re Mundy and Roper*, 1899, 1 Ch. 275, 296). As to the effect of resettlement on a tenant for life's powers, and as to the merger of a life estate, see note to sect. 2, *ante*, pp. 670, 671. The bankruptcy of a tenant for life does not prevent the exercise of his powers under this act (*Re Mansel*, 1884, W. N. 209; *Re Ailesbury*, 1892, 1 Ch. 535). The court, however, has refused to sanction the sale of a mansion-house without the consent of the tenant for life's mortgagees (*Re Sebright*, 33 Ch. D. 429); which they are free to give or withhold (*Cardigan v. Curzon-Howe*, 40 Ch. D. 341; see *Re Ailesbury*, 1893, W. N. 140).

The tenant for life's conveyance is subject to charges as mentioned in sect. 20, *ante*, p. 684, where see note. A mortgagee of the life estate who has consented to the tenant for life selling need not concur in the conveyance (*Re Dickin and Kelsall*, 1908, 1 Ch. 213).

As to a tenant for life's covenant, see *Re Hale and Smyth* (55 L. T. 151); quoted *ante*, p. 672.

In connection with the latter part of sub-sect. (1), see sect. 2 (7) (*ante*, p. 668); and compare 23 & 24 Vict. c. 145, s. 31 (*ante*, p. 548), and the note as to the extinguishment of powers appendant (*ante*, p. 323).

51.—(1.) If in a settlement, will, assurance, or other instrument executed or made before or after, or partly before and partly after, the commencement of this act a provision is inserted purporting or attempting, by way of direction, declaration, or otherwise, to forbid a tenant for life to exercise any power under this act, or attempting, or tending, or intended, by a limitation, gift, or disposition over of settled land, or by a limitation, gift, or disposition of other real or any personal property, or by the imposition of any condition, or by forfeiture, or in any other manner whatever, to prohibit or prevent him from exercising, or to induce him to abstain from exercising, or to put him into a position inconsistent with his exercising, any power under this act, that provision, as far as it purports, or attempts, or tends, or is intended to have, or would or might have, the operation aforesaid, shall be deemed to be void. Prohibition
or limitation
against
exercise of
powers, void.

(2.) For the purposes of this section an estate or interest limited to continue so long only as a person abstains from exercising any power shall be and take effect as an estate or interest to continue for the period for which it would continue if that person were to abstain from exercising the power, discharged from liability to determination or cesser by or on his exercising the same.

This section was not intended to enlarge a particular estate not properly an estate for life (*Re Hazle*, 29 Ch. Div. 84). To make it apply there must be found in the settlement a limitation, which but for the attempted prohibition would constitute a tenant for life within this act (*Re Atkinson, Atkinson v. Bruce*, 31 Ch. Div. 581).

A condition of forfeiture for non-residence does not prevent a lease of a

45 & 46 Vict. c. 38, s. 51. mansion-house (*Re Thompson*, 21 L. R. Ir. 109), or a sale (*Re Paget*, 30 Ch. D. 162; see *Re Brown*, 27 Ch. D. 179; *Re Richardson*, R. v. R., 1904, 2 Ch. 777; and compare *Re Eastman*, 68 L. J. Ch. 122); and does not attach to the proceeds of sale (*Re Paget*, *sup.*). But such a condition is not rendered void under this section unless it interferes with the exercise of the powers of the tenant for life (*Re Haynes*, *Kemp v. Haynes*, 37 Ch. D. 307; *Re Trenchard*, T. v. T., 1902, 1 Ch. 378). A provision of this nature was held void under the section (*Re Dalrymple*, *Bircham v. Springfield*, 49 W. R. 627).

A proviso depriving a tenant for life of real estate of certain benefits in personal estate in the event of his "selling" or becoming "disentitled to the possession of" the real estate is void, whether contained in the settlement of the real estate (*Re Ames*, A. v. A., 1893, 2 Ch. 479; see *Re Eastman*, *sup.*), or in the will of a person other than the settlor (*Re Smith*, *Grose Smith v. Bridger*, 1899, 1 Ch. 331).

A provision binding the tenant for life to recoup to the trustees money applied by them under the act for improvements would be void under this section (*Re Sudbury*, *Vernon v. Vernon*, 1893, 3 Ch. 78).

Provision
against
forfeiture.

52. Notwithstanding anything in a settlement, the exercise by the tenant for life of any power under this act shall not occasion a forfeiture.

See note to sect. 51.

Tenant for
life trustee
for all parties
interested.

53. A tenant for life shall, in exercising any power under this act, have regard to the interests of all parties entitled under the settlement, and shall, in relation to the exercise thereof, by him, be deemed to be in the position and to have the duties and liabilities of a trustee for those parties.

The object of this section is to protect the material interests of all the parties entitled, and to prevent the tenant for life from doing anything in the exercise of his powers which will damage those interests (*Re Ailesbury*, 1892, 1 Ch. 540; *Re Stafford*, *Gerard v. Stafford*, 1904, 2 Ch. 83). He should consider not merely pecuniary interests but also sentimental feelings (*Re Ailesbury*, 1892, 1 Ch. 536, 541; *Re Hope*, *De Cetto v. Hope*, 1899, 2 Ch. 679). He may exercise his powers for his own benefit (*Re Sebright*, 33 Ch. D. 436; *Wheelwright v. Walker*, 23 Ch. D. 759); but not for his own benefit solely, or for the benefit of a stranger (*Cardigan v. Curzon-Howe*, 30 Ch. D. 539; *Re Chawner*, 1892, 2 Ch. 195; *Sutherland v. S.*, 1893, 3 Ch. 169; *Middlemas v. Stevens*, 1901, 1 Ch. 574). He is bound to exercise his discretion as if he were an independent trustee for himself and all the other members of the family (*Re Radnor*, 45 Ch. Div. 417). The fact that he gets a benefit is not sufficient to prevent him from exercising the requisite discretion (*Re Stamford*, 56 L. T. 484). *Prima facie* that discretion ought to prevail (*Re Stamford*, 43 Ch. D. 95; *Re Radnor*, 45 Ch. D. 417; *Re Ailesbury*, 1892, 1 Ch. 536; *Re Coleridge*, 1895, 2 Ch. 707), *e.g.* in the general policy as to improvements (*Re Egmont*, *Lefroy v. Egmont*, 1906, 2 Ch. 161).

The court, however, may interfere if it sees that, in spite of his honesty, the tenant for life is acting injuriously towards those whom he is bound to protect (*Re Richardson*, R. v. R., 1900, 2 Ch. 791; *Hampden v. Buckinghamshire*, 1893, 2 Ch. 544). Thus where the settled land included public-houses, the tenant for life could not grant leases of these so as to preclude the sale of intoxicating liquors (*Re Somers*, *Cocks v. Somerset*, 11 Times L. R. 567); and he has been restrained from mortgaging one part of settled land, to the prejudice of annuities charged thereon, in order to pay off incumbrances on another part (*Hampden v. Buckinghamshire*, 1893, 2 Ch. 531; compare *Re Monson*, 1898, 1 Ch. 427). A tenant for life will be personally answerable for the improper or improvident exercise

of his powers (*Re Ailesbury*, 1892, 1 Ch. 536; *Re Marlborough, Marlborough v. Marjoribanks*, 32 Ch. D. 14; *Re Norfolk*, 1900, 1 Ch. 467; see *Hatten v. Russell*, 38 Ch. D. 345; *Wheelwright v. Walker*, 23 Ch. D. 762; *Norton v. Johnstone*, 30 Ch. D. 651). See as to the bearing of sect. 53 on the payment off out of capital moneys of incumbrances payable (under the trusts of the settlement) out of rents and profits, *Re Knatchbull*, 29 Ch. Div. 588; *Re Richardson, R. v. R.*, 1900, 2 Ch. 778.

45 & 46 Vict.
c. 38, s. 53.

The fiduciary character of a tenant for life has been held to prevent him from selling at a price to be fixed by another (*Re Wilton*, 1907, 1 Ch. 55); and from directing an improper investment in leaseholds (*Re Hunt, Bulteel v. Lawdeshayne*, 1905, 2 Ch. 423; compare *Re Peel*, 1910, 1 Ch. 389).

The duty imposed by this section on the tenant for life does not affect the title of a purchaser without notice of any breach of such duty (*Re Ailesbury*, 1892, 1 Ch. 536; see *Mogridge v. Clapp*, 1892, 3 Ch. 396, and sect. 54). But a lease granted by a tenant for life in consideration of a money payment to himself was void (*Chandler v. Bradley*, 1897, 1 Ch. 315). So also a lease granted solely for the benefit of his wife (*Sutherland v. S.*, 1893, 3 Ch. 169).

Under this section a tenant for life has rather the responsibilities than the rights of a trustee (*Re Llewellyn, Llewellyn v. Williams*, 37 Ch. D. 325; see *Cardigan v. Curzon-Howe*, 41 Ch. Div. 379; *Re Gerard*, 1893, 3 Ch. 265), and accordingly is not entitled to all costs and expenses (*Sebright v. Thornton*, 1885, W. N. 176; *Cardigan v. Curzon-Howe*, 41 Ch. Div. 375; see *Re Beck*, 24 Ch. D. 608; *Re Llewellyn, sup.*). See further, as to the costs of the tenant for life, the note to sect. 21, sub-sect. (x.) (*ante*, p. 688), and the note to sect. 46 (*ante*, p. 706).

54. On a sale, exchange, partition, lease, mortgage, or charge, a purchaser, lessee, mortgagee, or other person dealing in good faith with a tenant for life shall, as against all parties entitled under the settlement, be conclusively taken to have given the best price, consideration, or rent, as the case may require, that could reasonably be obtained by the tenant for life, and to have complied with all the requisitions of this act.

General protection of purchasers, &c.

"Good faith" involves a belief that all is being regularly and properly done (*Chandler v. Bradley*, 1897, 1 Ch. 323). A. purchasing from a tenant for life is not bound to inquire whether the vendor has had a valuation (*Hurrell v. Littlejohn*, 1904, 1 Ch. 694); and an immediate re-sale by A. at an advanced price is not alone sufficient evidence of bad faith on his part (*Ib.* 689). A. dealing in good faith with the tenant for life is not concerned to inquire as to notices to trustees (sect. 45). The mere knowledge that there are no trustees seems not to prevent A. from being protected by sect. 54 (*Mogridge v. Clapp*, 1892, 3 Ch. 396, 401; see *Fisher v. Grazebrook*, 1898, 2 Ch. 661).

Where a person pays a sum of money to the tenant for life to obtain a lease he is not protected by this section (*Chandler v. Bradley*, 1897, 1 Ch. 315; see also *Sutherland v. S.*, 1893, 3 Ch. 193). The section only applies to the grant of a lease, not to a subsequent transfer (*Re Handman and Wilcox*, 1902, 1 Ch. 601).

55.—(1.) Powers and authorities conferred by this act on a tenant for life or trustees or the court or the Land Commissioners are exerciseable from time to time.

Exercise of powers; limitation of provisions, &c.

(2.) Where a power of sale, enfranchisement, exchange, partition, leasing, mortgaging, charging, or other power is exercised by a tenant for life, or by the trustees of a settlement, he and they may respectively execute, make, and do all deeds, instruments, and things necessary or proper in that behalf.

45 & 46 Vict.
c. 38, s. 55.

(3.) Where any provision in this act refers to sale, purchase, exchange, partition, leasing, or other dealing, or to any power, consent, payment, receipt, deed, assurance, contract, expenses, act, or transaction, the same shall be construed to extend only (unless it is otherwise expressed) to sales, purchases, exchanges, partitions, leasings, dealings, powers, consents, payments, receipts, deeds, assurances, contracts, expenses, acts, and transactions under this act.

A tenant for life selling may enter into the usual covenants for title (*Re Ray*, 1896, 1 Ch. 468, 479; see also *Re Llewellyn*, *Llewellyn v. Williams*, 37 Ch. D. 327; *Re Smith*, 1891, 3 Ch. 65).

Saving for
other powers.

56.—(1.) Nothing in this act shall take away, abridge, or prejudicially affect any power for the time being subsisting under a settlement, or by statute or otherwise, exerciseable by a tenant for life, or by trustees with his consent, or on his request, or by his direction, or otherwise; and the powers given by this act are cumulative.

(2.) But, in case of conflict between the provisions of a settlement and the provisions of this act, relative to any matter in respect whereof the tenant for life exercises or contracts or intends to exercise any power under this act, the provisions of this act shall prevail; and, accordingly, notwithstanding anything in the settlement, the consent of the tenant for life shall, by virtue of this act, be necessary to the exercise by the trustees of the settlement or other person of any power conferred by the settlement exerciseable for any purpose provided for in this act (2).

(3.) If a question arises, or a doubt is entertained, respecting any matter within this section, the court may, on the application of the trustees of the settlement, or of the tenant for life, or of any other person interested, give its decision, opinion, advice, or direction thereon.

Instances of powers by statute exerciseable by a tenant for life or by trustees with his consent will be found in the Fines and Recoveries Act, sect. 15, *ante*, p. 275 (leases by tenant in tail, see sect. 58, sub-sect. 1, *post*); in Lord Cranworth's Act, sects. 1 and 10 (*ante*, pp. 542—544); in the S. E. Act, 1877, sect. 46 (*ante*, p. 653); and in the L. C. C. Act, 1845, sect. 7.

A statute may constitute the settlement or form part thereof (sect. 2, sub-sect. 1, *ante*, p. 668). In sect. 56, sub-sect. 1, it seems to be distinguished from it. A private statute did not form part of the settlement where the land was settled by will and the statute did not incorporate the will or contain any limitations to persons in succession, but gave powers to the will trustees (*Talbot v. Scarisbrick*, 1908, 1 Ch. 812). The restriction in a private act on a trustee's power of sale did not limit the tenant for life's power under this act (*Re Chaytor*, 25 Ch. D. 651).

As to the joint operation of powers in the settlement and the powers in the act, see *Re Newcastle* (24 Ch. D. 129); and compare *Re Sudbury*, *Vernon v. Vernon* (1893, 3 Ch. 74). Where an order has already been made under the S. E. Act, 1877, the powers of this act are not cumulative (*Re Poole*, 50 L. T. 585; 32 W. R. 956; see *De Barrs-Haden*, 49 L. T. 661; 32 W. R. 194).

A case of conflict within sub-sect. 2 was held to arise in *Clarke v. Thornton*

(35 Ch. D. 315), where the statutory power of a tenant for life to have capital money expended in improvements was held to override a power given by the settlement to trustees to apply income for that purpose (see *De Stamford*, 56 L. T. 484); also in a case where a provision for payment of the rents and profits "after payment thereof of all incidental expenses and outgoings" was held not to prevent the application of capital moneys in re-constructing the drains of leasehold houses (*Re Thomas, Weatherall v. Thomas*, 1900, 1 Ch. 319; compare *Re Sudbury, Vernon v. Vernon*, 1893, 3 Ch. 74; and see *Re Partington, Reigh v. Kane*, 1902, 1 Ch. 711).

45 & 46 Vict.
c. 38, s. 56.

It has been said, however, that the provisions referred to in this sub-section are provisions connected with the execution of the power (e.g., consent of a third person); not with the results of such execution (*Lonsdale v. Lowther*, 1900, 2 Ch. 697). So a power of leasing given by the settlement and more beneficial in result to the tenant for life was presumed to have been exercised in preference to the statutory power (*Ib.*). The consent of the tenant for life is not necessary to the exercise by trustees of an absolute trust for sale (*Taylor v. Poncia*, 25 Ch. D. 646); or of powers in a private act, which does not form part of the settlement (*Talbot v. Scarisbrick*, 1908, 1 Ch. 812); but was necessary to the exercise by trustees of a power of sale in the settlement (*Re Clitheroe*, 31 Ch. Div. 135; *Re Osborne and Bright*, 1902, 1 Ch. 335). An order for sale overrides the necessity for any such consent (*Taylor v. Poncia, sup.*). The consent of one of several persons constituting the tenant for life is sufficient (S. L. Act, 1884, s. 6, *post*, p. 723); but not where the several persons are tenants for life of separate undivided shares (see *Re Osborne and Bright, sup.*).

The power given by sub-sect. 2 to the tenant for life to consent or refuse to consent to the exercise of a power has been held to be one of the powers of a tenant for life under the act (*Re Newcastle*, 24 Ch. D. 139). And accordingly where the tenant for life is an infant, the consent required by sub-sect. 2 may under sect. 60 be given by the trustees (*ib.* 139, 140). Where he is a lunatic so found, the consent can, it seems, be given by his committee (sect. 62, *post*). Where he is a lunatic not so found, it can also, it seems, be given by the quasi committee appointed under sect. 116 of the Lunacy Act, 1890, subject to the direction of the Judge in Lunacy (Lunacy Act, 1908, sect. 1). Before this act it was held that such a power of giving consent did not fall within sect. 128 of the Lunacy Act, 1890, *post*; and accordingly could not be exercised by the quasi committee (*Re De Moleyns, and Harris*, 1908, 1 Ch. 110).

57.—(1.) Nothing in this act shall preclude a settlor from conferring on the tenant for life, or the trustees of the settlement, any powers additional to or larger than those conferred by this act.

Additional or
larger powers
by settle-
ment.

(2.) Any additional or larger powers so conferred shall, as far as may be, notwithstanding anything in this act, operate and be exercisable in the like manner, and with all the like incidents, effects, and consequences, as if they were conferred by this act, unless a contrary intention is expressed in the settlement.

XIII.—LIMITED OWNERS GENERALLY.

58.—(1.) Each person as follows shall, when the estate or interest of each of them is in possession (*a*), have the powers of a tenant for life under this act, as if each of them were a tenant for life as defined in this act (namely):

Enumeration
of other
limited
owners, to
have powers

45 & 46 Vict.
c. 38, s. 58.

of tenant for
life.

- (i.) A tenant in tail, including a tenant in tail who is by act of parliament restrained from barring or defeating his estate tail, and although the reversion is in the Crown, and so that the exercise by him of his powers under this act shall bind the Crown, but not including such a tenant in tail where the land in respect whereof he is so restrained was purchased with money provided by Parliament in consideration of public services (*b*):
- (ii.) A tenant in fee simple, with an executory limitation, gift, or disposition over, on failure of his issue, or in any other event (*c*):
- (iii.) A person entitled to a base fee, although the reversion is in the Crown, and so that the exercise by him of his powers under this act shall bind the Crown (*d*):
- (iv.) A tenant for years determinable on life, not holding merely under a lease at a rent (*e*):
- (v.) A tenant for the life of another, not holding merely under a lease at a rent (*f*):
- (vi.) A tenant for his own or any other life, or for years determinable on life, whose estate is liable to cease in any event during that life, whether by expiration of the estate, or by conditional limitation, or otherwise, or to be defeated by an executory limitation, gift, or disposition over, or is subject to a trust for accumulation of income for payment of debts or other purpose (*g*):
- (vii.) A tenant in tail after possibility of issue extinct:
- (viii.) A tenant by the curtesy (*h*):
- (ix.) A person entitled to the income of land under a trust or direction for payment thereof to him during his own or any other life, whether subject to expenses of management or not, or until sale of the land, or until forfeiture of his interest therein on bankruptcy or other event (*i*).

(2.) In every such case, the provisions of this act referring to a tenant for life, either as conferring powers on him or otherwise, and to a settlement, and to settled land, shall extend to each of the persons aforesaid, and to the instrument under which his estate or interest arises, and to the land therein comprised.

(3.) In any such case any reference in this act to death as regards a tenant for life shall, where necessary, be deemed to refer to the determination by death or otherwise of such estate or interest as last aforesaid.

In sect. 58 the singular may include the plural (*Re Bennet*, B. v. B. 1903, 2 Ch. 142). But the limited owners referred to in the section must be persons possessing beneficially the estates or interests therein mentioned (*Re Jemmett and Guest*, 1907, 1 Ch. 634).

Sub-sect. (1). (*a*) In sub-sect. (1) the words "in possession" are used by way of distinction from in remainder and reversion (*Re Jones*, 26 Ch. Div. 744; *Re Morgan*, 24 Ch. D. 116). So an infant may be "in possession" by his

guardian (*Re Morgan, sup.*). But where there was a trust of the whole income for a term for management and accumulation, with a trust after the determination of the term to settle the land, the life estate under the executory settlement was held to be *in futuro*, and not within this section (*Re Strangways, Hickley v. Strangways*, 34 Ch. Div. 423).

45 & 46 Vict.
c. 38, s. 58.

(b) Clause (i.) does not render a tenant in tail who is within the clause capable of alienating within the meaning of sect. 5, sub-sect. 5, of the Finance Act, 1894 (*Re Bolton Estates Act*, 1863, 1904, 2 Ch. 289). As to the tenants in tail who are within the clause, see note to sect. 18 of the Fines and Recoveries Act, 1833, *ante*, p. 278; and see *Re Bolton*, 52 L. T. 728.

Clause (i.).

(c) Clause (ii.) applied where there was an executory limitation over in a certain event (*Re Richardson, R. v. R.*, 1904, 2 Ch. 777); and where there was a trust to pay the income to a person for the maintenance of an infant until twenty-one, then to the infant absolutely, but if he died under twenty-one over (*Re Morgan*, 24 Ch. D. 114; see *Re James*, 51 L. T. 596).

Clause (ii.).

(d) As to the words "base fee," in clause (iii.), see Fines and Recoveries Act, 1833, s. 1 (*ante*, p. 263). A tenant for life of a base fee can sell the fee simple (*Re Morshead*, 1893, W. N. 180).

Clause (iii.).

(e) These words do not include a person entitled to receive, if he shall so long live, the rents payable under a lease for years (*Re Hazle*, 29 Ch. Div. 79). As to the reason for the insertion of the words, see *Re Mundy and Roper*, 1899, 1 Ch. 298.

Clause (iv.).

(f) Where income was directed to be accumulated during a person's life, the next of kin entitled under the Thellusson Act were held to be within this clause (*Vine v. Raleigh*, 1896, 1 Ch. 37).

Clause (v.).

(g) A person to whom a property is devised so long as he shall reside, and in default over, is within clause (vi.) (*Re Paget*, 30 Ch. D. 161); which has been applied also to a trust to permit a person to occupy a house so long as she desires (*Re Edwards*, 1897, 2 Ch. 412; see *Re Carne*, 1899, 1 Ch. 324; see *Re Llanover, Herbert v. Freshfield*, 1903, 2 Ch. 16), and to a widowhood interest (*Re Eastman*, 68 L. J. Ch. 122). Even where the widow's interest was subject to a trust for maintenance of children (*Re Pollock, P. v. P.*, 1906, 1 Ch. 146; see *Re Booth*, 1894, 2 Ch. 282; and sect. 2, sub-sect. 7, *ante*, p. 668). But the clause does not apply to a person merely entitled to receive surplus rents from managing trustees (*Re Llanover, Herbert v. Ram*, 1907, 1 Ch. 649), or to a trust to pay rents during A.'s life to A., his wife and children, or one or more of them (*Re Atkinson, Atkinson v. Bruce*, 31 Ch. Div. 577).

Clause (vi.).

The words "trust for accumulation" applied where there was an antecedent term supporting such a trust (*Re Clitheroe*, 31 Ch. Div. 141); and include a trust for payment of debts without express direction for accumulation (*Williams v. Jenkins*, 1893, 1 Ch. 700; see *Re Richardson, R. v. R.* 1900, 2 Ch. 778; *Re Money-Kyrle, M. v. M.*, *Ib.*, 839). Where the whole income is during a term directed to be applied in a certain manner or accumulated, a tenant for life who is given an immediate estate subject to the term is within this sub-section (*Re Martyn, Coope v. Martyn*, 69 L. J. Ch. 733; 83 L. T. 146; see *Re Woodhouse, Annesley v. Woodhouse*, 1898, 1 Ir. R. 69); *secus*, where the life estate only commences after the determination of the term (*Re Strangways, Hickley v. Strangways*, 34 Ch. Div. 431).

(h) The estate by the curtesy (clause viii.) is deemed to arise under a settlement made by the wife (S. L. Act, 1884, s. 8, *post*, p. 724). For the case of a lease under this act by a tenant by the curtesy, see *Mogridge v. Clapp* (1892, 3 Ch. 382); see also *Bates v. Kesterton* (1896, 1 Ch. 159); *Re Pocock and Prankerdt, Ib.* 306. As to an estate by the curtesy generally, see the note, *ante*, p. 378.

Clause (viii.).

(i) Clause (ix.) applied where several annuitants were together entitled to the whole income, the singular including the plural (*Re Bennet, B. v. B.*, 1903, 2 Ch. 136). "Entitled" in the clause means entitled according to the

Clause (ix.).

- 45 & 46 Vict. c. 38, s. 58.** limitations of the settlement, without regard to incumbrances (*Re Jones*, 26 Ch. Div. 738). The clause includes a direction to pay surplus rents, after keeping down interest on mortgages (*Cardigan v. Curzon-Howe*, 30 Ch. D. 525), or expenses under extensive powers of management (*Clarke v. Thornton*, 35 Ch. D. 307; see *Re Jones*, 26 Ch. Div. 738; *Re Cookes*, 1885, W. N. 177; *Re Bentley, Wade v. Wilson*, 33 W. R. 610), but does not apply to an interest taken under an intestacy (*Re Llanover, Herbert v. Ram*, 1907, 1 Ch. 650). A trust for a married woman for life for her separate use without power of anticipation and after her death as she should by will appoint and in default to her in fee is within this clause (*Re Pocock and Prankerd*, 1896, 1 Ch. 302). A trust, however, to apply the whole or a part of the income for the maintenance of an infant, the surplus to be accumulated not necessarily for his benefit, does not entitle the infant to the income within this clause (*Re Horne*, 39 Ch. Div. 84). The clause does not apply to a trust to pay income to a husband, wife and children, or one or more of them (*Re Atkinson, Atkinson v. Bruce*, 31 Ch. Div. 577).
- Sub.-sect. (2). The effect of sub-sect. (2) is to bring within the act instruments which do not fall within the definition of settlement in sect. 2 (*Re Pocock and Prankerd*, 1896, 1 Ch. 306).

XIV.—INFANTS; MARRIED WOMEN; LUNATICS.

- 59.** Where a person, who is in his own right seised of or entitled in possession to land, is an infant, then for purposes of this act the land is settled land, and the infant shall be deemed tenant for life thereof.

Under this section an infant was deemed tenant for life when his title had vested absolutely (*Re Price, Leighton v. Price*, 27 Ch. D. 552), or subject to divesting on death under twenty-one (*Re James*, 51 L. T. 596; 32 W. R. 898).

An infant entitled contingently on attaining twenty-one is not "entitled in possession" within the section, though there is a trust to apply income for maintenance (*Re Horne*, 39 Ch. D. 84). Compare the position under the S. E. Act of such an infant (*Liddell v. L.*, 52 L. J. Ch. 207; Conv. Act, 1882, sect. 41; *ante*, p. 595). An interest in land belonging to a partnership which had descended to an infant on the death of one partner was within this section (*Re Wells*, 48 L. T. 859; 31 W. R. 764; see *Re Greenville*, 11 L. R. Ir. 138).

- 60.** Where a tenant for life, or a person having the powers of a tenant for life under this act, is an infant, or an infant would, if he were of full age, be a tenant for life, or have the powers of a tenant for life under this act, the powers of a tenant for life under this act may be exercised on his behalf by the trustees of the settlement (*k*), and if there are none, then by such person and in such manner as the court, on the application of a testamentary or other guardian or next friend of the infant, either generally or in a particular instance, orders (*l*).

(*k*) The trustees of the settlement may give, on behalf of the infant, the consent required by sect. 56 (*Re Newcastle*, 24 Ch. D. 140). During the minority of a tenant for life the trustees may prepare and approve their own schemes under sect. 26 (*Re Greys Court*, 1901, W. N. 60). As to trustees exercising the powers of sect. 42 of the Conv. Act, 1881, see *Re Helyar, Helyar v. Beckett*, 1902, 1 Ch. 391. It has been suggested that

the first part of this section gives the trustees of the settlement unrestricted power to exercise the powers of the tenant for life (*Re Dudley*, 35 Ch. D. 343; see *Re Newcastle*, 24 Ch. D. 140). Where, however, it was necessary to obtain the sanction of the court under sect. 10, *ante*, p. 679, the court imposed conditions by reason of the infant being nearly of age (*Cecil v. Langdon*, 54 L. T. 418; and see *Re Powell, Allaway v. Oakley*, 1884, W. N. 67). Where the trustees have already powers of leasing under an order under the S. E. Act, 1877, that order must be suspended before they can exercise the powers given by this act (*Re Poole*, 32 W. R. 956; 50 L. T. 585).

(2) Where an infant is entitled to property, and there are no trustees of the settlement, two courses appear to be open:—(1) To obtain the appointment of trustees under sect. 38; and (2) to obtain the appointment of persons to exercise the powers of a tenant for life on behalf of the infant. If the first course be adopted the trustees will be within the words “the trustees of the settlement” in the above section (*Re Dudley*, 35 Ch. D. 342); and the court has no jurisdiction to restrict the exercise of their powers (*Ib.* 343). The right order would seem to be to appoint trustees generally (see *Re Morgan*, 24 Ch. D. 117; *Re Simpson, Re Whitchurch*, 1897, 1 Ch. 256). Special directions, however, were given in *Re Price, Leighton v. Price* (27 Ch. D. 552), that the trustees might sell out of court; and in *Re Wells* (48 L. T. 859; 31 W. R. 764) that powers under the particular sections might be exercised. See *Re James* (51 L. T. 596; 32 W. R. 898).

If the second course be adopted the court can restrict the exercise of the powers (*Re Dudley*, 35 Ch. D. 342). The court has refused to appoint under this section a co-owner to exercise the infant's powers for the purpose of a sale (*Re Greenville*, 11 L. R. Ir. 138). Persons were appointed to exercise the infant's powers (*Re M'Clintock*, 27 L. R. Ir. 462). Where a person has been ordered to sell under this section no notice to trustees is necessary, and therefore none need be appointed to receive a notice (*Re Dudley*, 35 Ch. D. 338); but the purchase-money must in such a case be paid into court (*Ib.*).

As to leases of an infant's land, see further the note, *ante*, p. 638.

For form of summons, see R. S. L. Act, Form 22, *post*.

61.—(1.) The foregoing provisions of this act do not apply in the case of a married woman. Married woman, how to be affected.

(2.) Where a married woman who, if she had not been a married woman, would have been a tenant for life, or would have had the powers of a tenant for life under the foregoing provisions of this act, is entitled for her separate use, or is entitled under any statute, passed or to be passed, for her separate property, or as a feme sole, then she, without her husband, shall have the powers of a tenant for life under this act.

(3.) Where she is entitled otherwise than as aforesaid, then she and her husband, together shall have the powers of a tenant for life under this act.

(4.) The provisions of this act referring to a tenant for life and a settlement and settled land shall extend to the married woman without her husband, or to her and her husband together, as the case may require, and to the instrument under which her estate or interest arises, and to the land therein comprised.

(5.) The married woman may execute, make, and do all deeds, instruments, and things necessary or proper for giving effect to the provisions of this section.

45 & 46 Vict.
c. 38, s. 61.

(6.) A restraint on anticipation in the settlement shall not prevent the exercise by her of any power under this act.

A married woman may become entitled as *feme sole* under the following statutes:—Matrimonial Causes Acts, 1857, ss. 21, 25; 1858, ss. 6, 8; and 1878, s. 4; and the M. W. P. Act, 1882 (*ante*, pp. 346 *et seq.*); see *Re Bentley, Wade v. Wilson* (33 W. R. 610); *Bates v. Kesterton* (1896, 1 Ch. 159). Compare also *Re Pocock and Frankerd*, 1896, 1 Ch. 302, quoted *ante*, p. 716.

Tenant for
life, lunatic.

62. Where a tenant for life, or a person having the powers of a tenant for life under this act, is a lunatic, so found by inquisition, the committee of his estate may, in his name and on his behalf, under an order of the Lord Chancellor, or other person entrusted by virtue of the Queen's sign manual with the care and commitment of the custody of the persons and estates of lunatics, exercise the powers of a tenant for life under this act; and the order may be made on the petition of any person interested in the settled land or of the committee of the estate.

A general authority may be given to the committee to take proceedings under this act to sell (*Re Gaitskell*, 40 Ch. Div. 416). Trustees should be appointed, if there are none, to receive notice under sect. 45 (*Re Taylor*, 49 L. T. 420; 52 L. J. Ch. 728). Notices cannot be given by the committee without the leave of the court (*Re Ray*, 25 Ch. D. 464). On a sale of the fee the committee may be authorized to enter into the covenants usual in a conveyance (*Re Ray*, 1896, 1 Ch. 468; see *Re Fox*, 33 Ch. Div. 37). As to the jurisdiction in lunacy, see now Lunacy Act, 1890, ss. 108, 120; and as to applications in lunacy, see sect. 338.

In the case of a lunatic not so found, any powers which, if such person were a lunatic so found, could be exercised by his committee may be exercised by the quasi committee appointed under sect. 116 of the Lunacy Act, 1890, subject to the direction of the Judge in Lunacy (Lunacy Act, 1908, sect. 1). Before that act it had been held that the power of leasing vested in the tenant for life by the Settled Land Acts fell within sect. 120 of the Lunacy Act, 1890, and accordingly could be exercised by the quasi committee appointed under sect. 116 of that act (*Re Salt*, 1896, 1 Ch. 117). On the other hand, it had been held that the quasi committee could not exercise certain other powers which did not fall within sect. 120 or sect. 128 of the Lunacy Act, 1890; such as the power of sale given by the Settled Land Acts (*Re Baggs*, 1894, 2 Ch. 416); or the power of sale given by sect. 7 of the L. C. C. Act, 1845 (*Re S. S. B.*, 1906, 1 Ch. 712); or the power of consenting to a sale by trustees (*Re De Moleyns and Harris*, 1908, 1 Ch. 110).

XV.—SETTLEMENT BY WAY OF TRUSTS FOR SALE.

Provision for
case of trust
to sell and re-
invest in land.

63.—(1.) Any land, or any estate or interest in land, which under or by virtue of any deed, will, or agreement, covenant to surrender, copy of court roll, act of parliament, or other instrument or any number of instruments, whether made or passed before or after, or partly before or partly after, the commencement of this act, is subject to a trust or direction for sale of that land, estate, or interest, and for the application or disposal of

the money to arise from the sale, or the income of that money, or the income of the land until sale, or any part of that money or income, for the benefit of any person for his life, or any other limited period, or for the benefit of two or more persons concurrently for any limited period, and whether absolutely, or subject to a trust for accumulation of income for payment of debts or other purpose, or to any other restriction, shall be deemed to be settled land, and the instrument or instruments under which the trust arises shall be deemed to be a settlement; and the person for the time being beneficially entitled to the income of the land, estate, or interest aforesaid until sale, whether absolutely or subject as aforesaid, shall be deemed to be tenant for life thereof; or if two or more persons are so entitled concurrently, then those persons shall be deemed to constitute together the tenant for life thereof; and the persons, if any, who are for the time being under the settlement trustees for sale of the settled land, or having power of consent to, or approval of, or control over the sale, or if under the settlement there are no such trustees, then the persons, if any, for the time being, who are by the settlement declared to be trustees thereof for purposes of this act are for purposes of this act trustees of the settlement.

45 & 46 Vict.
c. 38, s. 63.

(2.) In every such case the provisions of this act referring to a tenant for life, and to a settlement, and to settled land, shall extend to the person or persons aforesaid, and to the instrument or instruments under which his or their estate or interest arises, and to the land therein comprised, subject and except as in this section provided (that is to say):

(i.) Any reference in this act to the predecessors or successors in title of the tenant for life, or to the remaindermen, or reversioners or other persons interested in the settled land, shall be deemed to refer to the persons interested in succession or otherwise in the money to arise from sale of the land, or the income of that money, or the income of the land, until sale (as the case may require).

(ii.) Capital money arising under this act from the settled land shall not be applied in the purchase of land unless such application is authorized by the settlement in the case of capital money arising thereunder from sales or other dispositions of the settled land, but may, in addition to any other mode of application authorized by this act, be applied in any mode in which capital money arising under the settlement from any such sale or other disposition is applicable thereunder, subject to any consent required or direction given by the settlement with respect to the application of trust money of the settlement.

(iii.) Capital money arising under this act from the settled land and the securities in which the same is invested, shall not for any purpose of disposition, transmission,

45 & 46 Vict.
c. 38, s. 63.

or devolution, be considered as land unless the same would, if arising under the settlement from a sale or disposition of the settled land, have been so considered, and the same shall be held in trust for and shall go to the same persons successively in the same manner, and for and on the same estates, interests, and trusts as the same would have gone and been held if arising under the settlement from a sale or disposition of the settled land, and the income of such capital money and securities shall be paid or applied accordingly.

- (iv.) Land of whatever tenure acquired under this act by purchase, or in exchange, or on partition, shall be conveyed to and vested in the trustees of the settlement, on the trusts, and subject to the powers and provisions which, under the settlement or by reason of the exercise of any power of appointment or charging therein contained, are subsisting with respect to the settled land, or would be so subsisting if the same had not been sold, or as near thereto as circumstances permit, but so as not to increase or multiply charges or powers of charging.

See S. L. Act, 1884, sect. 6 (1) and sect. 7, *post*, p. 723. Where leave has not been given under the last-mentioned section, trustees for sale can determine how land should be placed on market (*Re Harding*, 1891, 1 Ch. 64). Sect. 11, *ante*, p. 680, applies to cases within this section (*Re Ridge*, *Hellard v. Moody*, 31 Ch. Div. 504). The only instrument to be considered the settlement under this section is the instrument which contains the trust for sale (*Re Earle and Webster*, 24 Ch. D. 144). If the only person entitled under that instrument is entitled absolutely, this section has no application (*Ib.*).

Trusts for
sale within
section.

As regards trusts for sale; a trust implied from a will was within the section (*Re McCurdy*, 27 L. R. Ir. 395). A trust to retain real estate or sell at the discretion of the trustees was within the section (*Re Crips*, *Crips v. Todd*, 95 L. T. 865). The fact of the consent of the tenant for life being required to a sale does not prevent a trust from being within the section (*Re Wagstaffe*, 1909, 2 Ch. 201; see *Re Child*, 1907, 2 Ch. 348; *Re Tuthill*, 1907, 1 I. R. 305). But a trust for sale which by reason of an over-riding power may never arise is not within the section (*Re Goodall*, *Fane v. Goodall*, 1909, 1 Ch. 440), nor is a postponed trust (*Re Horne*, 39 Ch. Div. 84).

Tenants for
life within
section.

As regards tenants for life; where land is directed to be sold and the proceeds held in trust for A. for life and the sale is properly postponed, A. is entitled to the rents of the real estate until sale (*Re Oliver*, *Wilson v. Oliver*, 1908, 2 Ch. 74; *Re Darnley*, *Clifton v. Darnley*, 1907, 1 Ch. 159); and is tenant for life of the land within this section (*Re Searle*, *Searle v. Baker*, 1900, 2 Ch. 829). Where there is a discretionary power of maintenance, the surplus to be accumulated, no one is beneficially entitled to the income within this section (*Re Horne*, *sup.*; see *Re Powell*, *Allaway v. Oakley*, 1884, W. N. 67). A married woman equitable tenant for life under a settlement by way of trust for sale was let into possession, and leave was given her to exercise all the powers of a tenant for life except sale and exchange (*Re Bagot*, *Bagot v. Kittoe*, 1894, 1 Ch. 177).

No consent of the tenant for life (see sect. 56) is necessary to a sale by trustees in cases within this section (S. L. Act, 1884, s. 6 (1), *post*, p. 723; *Taylor v. Poncia*, 25 Ch. D. 646).

XVI.—REPEALS.

45 & 46 Vict.
c. 38, s. 64.

64.—(1.) The enactments described in the schedule to this act are hereby repealed. Repeal of enactments in schedule.

(2.) The repeal by this act of any enactment shall not affect any right accrued or obligation incurred thereunder before the commencement of this act; nor shall the same affect the validity or invalidity, or any operation, effect, or consequence, of any instrument executed or made, or of anything done or suffered, or of any order made, before the commencement of this act; nor shall the same affect any action, proceeding, or thing then pending or uncompleted; and every such action, proceeding, and thing may be carried on and completed as if there had been no such repeal in this act.

XVII.—IRELAND.

65.—(1.) In the application of this act to Ireland the foregoing provisions shall be modified as in this section provided. Modifications respecting Ireland.

(2.)—The court shall be her Majesty's High Court of Justice in Ireland.

(3.) All matters within the jurisdiction of that court shall, subject to the acts regulating that court, be assigned to the Chancery Division of that court; but general rules under this act for Ireland may direct that those matters or any of them be assigned to the land judges of that division.

(4.) Any deed inrolled under this act shall be inrolled in the record and writ office of that division.

(5.) General rules for purposes of this act for Ireland shall be deemed rules of court within the Supreme Court of Judicature Act (Ireland), 1877, and may be made accordingly, at any time after the passing of this act, to take effect on or after the commencement of this act. 40 & 41 Vict. c. 57.

(6.) The several Civil Bill Courts in Ireland shall, in addition to the jurisdiction possessed by them independently of this act, have and exercise the power and authority exerciseable by the court under this act, in all proceedings where the property, the subject of the proceedings, does not exceed in capital value five hundred pounds, or in annual value thirty pounds.

(7.) The provisions of Part II. of the County Officers and Courts (Ireland) Act, 1877, relative to the equitable jurisdiction of the Civil Bill Courts, shall apply to the jurisdiction exerciseable by those courts under this act. 40 & 41 Vict. c. 56.

(8.) Rules and orders for purposes of this act, as far as it relates to the Civil Bill Courts, may be made at any time after the passing of this act, to take effect on or after the commencement of this act, in manner prescribed by section seventy-nine of the County Officers and Courts (Ireland) Act, 1877.

45 & 46 Vict.
c. 38, s. 65.

(9.) The Commissioners of Public Works in Ireland shall be substituted for the Land Commissioners.

(10.) The term for which a lease other than a building or mining lease may be granted shall be not exceeding thirty-five years.

THE SCHEDULE.

Sect. 64.

REPEALS.

23 & 24 Vict. c. 145...An act to give to trustees,
in part. mortgagees, and others,
certain powers now com- } in part; namely,—
monly inserted in settle-
ments, mortgages, and wills

Part I. and IV.

(being so much of the act as is not repealed by the
Conveyancing and Law of Property Act, 1881).

27 & 28 Vict. c. 114...The Improvement of Land } in part; namely,—
in part. Act, 1864

Sections seventeen and eighteen:

Section twenty-one, from "either by a
party" to "benefice) or" (inclusive); and
from "or if the land owner" to "minor
or minors" (inclusive); and "or circum-
stances" (twice):

Except as regards Scotland.

40 & 41 Vict. c. 18...The Settled Estates Act, 1877...in part; namely,—
in part. Section seventeen.

III.—THE SETTLED LAND ACT, 1884.

47 & 48 VICT. c. 18.

47 & 48 Vict.
c. 18, s. 1.

1. This act may be cited as the Settled Land Act, 1884.

Short title.
Interpreta-
tion.

2. The expression "the Act of 1882" used in this act means
the Settled Land Act, 1882.

Construction
of act.

3. The Act of 1882 and this act are to be read and construed
together as one act, and expressions used in this act are to have
the same meanings as those attached by the Act of 1882 to
similar expressions used therein.

Fine on a
lease to be
capital
money.

4. A fine received on the grant of a lease under any power
conferred by the Act of 1882 is to be deemed capital money
arising under that act.

See *Re Moses, Beddington v. B.*, 1902, 1 Ch. 100; and the note, *ante*,
p. 689.

Notice under
45 & 46 Vict.
c. 38, s. 46,
may, as to a

5.—(1.) The notice required by section forty-five of the Act
of 1882 of intention to make a sale, exchange, partition, or lease
may be notice of a general intention in that behalf.

(2.) The tenant for life is, upon request by a trustee of the settlement to furnish to him such particulars and information as may reasonably be required by him from time to time with reference to sales, exchanges, partitions, or leases effected, or in progress, or immediately intended.

47 & 48 Vict.
c. 18, s. 5.

sale, ex-
change, par-
tition, or
lease, be
general.

(3.) Any trustee, by writing under his hand, may waive notice either in any particular case, or generally, and may accept less than one month's notice.

(4.) This section applies to a notice given before, as well as to a notice given after, the passing of this act.

(5.) Provided that a notice, to the sufficiency of which objection has been taken before the passing of this act, is not made sufficient by virtue of this act.

6.—(1.) In the case of a settlement within the meaning of section sixty-three of the Act of 1882, any consent not required by the terms of the settlement is not by force of anything contained in that act to be deemed necessary to enable the trustees of the settlement, or any other person, to execute any of the trusts or powers created by the settlement.

As to consents
of tenants for
life.

(2.) In the case of every other settlement, not within the meaning of section sixty-three of the Act of 1882, where two or more persons together constitute the tenant for life for the purposes of that act, then, notwithstanding anything contained in sub-section (2) of section fifty-six of that act, requiring the consent of all those persons, the consent of one only of those persons is by force of that section to be deemed necessary to the exercise by the trustees of the settlement, or by any other person, of any power conferred by the settlement exerciseable for any purpose provided for in that act.

(3.) This section applies to dealings before, as well as after, the passing of this act.

See *Re Harding*, 1891, 1 Ch. 60; *Re Osborne and Bright*, 1902, 1 Ch. 335; and the note, *ante*, p. 713.

7. With respect to the powers conferred by section sixty-three of the Act of 1882, the following provisions are to have effect:—

Powers given
by sect. 63 to
be exercised
only with
leave of the
court.

(i.) Those powers are not to be exercised without the leave of the court.

(ii.) The court may by order, in any case in which it thinks fit, give leave to exercise all or any of those powers, and the order is to name the person or persons to whom leave is given (*m*).

(iii.) The court may from time to time rescind, or vary, any order made under this section, or may make any new or further order.

(iv.) So long as an order under this section is in force, neither the trustees of the settlement, nor any person other than a person having the leave, shall execute any trust or power created by the settlement, for any

47 & 48 Vict.
c. 18, s. 7.

purpose for which leave is by the order given, to exercise a power conferred by the Act of 1882.

- (v.) An order under this section may be registered and re-registered, as a *lis pendens*, against the trustees of the settlement named in the order, describing them on the register as "Trustees for the purposes of the Settled Land Act, 1882" (*n*).
- (vi.) Any person dealing with the trustees from time to time, or with any other person acting under the trusts or powers of the settlement, is not to be affected by an order under this section, unless and until the order is duly registered, and when necessary re-registered as a *lis pendens*.
- (vii.) An application to the court under this section may be made by the tenant for life, or by the persons who together constitute the tenant for life, within the meaning of section sixty-three of the Act of 1882.
- (viii.) An application to rescind or vary an order, or to make any new or further order under this section, may be made also by the trustees of the settlement, or by any person beneficially interested under the settlement.
- (ix.) The person or persons to whom leave is given by an order under this section, shall be deemed the proper person or persons to exercise the powers conferred by section sixty-three of the Act of 1882, and shall have, and may exercise those powers accordingly.
- (x.) This section is not to affect any dealing which has taken place before the passing of this act, under any trust or power to which this section applies.

(*m*) Leave to sell was given to the tenant for life (*Re Harding*, 1891, 1 Ch. 60). Leave was given to a married woman, equitable tenant for life, to exercise all powers except those of sale and exchange (*Re Bagot*, *Bagot v. Kittoe*, 1894, 1 Ch. 177). The giving leave to sell land in Ireland was discussed (*Re Tuthill*, 1907, 1 I. R. 305). The court refused to sanction a "building lease" in which the work agreed to be done was such as a landlord is usually expected to do (*Re Daniell*, 1894, 3 Ch. 503).

(*n*) As to registering a *lis pendens*, see *ante*, p. 503.

Curtesy to
be deemed to
arise under
settlement.

8. For the purposes of the Act of 1882 the estate of a tenant by the curtesy is to be deemed an estate arising under a settlement made by his wife.

See S. L. Act, 1882, sect. 58 (1) (viii.), *ante*; *Mogridge v. Clapp*, 1892, 3 Ch. 382; *Bates v. Kesterton*, 1896, 1 Ch. 159.

IV.—THE SETTLED LAND ACTS (AMENDMENT) ACT, 1887.

50 & 51 VICT. c. 30.

50 & 51 Vict.
c. 30.

WHEREAS by the twenty-first section of the Settled Land Act, 1882 (in this act referred to as the Act of 1882), it is provided

that capital money arising under that act may be applied in payment for any improvement by that act authorized:

50 & 51 Vict.
c. 30, s. 1.

Be it therefore enacted as follows:

45 & 46 Vict.
c. 38.

1. Where any improvement of a kind authorized by the Act of 1882 has been or may be made either before or after the passing of this act, and a rent charge, whether temporary or perpetual, has been or may be created in pursuance of any act of parliament, with the object of paying off any moneys advanced for the purpose of defraying the expenses of such improvement, any capital money expended in redeeming such rent charge, or otherwise providing for the payment thereof, shall be deemed to be applied in payment for an improvement authorized by the Act of 1882.

Amendment
of sect. 21 of
the Settled
Land Act,
1882.

Temporary rent charges created under the Improvement of Land Act, 1864, could not before the passing of the above act be paid off out of capital moneys (*Re Knatchbull*, 29 Ch. Div. 588).

Under the above act capital moneys may now be applied, either (1) in payment from time to time of the instalments of such rent charges (*Re Sudeley*, 37 Ch. D. 123), including, it would seem, interest as well as principal (*Re Egmont*, 45 Ch. Div. 395; *Re Newton*, 61 L. T. 787); or (2) in redeeming the rent charges by one payment (*Re Egmont, sup.*), in which case the payment may include not only the balance of principal, but a bonus to compensate the lender for loss of interest (*Ib.*).

The powers of this act were applied where the trustees of a settlement had themselves purchased the rent charges under sect. 60 of the Act of 1864 (*Re Howard*, 1892, 2 Ch. 233); and where the improved portions of the settled estates had been sold (*Ib.*); but the Court refused to apply money arising under the Lands Clauses Act (and applicable as capital money under sect. 32 of the S. L. Act, 1882) in redeeming a charge on glebe lands (*Re Castle Bytham*, 1895, 1 Ch. 348).

This act does not enable the tenant for life to be recouped out of capital moneys the instalments of the rent charges actually paid by him, whether before the act came into operation (*Re Howard, sup.*); or since (*Re Dalison*, 1892, 3 Ch. 522; *Re Bristol*, 1893, 3 Ch. 161; compare *Re Nepean*, 1900, 1 L. R. 298); nor a sum paid by him on a transfer of the charge in order to reduce the interest (*Re Verney*, 1898, 1 Ch. 508).

Where the works paid for by means of the rent charge were not within the description of improvements authorized by the S. L. Act, 1882, the application of capital moneys was not allowed (*Re Newton*, 61 L. T. 787).

2. Any improvement in payment for which capital money is applied or deemed to be applied under the provisions of the preceding section shall be deemed to be an improvement within the meaning of section twenty-eight of the Act of 1882, and the provisions of such last-mentioned section shall, so far as applicable, be deemed to apply to such improvement.

Sect. 28 of
Settled Land
Act, 1882, to
apply to im-
provements
within pre-
ceding
section.

See *Re Verney*, 1898, 1 Ch. 508.

V.—THE SETTLED LAND ACT, 1889.

52 & 53 VICT. c. 36.

1. This act shall be construed as one with the Settled Land Acts, 1882 to 1887, and may be cited together with those acts

52 & 53 Vict.
c. 36, s. 1.

52 & 53 Vict. c. 36, s. 1. as the Settled Land Acts, 1882 to 1889, and separately as the Settled Land Act, 1889.

Construction and short title.

Option of purchase in building lease.

45 & 46 Vict. c. 38.

2. Any building lease, and any agreement for granting building leases, under the Settled Land Act, 1882, may contain an option, to be exercised at any time within an agreed number of years not exceeding ten, for the lessee to purchase the land leased at a price fixed at the time of the making of the lease or agreement for the lease, such price to be the best which, having regard to the rent reserved, can reasonably be obtained, and to be either a fixed sum of money, or such a sum of money as shall be equal to a stated number of years' purchase of the highest rent reserved by the lease or agreement.

Price to be capital money.

3. Such price when received shall for all purposes be capital money arising under the Settled Land Act, 1882.

VI.—THE SETTLED LAND ACT, 1890.

53 & 54 VICT. C. 69.

Preliminary.

53 & 54 Vict. c. 69, s. 1.

Short title.
Acts to be construed together.

Interpretation.

1. This act may be cited as the Settled Land Act, 1890.

2. The Settled Land Acts, 1882 to 1889, and this act are to be read and construed together as one act, and may be cited as the Settled Land Acts, 1882 to 1890.

3. Expressions used in this act are to have the same meanings as those attached by the Settled Land Acts, 1882 to 1889, to similar expressions used therein.

Definitions.

Instrument in consideration of marriage, &c. to be part of the settlement.

45 & 46 Vict. c. 38.

4.—(1.) Every instrument whereby a tenant for life, in consideration of marriage or as part or by way of any family arrangement, not being a security for payment of money advanced, makes an assignment of or creates a charge upon his estate or interest under the settlement is to be deemed one of the instruments creating the settlement, and not an instrument vesting in any person any right as assignee for value within the meaning or operation of section fifty of the Act of 1882.

(2.) This section is to apply and have effect with respect to every disposition before as well as after the passing of this act, unless inconsistent with the nature or terms of the disposition.

See note to S. L. Act, 1882, sect. 2 (1), *ante*, p. 670; sect. 50, *ante*, p. 708. This section is not a positive enactment that every instrument of the kind described shall be one of the instruments creating the settlement for all the purposes of the Act; but is limited to the purpose of excluding the operation of sect. 50 of the S. L. Act, 1882 (*Re Du Cane and Nettlefold*, 1898,

2 Ch. 96; see, however, *Re Tibbits*, 1897, 2 Ch. 149). See also *Re Ailesbury*, 53 & 54 Vict. 1893, W. N. 140. c. 69, s. 4.

Exchanges.

5. On an exchange or partition any easement, right, or privilege of any kind may be reserved or may be granted over or in relation to the settled land, or any part thereof, or other land, or an easement, right, or privilege of any kind may be given or taken in exchange or on partition for land or for any other easement, right, or privilege of any kind. Creation of easements on exchange or partition.

Under this section easements may be exchanged apart from any exchange of land (*Re Bracken*, 1903, 1 Ch. 265). Cross sales of easements by the tenants for life of adjoining settled estates were held to be within their powers (*Re Brotherton, B. v. B.*, 1908, W. N. 56). The power to exchange releases of easements is doubtful (*Ib.*, 1907, W. N. 230).

Completion of Contracts.

6. A tenant for life may make any conveyance which is necessary or proper for giving effect to a contract entered into by a predecessor in title, and which if made by such predecessor would have been valid as against his successors in title. Power to complete predecessor's contract.

This section does not apply to leases (*Kemeys-Tynte v. Kemeys-Tynte*, 1892, 2 Ch. 213); see sect. 12 (i.) of S. L. Act, 1882, *ante*. The general power to make contracts is given by sect. 31 of S. L. Act, 1882, *ante*.

Leases.

7. A lease for a term not exceeding twenty-one years at the best rent that can be reasonably obtained without fine, and whereby the lessee is not exempted from punishment for waste, may be made by a tenant for life— Provision as to leases for twenty-one years.

- (i.) Without any notice of an intention to make the same having been given under section forty-five of the Act of 1882; and 45 & 46 Vict. c. 38.
- (ii.) Notwithstanding that there are no trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890; and
- (iii.) By any writing under hand only containing an agreement instead of a covenant by the lessee for payment of rent in cases where the term does not extend beyond three years from the date of the writing.

See *Mogridge v. Clapp*, 1892, 3 Ch. 395.

8. In a mining lease—

- (i.) The rent may be made to vary according to the price of the minerals or substances gotten, or any of them: Provision as to mining leases.

53 & 54 Vict.
c. 69, s. 8.

- (ii.) Such price may be the saleable value, or the price or value appearing in any trade or market or other price list or return from time to time, or may be the marketable value as ascertained in any manner prescribed by the lease (including a reference to arbitration), or may be an average of any such prices or values taken during a specified period.

See S. L. Act, 1882, sect. 9, *ante*; *Lonsdale v. Lowther*, 1900, 2 Ch. 687; and as to a minimum rent, *Re Aldam*, 1902, 2 Ch. 46.

Power to
reserve a
rent-charge
on a grant in
fee simple.

44 & 45 Vict.
c. 41.

9. Where, on a grant for building purposes (o) by a tenant for life, the land is expressed to be conveyed in fee simple with or subject to a reservation thereout of a perpetual rent or rent-charge, the reservation shall operate to create a rentcharge in fee simple issuing out of the land conveyed, and having incidental thereto all powers and remedies for recovery thereof conferred by section forty-four of the Conveyancing and Law of Property Act, 1881 (p), and the rentcharge so created shall go and remain to the uses on the trusts and subject to the powers and provisions which, immediately before the conveyance, were subsisting with respect to the land out of which it is reserved.

(o) Grants for building purposes are referred to in S. L. Act, 1882, s. 10, s. 2 (10) (iii.).

(p) *Ante*, p. 599.

Mansion and Park.

Restriction
on sale of
mansion.

10.—(1.) From and after the passing of this act section fifteen of the Act of 1882, relating to the sale or leasing of the principal mansion house, shall be and the same is hereby repealed.

(2.) Notwithstanding anything contained in the Act of 1882, the principal mansion house (if any) on any settled land, and the pleasure grounds and park and lands (if any) usually occupied therewith, shall not be sold, exchanged, or leased by the tenant for life without the consent of the trustees of the settlement or an order of the court.

(3.) Where a house is usually occupied as a farmhouse, or where the site of any house and the pleasure grounds and park and lands (if any) usually occupied therewith do not together exceed twenty-five acres in extent, the house is not to be deemed a principal mansion house within the meaning of this section.

There may be two principal mansion houses on lands settled by one settlement (*Gilbey v. Rush*, 1906, 1 Ch. 21). But a house may cease to be a principal mansion house, as where it was adapted for a school, and the park was laid out for building (*Re Wythes*, 1908, 1 Ch. 593). The above section applies to the lease of an easement over the principal mansion house, park and lands (*Pease v. Courtney*, 1904, 2 Ch. 503; *Sutherland v. S.*, 1893, 3 Ch. 194). Also to the lease of a park not usually occupied with the principal mansion house (*Pease v. Courtney*, *sup.*). The word "park" includes an

ordinary private park (*ib.*). The consent of the trustees need not be in writing or communicated to the parties. But it must be the consent of all the trustees, given at the time with reference to the particular transaction (*Gilbey v. Rush*, 1906, 1 Ch. 23). It is immaterial, where the principal mansion house is dealt with, whether the trustees believed the house to be the principal mansion house or not (*ib.*).

53 & 54 Vict.
c. 69, s. 10.

When the tenant for life was insolvent and had mortgaged his life interest, the court sanctioned a sale of the principal mansion and large family estates, even though the next remainderman could keep up the estates if he came into them (*Re Ailesbury*, 1892, 1 Ch. 506; *Bruce v. Ailesbury*, 1892, A. C. 356). In giving its consent the court had regard to public interests, and the interests of tenants (*ib.*). A subsequent action to restrain the sale on the ground of fraud was dismissed (*Bruce v. Ailesbury*, 1892, W. N. 149). And in connection with the sale trustees of the compound settlement were appointed (*Re Ailesbury and Iveagh*, 1893, 2 Ch. 345). But owing to a claim in respect of an annuity granted by the tenant for life, his title was subsequently held too doubtful to force on the purchaser (*Re Ailesbury*, 1893, W. N. 140).

The following cases have been decided under sub-sect. 2 or under S. L. Act, 1882, s. 15, which was similar to sub-sect. 2. Notwithstanding a clause of forfeiture for non-residence, a mansion house may be sold (*Re Paget*, 30 Ch. D. 161) or let (*Re Thompson*, 21 L. R. Ir. 109). So a mansion house may be ordered to be sold though directed to be kept as a residence, and expressly excluded from the power of sale (*Re Brown*, 27 Ch. D. 179). But not without an order as to the disposal of heirlooms in a case where the settlement directed the heirlooms to devolve with the house (*ib.*). A house subject to a trust for sale on the death of the tenant for life was allowed to be sold by him (*Re Wortham*, 75 L. T. 293). The court refused to order a sale until all facts were known (*Re Sebright*, 33 Ch. Div. 429). For forms of summons, see *post*.

The Raising of Money.

11.—(1.) Where money is required for the purpose of dis- charging an incumbrance on the settled land or part thereof, the tenant for life may raise the money so required, and also the amount properly required for payment of the costs of the transaction on mortgage of the settled land, or of any part thereof, by conveyance of the fee-simple or other estate or interest the subject of the settlement, or by creation of a term of years in the settled land, or any part thereof, or otherwise, and the money so raised shall be capital money for that purpose, and may be paid or applied accordingly.

Power to
raise money
by mortgage.

(2.) Incumbrance in this section does not include any annual sum payable only during a life or lives or during a term of years absolute or determinable.

“Required” means reasonably required having regard to the circumstances of the settled land; and is not confined to a mortgagee calling in money (*Re Clifford, Scott v. Clifford*, 1902, 1 Ch. 87). So one part of the settled land may be mortgaged in order to pay off incumbrances on another part (*Hampden v. Buckinghamshire*, 1893, 2 Ch. 531; *Re Monson*, 1898, 1 Ch. 427). But such a course will be restrained where it would act unfairly on some of the persons interested (*Hampden v. Buckinghamshire, sup.*; see also *Annesley v. Woodhouse*, 1898, 1 Ir. R. 69).

Expenses incurred by a local authority and charged on settled land by sect. 257 of the P. H. Act, 1875, are an “incumbrance” within this section; and if the tenant for life pays them, he can raise the money by a mortgage

53 & 54 Vict. of the land (*Re Smith*, 1901, 1 Ch. 689). *Semble*, he could also do so in c. 69, s. 11. respect of a charge under sect. 13 of the Private Street Works Act, 1892 (*Re Pizzi, Scrivener v. Aldridge*, 1907, 1 Ch. 71).

Dealings as between Tenant for Life and the Estate.

Provision enabling dealings with tenant for life.

12. Where a sale of settled land is to be made to the tenant for life, or a purchase is to be made from him of land to be made subject to the limitations of the settlement, or an exchange is to be made with him of settled land for other land, or a partition is to be made with him of land an undivided share whereof is subject to the limitations of the settlement, the trustees of the settlement shall stand in the place of and represent the tenant for life, and shall, in addition to their powers as trustees, have all the powers of the tenant for life in reference to negotiating and completing the transaction.

Application of Capital Money.

Application of capital money.

13. Improvements authorized by the Act of 1882 shall include the following ; namely :

- (i.) Bridges ;
- (ii.) Making any additions to or alterations in buildings reasonably necessary or proper to enable the same to be let (q) ;
- (iii.) Erection of buildings in substitution for buildings within an urban sanitary district taken by a local or other public authority, or for buildings taken under compulsory powers, but so that no more money be expended than the amount received for the buildings taken and the site thereof ;
- (iv.) The rebuilding of the principal mansion house on the settled land : Provided that the sum to be applied under this sub-section shall not exceed one-half of the annual rental of the settled land.

See the cases *ante*, p. 692, in which works have been held not within sect. 25 of the S. L. Act, 1882.

Sub-sect. (ii.). (q) The jurisdiction under sub-sect. (ii.) depends not on whether there is to be an immediate letting, but on whether there is a present intention to let as distinguished from an intention to occupy (*Stanford v. Roberts*, 1901, 1 Ch. 440 ; see *Re De Teissier, De T. v. De T.*, 1893, 1 Ch. 153 ; *Re Gerard*, 1893, 3 Ch. 260, 264, 267). Where the occupying tenant will quit unless additions are made, then additions are within the sub-section (*Re Calverley*, 1904, 1 Ch. 154). The additions and alterations referred to in the sub-section must be structural (*Re Clarke*, 1902, 2 Ch. 330). Additions and alterations in stables came within it (*Re Gerard*, 1893, 3 Ch. 260) ; and a new floor for the basement of a house (*Stanford v. Roberts, sup.*) ; also a new roof and a change in the main entrance (*Re Gaskell*, 1894, 1 Ch. 485) ; and new drainage (*Standing v. Gray*, 1903, 1 I. R. 49). But not heating

apparatus (*Re Gaskell, sup.*); nor electric lighting installation (*Re Blagrove*, 53 & 54 Vict. 1903, 1 Ch. 560; see *Re Leconfield*, 1907, 2 Ch. 340; *Re Gossling, Gossling v. Freahe*, 87 L. T. 62); nor the lengthening of mill shafting (*Re Harrington*, 75 L. J. Ch. 460). The subsection does not apply to the erection of a new building in place of an old building (*Re Leveson Gower*, 1905, 2 Ch. 95).

Sub-sect. (iv.) might apply to stables, &c. (*Re Gerard*, 1893, 3 Ch. 260, Sub-sect. (iv.). 261, 264, 268; see *Re Dunham Massey*, 22 Times L. R. 595); but did not apply to a distant laundry (*Re Dunraven*, 1907, 2 Ch. 417). As to what is "rebuilding," see *Re De Teissier*, 1893, 1 Ch. 158; *Re Walker*, 1894, 1 Ch. 189, where the rebuilding was executed before the Act of 1890; *Re Wright*, 83 L. T. 159. The "annual rental of the settled land" includes the rent of all the land in the settlement (*Re Gerard*, 1893, 3 Ch. 268); and the income of any capital money (*Re De Teissier*, 1893, 1 Ch. 153); and the amount of the rent usually paid for a farm for the moment unoccupied (*Re Walker*, 1894, 1 Ch. 189); but not the rental value of settled land occupied by the tenant for life (*ib.*). The cost of repairs should not be taken into account (*Re Kensington*, 21 Times L. R. 351). The sub-section was applied in *Re Legh*, 1902, 2 Ch. 274. See further the note to S. L. Act, 1882, s. 25, *ante*.

14. All or any part of any capital money paid into court may, if the court thinks fit, be at any time paid out to the trustees of the settlement for the purposes of the Settled Land Acts, 1882 to 1890. Capital money in court may be paid out to trustees.

See S. L. Act, 1882, s. 22, *ante*.

15. The court may, in any case where it appears proper, make an order directing or authorizing capital money to be applied in or towards payment for any improvement authorized by the Settled Land Acts, 1882 to 1890, notwithstanding that a scheme was not, before the execution of the improvement, submitted for approval, as required by the Act of 1882, to the trustees of the settlement or to the court. Court may order payment for improvements executed.

See S. L. Act, 1882, s. 26 (*ante*, p. 693), requiring a previous scheme.

The court in exercising the jurisdiction of sect. 15 will be very vigilant and careful, and must consider what is fair as between tenant for life and remainderman (*Re Tucker*, 1895, 2 Ch. 471). An order has been made where the works were done by the trustees (*Re Thomas, Weatherall v. Thomas*, 1900, 1 Ch. 323); and where the work was done by tenant for life, but no scheme had been prepared because trustees had then no capital money (*Re Lisburne*, 1901, W. N. 91; see *Re Norfolk, inf.*).

On the other hand, under the discretion conferred by this section the court refused to authorize the application of capital money for improvements (*Cardigan v. Curzon-Howe*, 9 T. L. R. 244; *Re Partington, Reigh v. Kane*, 1902, 1 Ch. 711). And the court has refused to make an order for repayment of instalments of an Improvement of Land Act rentcharge paid by the tenant for life before he had required provision to be made under the S. L. Act, 1887 (*Re Dalison*, 1892, 3 Ch. 522; *Re Bristol*, 1893, 3 Ch. 161; see *Re Verney*, 1898, 1 Ch. 508); or to make an order in the case of works done prior to 1883 (*Re Ormerod*, 1892, 2 Ch. 318); or to make a prospective order as to applying future capital money (*Re Bristol*, 1893, 3 Ch. 161). See as to trustees approving a scheme by anticipation, *Re Norfolk, Norfolk v. Herries*, 1900, 1 Ch. 461; *Re Calverley*, 1904, 1 Ch. 150; and compare *Re Lisburne* (1901, W. N. 91). The above section applied where a scheme had been submitted and approved but was departed from (*Re Egmont*, 1908, W. N. 176), and may apply to a case where no scheme could have been submitted (*Re Wormald, Wormald v. Ollivant*, 1908, W. N. 214).

53 & 54 Vict.
c. 69, s. 16.

Trustees.

Trustees for
the purposes
of the act.

16. Where there are for the time being no trustees of the settlement within the meaning and for the purposes of the Act of 1882, then the following persons shall, for the purposes of the Settled Land Acts, 1882 to 1890, be trustees of the settlement; namely,

- (i.) The persons (if any) who are for the time being under the settlement trustees, with power of or upon trust for sale of any other land comprised in the settlement and subject to the same limitations as the land to be sold, or with power of consent to or approval of the exercise of such a power of sale, or, if there be no such persons, then
- (ii.) The persons (if any) who are for the time being under the settlement trustees with future power of sale, or under a future trust for sale of the land to be sold, or with power of consent to or approval of the exercise of such a future power of sale, and whether the power or trust takes effect in all events or not.

See, before this act, *Wheelwright v. Walker*, 23 Ch. D. 752. For further definition of "trustees," see S. L. Act, 1882, s. 2 (8), *ante*. "Land comprised in the settlement," in sub-sect. (i.), means "for the time being comprised"; and includes land subsequently purchased and settled (*Re Moore, Moore v. Bigg*, 1906, 1 Ch. 792).

A tenant for life of settled land which is subject to a future trust for sale exerciseable after his death can be a trustee (*Re Davies and Kent*, 1910, W. N. 61; *Re Jackson*, 1902, 1 Ch. 258); in which last case it was said that "under" in sub-sect. (ii.) meant "bound by." If the "future trust" is valid at the time of the tenant for life's sale, it is immaterial that it may afterwards be made invalid (*Re Davies and Kent*, 1910, W. N. 61).

[Sect. 17, as to the appointment, discharge and retirement of trustees, has been replaced by sect. 47 of the *Trustee Act*, 1893, post.]

Extension of
meaning of
"working
classes" in
48 & 49 Vict.
c. 72.

18. The provisions of section eleven of the Housing of the Working Classes Act, 1885, and of any enactment which may be substituted therefor, shall have effect as if the expression "working classes" included all classes of persons who earn their livelihood by wages or salaries: Provided that this section shall apply only to buildings of a rateable value not exceeding one hundred pounds per annum.

Sect. 74 of the Housing of the Working Classes Act, 1890, has been substituted for sect. 11 of the Act of 1885.

Power to
vacate regis-
tration of
writ.

19. The registration of a writ or order affecting land may be vacated pursuant to an order of the High Court or any judge thereof.

RULES UNDER THE SETTLED LAND ACT, 1882.

1. The expression "the act" used in these rules means the Settled Land Act, 1882. Interpretation.

Words defined by the act when used in these rules have the same meanings as in the act.

The expression "the tenant for life" includes the tenant for life as defined by the act, and any person having the powers of a tenant for life under the act.

2. All applications to the court under the act may be made by summons in chambers; and if in any case a petition shall be presented without the direction of the judge, no further costs shall be allowed than would be allowed upon a summons. Application to be by summons.

An application for payment out of court to S. L. Act trustees of a fund exceeding £1000, which had not arisen under the S. L. Acts was properly made by petition (*Re Torry-Hill, Pemberton v. P.*, 1909, 1 Ch. 468).

3. The forms in the appendix to these rules are to be followed as far as possible, with such modification as the circumstances require. All summonses, petitions, affidavits, and other proceedings under the act are to be entitled according to Form 1 in the Appendix. Forms.

4. The persons to be served with notice of applications to the court shall, in the first instance, be as follows:—

In the case of applications by the tenant for life under sections 15 and 34, the trustees.

In the case of applications under section 38, the trustees (if any), and the tenant for life if not the applicant.

In the case of applications under section 44, the tenant for life, or the trustees, as the case may be.

No other person shall in the first instance be served. Except as hereinbefore provided where an application under the act is made by any person other than the tenant for life, the tenant for life alone shall be served in the first instance.

5. Except in the cases mentioned in the last rule, applications by a tenant for life shall not in the first instance be served on any person.

6. The judge may require notice of any application under the act to be served upon such persons as he thinks fit, and may give all necessary directions as to the persons (if any) to be served, and such directions may be added to or varied from time to time as the case may require. Where a petition is presented, the petitioner may, after the petition has been filed, apply by summons in Chambers (Appendix, Form 23) for directions with regard to the persons on whom the petition ought to be served. If any person not already served is directed to be served with notice of an application, the application shall stand over generally, or until such time as the judge directs. The judge may in any particular case, upon such terms (if any) as he thinks fit, dispense with service upon any person upon whom, under these rules, or under any direction of the judge, any application is to be served (a).

(a) The court dispensed with service on the children of the tenant for life, who were sufficiently represented by the trustees (*Re Brown*, 27 Ch. D. 186).

7. It shall be sufficient upon any application under the act to verify by Title. affidavit the title of the tenant for life and trustees or other persons interested in the application unless the judge in any particular case requires further evidence. Such affidavit may be in the form or to the effect of Form No. 8 in the Appendix.

8. Any sale authorised or directed by the court under the act, shall be carried into effect out of court, unless the judge shall otherwise order, and generally in such manner as the judge may direct. Sales.

Rules.

Leases, &c.,
under sect. 10.

9. Where the court authorises generally the tenant for life to make from time to time leases or grants for building or mining purposes under section 10 of the act, the order shall not direct any particular lease or grant to be settled or approved by the judge unless the judge shall consider that there is some special reason why such lease or grant should be settled or approved by him. Where the court authorises any such lease or grant in any particular case, or where the court authorises a lease under section 15 of the act, the order may either approve a lease or grant already prepared or may direct that the lease or grant shall contain conditions specified in the order or such conditions as may be approved by the judge at chambers without directing the lease or grant to be settled by the judge.

Payment
into court.

10. Any person directed by the tenant for life to pay into court any capital money arising under the act may apply by summons at chambers for leave to pay the money into court. (Appendix, Forms 9, 10, 11.)

11. The summons shall be supported by an affidavit setting forth—

1. The name and address of the person desiring to make the payment.
2. The place where he is to be served with notice of any proceeding relating to the money.
3. The amount of money to be paid into court and the account to the credit of which it is to be placed.
4. The name and address of the tenant for life under the settlement by whose direction the money is to be paid into court.
5. The short particulars of the transaction in respect of which the money is payable.

12. The order made upon the summons for payment into court may contain directions for investment of the money on any securities authorised by section 21, sub-section 1 of the act, and for payment of the dividends to the tenant for life, either forthwith or upon production of the consent in writing of the applicant; the signature to such consent, to be verified by the affidavit of a solicitor. But if the transaction in respect of which the money arises, is not completed at the date of payment into court, the money shall not, without the consent of the applicant, be ordered to be invested in any securities other than those upon which cash under the control of the court may be invested.

13. Money paid into court under the act shall be paid to an account, to be entitled in the matter of the settlement, with a short description of the mode in which the money arises if it is necessary or desirable to identify it, and in the matter of the act. (Appendix, Forms 9, 10 and 11.)

14. Any person paying into court any capital money arising under the act shall be entitled first to deduct the costs of paying the money into court.

Practice
generally.

15. In all cases not provided for by the act or these rules, the existing practice of the court as to costs and otherwise, so far as the same may be applicable, shall apply to proceedings under the act.

Fees.

16. The fees and allowances to solicitors of the court in respect of proceedings under the act shall be those provided by the Rules of the Supreme Court as to costs for the time being in force, so far as they are applicable to such proceedings.

17. The fees to be taken by the officers of the court in respect to proceedings under the act shall be those provided by the Rules of the Supreme Court as to court fees for the time being in force, so far as they are applicable to such proceedings.

18. These rules shall come into operation from and after the 31st December, 1882.

19. These rules may be cited as the Settled Land Act Rules, 1882.

APPENDIX.

Form I.—Title of Proceedings.

In the High Court of Justice, Chancery Division,
Vice-Chancellor Bacon,

or

Mr. Justice Chitty,

[*or other judge before whom the application is to be heard.*]

In the matter of the estate [*or, of the timber upon the estate*],
situate at in the county of , [*or, of the chattels*], settled by a
settlement made by an indenture dated the day of , and made
between [*or, by the will of dated or, as the case may be.*]

And in the matter of the Settled Land Act, 1882.

Form II.—Formal Part of Summons.

Title as in Form I.

Let all parties concerned attend at my chambers at the Royal Courts of
Justice on day, the day of 18 , at o'clock in the
forenoon, on the hearing of an application—

(*a.*) On the part of *A. B.*, the tenant for life [*or, tenant in tail, or as the case may be, describing the nature of the applicant's estate*] under the above-mentioned settlement.

Or, (b.) On the part of *A. B.*, the tenant for life [*or as the case may be*] under the above-mentioned settlement an infant, by *X. Y.*, his testamentary guardian [*or, guardian appointed by order dated the , or next friend*].

Or, (c.) On the part of *C. D.* and *E. F.*, the trustees of the above-mentioned settlement for the purposes of the above-mentioned act.

Or, (d.) On the part of *G. H.*, the tenant for life in remainder [*or, tenant in tail in remainder, or as the case may be, describing the applicant's interest*] under the above-mentioned settlement subject to the life interest of *A. B.* [*or as the case may be*].

Or, (e.) On the part of *I. J.*, the purchaser of the lands [*or, the timber upon the lands, or chattels, or as the case may be*], settled by the above-mentioned settlement.

Or, (f.) On the part of *I. J.*, the lessee under a mining lease dated the 18 , granted under the powers of the above-mentioned act of the mines and minerals under the lands settled by the above-mentioned settlement.

Or, (g.) On the part of *I. J.*, the mortgagee under a mortgage intended to be created under section 18 of the above-mentioned act of the lands settled by the above-mentioned settlement.

Or, (h.) On the part of *K. L.*, interested under the contract hereinafter mentioned.

Dated the day of 18 .

This summons was taken out by of , solicitor for the applicant.

To

(*Add the names of the persons (if any) on whom the summons is to be served.*)

Forms.**Form III.—Summons under Section 10 for General Leasing Powers.**

Title and formal parts as in Forms I. and II. *a* or *b*.

1. That the applicant [*or in the case of an infant that the said X. Y. during the infancy of the said A. B.*], and each of his successors in title [*or in the case of an infant, each of the successors in title of the said A. B.*], being a tenant for life or having the powers of a tenant for life under the above-mentioned act, may pursuant to section 10 of the said act be authorized from time to time to make building [*or mining*] leases of the lands comprised in the said settlement for the term of years [*or in perpetuity*] on the conditions specified in the said act [*or on other conditions than those specified in sections 7 to 9 of the said act*].

2. That the costs of this application may be directed to be taxed as between solicitor and client, and that the same when taxed may be paid out of the property subject to the said settlement, and that for that purpose all necessary directions may be given.

Note.—The proposed conditions ought not, except in simple cases, to be set forth in the summons.

Form IV.—Summons under Sections 10 or 15 for Authority to grant a particular Lease where the Tenant for Life has entered into a Contract.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the conditional contract, dated the 18 , and made between the applicant [*or the said X. Y.*] of the one part and of the other part, for a [*building or mining*] lease to the said of the hereditaments therein mentioned for the term, and upon the conditions therein stated, may, pursuant to section 10 [*or 15*] of the above-mentioned act be approved, and that the said *A. B.* [*or X. Y.*] may be authorized to execute a lease in pursuance of the said contract.

2. (*Add application for costs as in Form III. 2.*)

Form V.—Summons under Sections 10 or 15 for Authority to grant a particular Lease when no Contract has been entered into.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the [*building or mining*] lease intended to be granted to of the lands [*or of the mansion house, &c.*] settled by the said settlement may, pursuant to section 10 [*or 15*] of the above-mentioned act be approved, and that the applicant [*or the said X. Y.*] may be authorized to execute the same.

2. (*Add application for costs as in Form III. 2.*)

Form VI.—Summons under Sections 15, 35, or 37 for a Sale out of Court of the principal Mansion House, and Demesnes, or of Timber or Chattels.

Forms.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the applicant [*or in the case of an infant the said X. Y.*] may be authorized to sell the principal mansion house [*or the timber ripe and fit for cutting*] on the land [*or the furniture and chattels*] settled by the above-mentioned settlement in such manner and subject to such particulars, conditions, and provisions as he may think fit.

2. That the costs of this application may be taxed as between solicitor and client, and that *C. D.* and *E. F.*, the trustees of the said settlement, may be at liberty to pay the costs when taxed out of the proceeds of the said sale [*or, in the case of timber, out of the three-fourths of the proceeds of the said sale to be set aside as capital money arising under the said act*], *or, if this Form is not applicable as in Form III. 2.*

Form VII.—Summons under Sections 15, 35, or 37 for Sale by the Court of the principal Mansion House, and Demesnes, or of Timber or Chattels.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the principal mansion house [*or the timber ripe and fit for cutting*] on the land [*or the furniture and chattels*], settled by the above-mentioned settlement, may be sold under the direction of the court.

2. (*Application for costs as in Form III. 2.*)

Form VIII.—Affidavit verifying Title.

Title as in Form I.

I, _____, of _____, make oath and say as follows:

1. By the above-mentioned settlement the above-mentioned lands [*or certain chattels, shortly describing them*] stand limited to uses [*or upon trusts*] under which *A. B.* is [*or I am*] beneficially entitled in possession as tenant for life [*or tenant in tail, or tenant in fee simple, with an executory gift over, or as the case may be*].

2. (*If it is the fact.*) The said *A. B.* is an infant of the age of _____ years or thereabouts.

3. *C. D.*, of _____, and *E. F.*, of _____, are trustees under the said settlement, with a power of sale of the said lands [*or with power of consent to or approval of the exercise of a power of sale of the said lands contained in the said settlement, or are the persons by the said settlement declared to be trustees thereof for purposes of the above-mentioned act*].

Forms.

Form IX.—Summons under Section 22 by Purchaser for Payment into Court of Purchase-money of Settled Land, Timber, or Chattels.

Title as in Form I.

Formal parts as in Form II. *e*.

1. That the applicant may be at liberty to pay into court to the credit of
 “ In the matter of the settlement, dated the and made between
 [or will, &c.] proceeds of sale of the A. estate [or as the case may be], and in
 the matter of the Settled Land Act, 1882,” the sum of £ on account
 of the purchase-money of the said A. estate [or as the case may be] settled by
 the said settlement [or will, &c.].

2. That such directions may be given for the investment of the said sums
 when paid into court, and the accumulation or payment of the dividends of
 the securities, representing the same, as the court may think proper.

Form X.—Summons under Section 22 for Payment into Court by Lessee under a Mining Lease (see Section 11).

Title as in Form I.

Formal parts as in Form II. *f*.

1. That the applicant may be at liberty to pay into court to the credit of
 “ In the matter of the settlement, dated the and made between
 [or the will, &c.] mineral rents under lease, dated the and in the
 matter of the Settled Land Act, 1882,” the sum of £ being three-
 fourths [or one-fourth] of the rents payable by him under the said lease for
 the half-year ending less £ the costs of payment into court.

2. That the applicant may be at liberty on or before the day of
 and the day of in every year during the term created by
 the said lease to pay into court to the credit aforesaid, so much of the rents
 payable by him under the said lease as is by section 11 of the above-mentioned
 act directed to be set aside as capital money arising under the said act after
 deducting therefrom the costs of payment in, the amount paid in to be
 verified by affidavit.

3. That the said sum of £ and all other sums to be paid into court
 to the credit aforesaid may be invested in the purchase of (*name the invest-*
ment) to the like credit, and that the dividends on the said when
 purchased may be paid to A. B., the tenant for life under the above-
 mentioned settlement, during his life or until further order.

Form XI.—Summons under Section 22 for Payment into Court by Mortgagee (see Section 18).

Title as in Form I.

Formal parts as in Form II. *g*.

1. That the applicant may be at liberty to pay into court to the credit of
 “ Money advanced on mortgage of lands settled by the settlement dated the
 and made between [or the will, &c.] and in the matter of the
 Settled Land Act, 1882,” the sum of £ being the amount agreed to be
 advanced by him on mortgage of the lands comprised in the above-mentioned
 settlement less the costs of payment in.

2. (*Add directions for investment as in Form VIII. 2*) (*r*).

(*r*) This reference is inaccurate; see, however, Form IX. 2, and Form X. 3.

Form XII.—Summons under Section 26 (1).

Forms.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the scheme left at my chambers this day for the execution of improvements on the lands settled by the above-mentioned settlement may be approved.

2. (*Add application for costs as in Form III. 2.*)

Form XIII.—Summons under Section 26, Sub-section (2) (ii) for appointment of an Engineer or Surveyor.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That *M. N.* of engineer [*or* surveyor] may be approved as engineer [*or* surveyor] for the purposes of section 26, sub-section (2) (ii) of the above-mentioned act.

2. (*Add application for costs as in Form III. 2.*)

Form XIV.—Nomination of an Engineer or Surveyor by the Trustees.

Title as in Form I.

We *C. D.* of and *E. F.* of the trustees of the above-mentioned settlement for the purposes of the above-mentioned act, hereby nominate
of engineer [*or* surveyor], for the purposes of section 26, sub-section (2) (ii) of the said act.

(Signed) *C. D.*
 E. F.

Form XV.—Summons under Section 26, Sub-section (2) (iii).

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That *C. D.* and *E. F.* the trustees of the above-mentioned settlement, for the purposes of the above-mentioned act may be directed to apply the sum of £ out of the capital money arising under the said act in their hands subject to the said settlement in payment for [*describe the work or operation*] being [*part of*] an improvement executed upon the lands subject to the said settlement pursuant to a scheme approved by the said *C. D.* and *E. F.* under the said act.

2. (*Add application for costs as in Form III. 2.*)

Form XVI.—Summons under Section 26, Sub-section (3).

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the sum of £ may be ordered to be raised out of the in court to the credit of and that the same when raised may be paid to upon his undertaking to apply the same in payment for [*describe*

Forms. *the works or operation]* being part of an improvement executed upon the land settled by the above-mentioned settlement pursuant to the scheme approved by order dated the

2. (*Add application for costs as in Form III. 2.*)

Form XVII.—Summons under Section 31.

Title as in Form I.

Formal parts as in Form II. *a* or *b*.

1. That the applicant may be at liberty to enforce [*or carry into effect or vary or rescind as the case may be*] the contract entered into between the applicant of the one part, and of the other part.

2. Or that such directions may be given relating to the said contract as the judge may think fit.

3. (*Add application for costs as in Form III. 2.*)

Form XVIII.—Summons under Section 34 for application of Money paid for a Lease or Reversion.

Title as in Form I.

Formal parts as in Form II. *a*, *b*, or *d*.

1. That the sum of £ being the proceeds of sale of a lease for years [*or life or a reversion or other interest describing it*] settled by the above-mentioned settlement, may, pursuant to section 34 of the above-mentioned act, be directed to be applied for the benefit of the parties interested under the said settlement in such manner as the court may think fit.

2. (*Add application for costs as in Form III. 2.*)

Form XIX.—Summons under Section 38 for the Appointment of New Trustees.

Title as in Form I.

Formal parts as in Form II. *a*, *b*, *c*, or *d*.

1. That *G. H.* and *I. J.* may be appointed trustees under the above-mentioned settlement for the purposes of the above-mentioned act.

2. (*Add application for costs as in Form III. 2.*)

See *Re Harrop*, 24 Ch. D. 719; *Re Simpson*, *Re Whitchurch*, 1897, 1 Ch. 256; Seton, 5th ed. 1512.

Form XX.—Summons under Section 44.

Title as in Form I.

Formal parts as in Form II. *a*, *b*, or *c*.

1. That it may be declared that (*set out the declaration required*).

2. (*Add application for costs as in Form III. 2, or as the circumstances require.*)

Form XXI.—Summons under Section 56 for Advice and Direction.

Forms.

Title as in Form I.

Formal parts as in Form II. *a* to *h*.

For the opinion, advice, and direction of the judge on the following questions:—

1. Whether
2. Whether
3. Whether

(or if the questions involve complicated facts.)

for the opinion, advice, and direction of the judge on the facts and questions submitted by the statement left in my chambers this day.

(Add application for costs as in Form III, 2.)

Form XXII.—Summons under Section 60 for Appointment of
Persons to exercise Powers on Behalf of Infant.

Title as in Form I.

Formal parts as in Form II. *b*.

1. That the powers conferred upon a tenant for life by sections 6 to 13, both inclusive, and sections 16 to 20, both inclusive, of the above-mentioned act (or such other powers as it is desired to exercise) may be exercised by the said on behalf of the said during his minority,

2. (Add application for costs in Form III. 2.)

Form XXIII.—Summons for Directions as to Service of a Petition.

Title as in Form I.

Formal parts as in Form II.

That directions may be given as to the persons to be served with the petition presented in the above matter on the _____ day of _____, 18 ____.

TITLES OF SUMMONSES.

The following regulations as to the title of summonses appear in the Annual Practice for 1910, vol. ii, p. 946—

Where an Originating Summons is issued under the authority of an Act of Parliament giving summary jurisdiction or rules of Court, the summons must be entitled in a substantial matter (as the first title) and also in the matter of the particular Act as well as any general act applicable—such as the Settled Land Acts 1882 to 1890;—for instance

19 R. No. .

- (1) In the matter of the Blackacre Estate [or, of the timber on the Settled Land estate], situate at _____, in the county of _____ [or of the Acts, 1882 chattels] settled by a settlement, made by an indenture dated to 1890. the _____ day of _____, and made between A B and etc. (state parties) [or, by the will of C D, dated _____]. [or as the case may be]

And in the matter of the Settled Land Acts, 1882-1890.

Forms.

19 , S. No. .

Infant.

- (2) In the matter of the Blackacre Estate [*or*, of the timber on the estate] situate at , in the county of , settled land within the meaning of the Settled Land Act, 1882, s. 59 [*or* settled by a settlement deemed to be existing under the Settled Land Act, 1882, sect. 59], by reason of John Smith, the person seised of or entitled to such land, being an infant.

And in the matter of the Settled Land Acts, 1882-1890.

19 , R. No. .

Tenant by
curtesy.

- (3) In the matter of the Blackacre Estate, at , in the county of , settled by a settlement within the meaning of [*or* deemed to be existing under] the Settled Land Acts, 1882 and 1884, and made by Mary Roberts, deceased, the late wife of John Roberts.

And in the matter of the Settled Land Acts, 1882-1890.

PARTITION ACTS.

I.—THE PARTITION ACT, 1868.

31 & 32 VICT. c. 40.

An Act to amend the Law relating to Partition.

[25th June, 1868.]

BE it enacted as follows :

31 & 32 Vict.
c. 40, s. 1.

1. This act may be cited as "The Partition Act, 1868."

Short title.

2. In this act the term "the court" means the Court of Chancery in England, the Court of Chancery in Ireland, the Landed Estates Court in Ireland, and the Court of Chancery of the County Palatine of Lancaster, with their respective jurisdictions.

As to the
term "the
court."

By Jud. Act, 1873, s. 34 (3), the partition or sale of real estates has been assigned to the Chancery Division of the High Court in England. Under Palatine Court of Durham Act, 1889, s. 10, the Partition Acts apply to the Palatine Court of Durham.

3. In a suit for partition, where, if this act had not been passed, a decree for partition might have been made (*a*), then if it appears to the court that, by reason of the nature of the property to which the suit relates, or of the number of the parties interested or presumptively interested therein, or of the absence or disability of some of those parties, or of any other circumstance, a sale of the property and a distribution of the proceeds would be more beneficial for the parties interested than a division of the property between or among them, the court may, if it thinks fit, on the request of any of the parties interested, and notwithstanding the dissent or disability of any others of them, direct a sale of the property accordingly, and may give all necessary or proper consequential directions (*b*).

Power to
court to order
sale instead
of division.

(*a*) This and the two following sections only enable the court to decree a sale in a suit *for partition*, where, if this act had not been passed, a decree for partition might have been made. A decree for partition may be made, where the parties interested are either coparceners, or joint tenant or tenants could be in common in possession, whether in tail (*Brook v. Hertford*, 2 P. Wms. 518); for life (*Gaskell v. G.*, 6 Sim. 643); for life determinable on marriage (*Hobson v. Sherwood*, 4 Beav. 184); or for years (*Heaton v. Dearden*, 16

Cases where
decree for
partition
made :

31 & 32 Vict.
c. 40, s. 3.

Beav. 147); but not on the application of a reversioner (*Evans v. Bagshaw*, 5 Ch. 340). Such a decree may be made of property which is, freehold; or copyhold (Copyhold Acts, 1841 (s. 85) and 1894 (s. 87)); or leasehold (*Foster v. F.*, 1 Ch. D. 588); or consists of, manors (*Hanbury v. Hussey*, 14 Beav. 153); advowsons (*Johnstone v. Baker*, 6 D. M. & G. 439); tithes (*Bassett v. Knollys*, 1 Ves. Sen. 494); or rent charges (*Rivis v. Watson*, 5 M. & W. 255). A tenant in common has, subject to this act, a right to a decree for partition (*Mayfair Property Co. v. Johnston*, 1894, 1 Ch. 508). See, further, notes to *Agar v. Fairfax* (2 L. C. Eq.). Where, however, the

property held
on trust;

whole property is vested in trustees on trust for sale, it is personalty and the court has no jurisdiction to decree partition or sale (*Biggs v. Peacock*, 22 Ch. Div. 284); nor where there is a trust for sale after certain events (*Swaine v. Denby*, 14 Ch. D. 326; see *Cass v. Wood*, 30 L. T. 670). But the existence of a power of sale in trustees is no bar to a partition decree (*Boyd v. Allen*, 24 Ch. D. 622); unless the trustees are about to exercise the power (*Re Norris*, 1883, W. N. 65). In some cases, at all events where there are active trusts to be performed by the trustees, partition will not be decreed (*Taylor v. Grange*, 15 Ch. Div. 165). Where one tenant in common has mortgaged his share to another tenant, he has no right to partition or sale, except on the terms of paying off the mortgage (*Gibbs v. Haydon*, 47 L. T. 184; 30 W. R. 726); but a tenant in common can maintain an action for partition or sale against his co-tenant, when the co-tenant is mortgagee of the whole property (*Waite v. Bingley*, 21 Ch. D. 674). A property which is in mortgage may be made the subject of a partition action without interfering with the mortgage (*Ib.*; *Sinclair v. James*, 1894, 3 Ch. 554). In the latter case mortgagees of the whole property and also of the share of the plaintiff were dismissed from the action, there being no cause of action against them. A claim to redeem a mortgage cannot properly be made in a partition action (*Ib.*).

Cases under
the act.

(b) Under this act the court may direct the sale of the fee simple of an estate subject to an executory devise over (*Groves v. Carbert*, 55 L. T. W. N. 165). The court cannot, under this act, direct a sale in a suit, where a decree for partition, though not acted on, was made before the passing of the act (*Pryor v. P.*, 10 Ch. 469).

Power of
court under
this section
discretionary.

Sects. 3, 4, and 5 of the act are, in form at least, independent enactments, though all to be construed together. The 4th and 5th sections are not mere provisions on the 3rd section (*Pitt v. Jones*, 5 App. Cas. 659). Sect. 3 confers on the court an absolute power of sale on the request of any one interested, provided the court is satisfied that a sale would be more beneficial for the parties interested than a division (*Drinkwater v. Ratcliffe*, 20 Eq. 530; *Pitt v. Jones*, 5 App. Cas. 661). This power is discretionary (*Pemberton v. Barnes*, 6 Ch. 693; *Huddersfield v. Jacomb*, 1874, W. N. 80); and with this discretion the Court of Appeal will not ordinarily interfere (*Dyer v. Paynter*, 33 W. R. 806).

The *onus* lies on those who wish a sale to show that it would be more beneficial (*Huddersfield v. Jacomb*, 1874, W. N. 80; *Allen v. A.*, 42 L. J. Ch. 839). And when a division can reasonably be made, a sale should not be directed under this section unless there are other circumstances giving jurisdiction (*Dyer v. Paynter*, *sup.*). So a sale has been refused where the court considered that the proper order was for partition (*Dicks v. Batten*, 1870, W. N. 173; *Huddersfield v. Jacomb*, 1874, W. N. 80). As to the meaning of "beneficial," see *Drinkwater v. Ratcliffe* (20 Eq. 533); *Fleming v. Crouch* (1884, W. N. 111). The court may order partition of part and sale of the rest (*Roebuck v. Chadebet*, 8 Eq. 127). As to the nature of the orders that will be made, see note to sect. 9, *post*.

Requests
under this
section.

A sale may be decreed at the request of a mortgagee of part of the property (*Davenport v. King*, 49 L. T. 92; *Re Hawksworth*, 1 L. R. Ir. 179). As to requests by persons under disability, see now Partition Act, 1876, s. 6, *post*. For the law before that act, see *Higgs v. Duke* (13 Eq. 280) (married women); *Grove v. Comyn* (18 Eq. 387) (infants); *Halfhide v. Robinson* (9 Ch. 373) (persons of unsound mind).

4. In a suit for partition, where, if this act had not been passed, a decree for partition might have been made, then if the party or parties interested, individually or collectively, to the extent of one moiety or upwards in the property to which the suit relates, request the court to direct a sale of the property and a distribution of the proceeds, instead of a division of the property between or among the parties interested, the court shall, unless it sees good reason to the contrary, direct a sale of the property accordingly, and give all necessary or proper consequential directions.

31 & 32 Vict.
c. 40, s. 4.

Sale on application of certain proportion of parties interested.

This section is an imperative enactment to the effect that, if parties interested to the extent of one moiety or upwards requests a sale, the court shall order a sale, unless it sees good reason to the contrary (*Pitt v. Jones*, 5 App. 661; *Drinkwater v. Ratcliffe*, 20 Eq. 530). A mortgagee is a party interested, and must be reckoned in the proportion of interests under this section (*Davenport v. King*, 49 L. T. 92); so is a tenant for life with an absolute power of appointment subject to a contingent life interest (*Parker v. Trigg*, 1874, W. N. 27). An order was made when the plaintiffs were the owners of one moiety and the sole defendant a lessee for seven years of the other moiety (*Mason v. Keays*, 78 L. T. 33).

Effect of this section.

The onus is thrown on the person who says that the court ought not to order a sale to show some good reason why it should not do so: otherwise the court is bound to order it (*Pemberton v. Barnes*, 6 Ch. 693; *Fleming v. Crouch*, 1884, W. N. 111). The fact that the owner of one moiety of an estate is yearly tenant of the whole property, and occupies it for the purposes of his business, and also resides thereon, is no "good reason" why a sale should not be ordered (*Wilkinson v. Joberns*, 16 Eq. 14; *Roughton v. Gibson*, 36 L. T. 93; 46 L. J. Ch. 366); nor is the fact that a sale will reduce the income of an infant (*Rowe v. Gray*, 5 Ch. D. 263); nor the fact that the land has fallen in value, and the proceeds will only produce an income equal to half the rent (*Re Whitwell*, 19 L. R. Ir. 45). See as to what will not be "good reason" in the case of a mansion-house and estate (*Pemberton v. Barnes*, 6 Ch. 685; *Porter v. Lopes*, 7 Ch. D. 358; *Lys v. L.*, 7 Eq. 126). But where partition was as easy as sale, and would cause no loss to the plaintiff, while a sale would cause great loss to the defendant, and the action was vindictive, there was held to be "good reason" (*Saxton v. Bartley*, 48 L. J. Ch. 519; 1879, W. N. 94; see *Re Langdale*, I. R. 5 Eq. 572).

Good reason to the contrary.

5. In a suit for partition, where, if this act had not been passed, a decree for partition might have been made, then if any party interested in the property to which the suit relates requests the court to direct a sale of the property and a distribution of the proceeds instead of a division of the property between or among the parties interested, the court may, if it thinks fit, unless the other parties interested in the property, or some of them, undertake to purchase the share of the party requesting a sale, direct a sale of the property, and give all necessary or proper consequential directions, and in case of such undertaking being given, the court may order a valuation of the share of the party requesting a sale in such manner as the court thinks fit, and may give all necessary or proper consequential directions.

As to purchase of share of party desiring sale.

31 & 32 Vict.
c. 40, s. 5.

This section is an independent enactment, not to be construed merely as a proviso on sect. 3 (*Pitt v. Jones*, 5 App. Cas. 659); under it the court has a discretion to refuse a sale requested by any party, even should no other party interested undertake to buy him out (*Richardson v. Feary*, 39 Ch. D. 45). If such an undertaking be offered, the court cannot under this section order a sale (*Pitt v. Jones*, 5 App. Cas. 659); but a party requesting a sale cannot be compelled to sell his interest at a valuation (*Ib.*; *Williams v. Games*, 10 Ch. 204); and may still press for a sale under sect. 3 (*Pitt v. Jones*, 5 App. Cas. 659; *Drinkwater v. Ratcliffe*, 20 Eq. 531). Undertakings to purchase may be given by persons under disability (Partition Act, 1876, s. 6, *post*).

Authority for
parties inter-
ested to
bid.

6. On any sale under this act the court may, if it thinks fit, allow any of the parties interested in the property to bid at the sale, on such terms as to non-payment of deposit, or as to setting off or accounting for the purchase-money or any part thereof instead of paying the same, or as to any other matters, as to the court seem reasonable.

The party having the conduct of the sale will not as a rule be allowed to bid. In one special case he was allowed (*Pennington v. Dalbiac*, 18 W. R. 684); but this was not followed in a similar case (*Verrall v. Cathcart*, 27 W. R. 645; 1879, W. N. 100; see *Wilkinson v. Joberns*, 16 Eq. 14; *Gilbert v. Smith*, 11 Ch. Div. 82). Parties who bought under a liberty to bid, and had been allowed to set off part of the purchase-money against their shares, were charged interest at 3 p.c. on the amounts set off (*Re Dracup*, *Field v. Dracup*, 1894, 1 Ch. 59).

Application
of Trustee
Act.
13 & 14 Vict.
c. 60.

7. Sect. 30 of the Trustee Act, 1850, shall extend and apply to cases where, in suits for partition, the court directs a sale instead of a division of the property.

This section was repealed by the Trustee Act, 1893, and replaced by a provision in sect. 31 of that Act (*post*, p. 790). Where an order for sale was made contingent on the answers to certain inquiries, the court, by the same order, declared that on such a sale infant parties would be trustees, and appointed their next friend to convey their shares (*Davis v. Ingram*, 1897, 1 Ch. 477).

Application
of proceeds
of sale.
19 & 20 Vict.
c. 120.

8. Sects. 23 to 25 (both inclusive) of the act of the session of the 19th and 20th years of her Majesty's reign (c. 120), "to facilitate Leases and Sales of Settled Estates," shall extend and apply to money to be received on any sale effected under the authority of this act.

Sections 34 to 36 of the S. E. Act, 1877 (which correspond to sections 23 to 25 of the S. E. Act, 1856), are given at length, *ante*, pp. 649 *et seq.*

This section applies to all sales under this act, whether of settled estates or otherwise (*Re Barker*, 17 Ch. Div. 244). Money has been paid out to trustees appointed for the purposes of the S. L. Acts (*Pyne v. Phillips*, 1895, W. N. 8).

Conversion.

An order rightfully made for the sale of land effects conversion as from its date and before sale (*Burgess v. Booth*, 1908, 2 Ch. 648; *Hyett v. Mekin*, 25 Ch. D. 735). Orders for sale under this act effect a similar conversion as regards the share of a person *sui juris* (*Re Dodson*, *Yates v. Morton*, 1908, 2 Ch. 638; *Arnold v. Dixon*, 19 Eq. 113; 23 W. R. 314; see *Re Pickard*, *Turner v. Nicholson*, 53 L. T. 293; see *Re Morgan*, *Smith v. May*, 1900, 2 Ch.

478). As regards, however, the shares of persons under disability and who have not properly requested or consented to a sale, there is (in the case of sales under this act) an equity for reconversion in the sections of 19 & 20 Vict. c. 120 (see now S. E. Act, 1877, ss. 34, 35, and 36, *ante*, pp. 649 *et seq.*), which are imported into the Partition Act, 1868. So held in the case of a married woman (*Mildmay v. Quicke*, 6 Ch. D. 553; see *Re Lloyd*, 9 P. D. 65); a lunatic (*Re Barker*, 17 Ch. Div. 241; *Grimwood v. Bartels*, 46 L. J. Ch. 788); an infant (*Foster v. F.*, 1 Ch. D. 588; compare the similar case under sect. 69 of the Lands Clauses Act, 1845, *Kelland v. Fulford*, 6 Ch. D. 491). Under sect. 6 of the Partition Act, 1876 (*post*, p. 753), a request for sale may be made on the part of an infant or married woman by the next friend or guardian. Where in an action in which an infant suing by his next friend was plaintiff, other parties entitled to one moiety requested a sale, and a sale was ordered on that footing, there was an equity for reconversion of the infant's share even though according to the form of the judgment he had also requested a sale (*Re Norton, N. v. N.*, 1900, 1 Ch. 101). Similarly where the sale was ordered upon the request of several plaintiffs, one of whom was an infant (*Howard v. Jalland*, 1891, W. N. 210; see *Re Norton, sup.*). There is, however, no such equity for reconversion where a married woman has properly requested a sale under sect. 6 of the Partition Act, 1876 (*Wallace v. Greenwood*, 16 Ch. D. 362; see as to an infant, *Ib.*; *Re Norton, N. v. N.*, 1900, 1 Ch. 101). For reconversion is a question of intention (*Re Grimthorpe, Beckett v. Grimthorpe*, 1908, 1 Ch. 679). Where there is an equity for reconversion in the case of a married woman, she can signify her election to take the fund as personal estate by a separate examination (*Standerling v. Hall*, 11 Ch. D. 652). And where the fund was under 200l. her separate examination has been dispensed with, payment out to her being made on affidavit of no settlement (*Wallace v. Greenwood*, 16 Ch. D. 362; but see *Topham v. Burgoyne*, 41 L. T. 670). The committee of a lunatic will only be authorized to request a sale upon the terms that the proceeds shall be subject to the same uses as the land (*Re Pares, Lillingstone v. Pares*, 12 Ch. Div. 333; see Lunacy Act, 1890, s. 123).

It seems that proceeds of land sold under this act, which is in court, and belongs to a person *sui juris*, who is absolutely entitled thereto and does not deal with it, is personal estate, and in the event of his death is payable to his personal representatives. So held in the case of a person *sui juris* who had become entitled as heir-at-law to an infant's share of such proceeds (*Mordaunt v. Benwell*, 19 Ch. D. 302); and in the case of a person who had become of unsound mind after the date of an order for payment out to her (*Re Pickard, Turner v. Nicholson*, 53 L. T. 293). Compare the converse case of property which was originally money but afterwards became in fact land which passed on the death of the beneficiary to his heir (*Re Loveridge, Pearce v. Marsh*, 1904, 1 Ch. 518). Where at the time of an order for sale under this act an undivided share of the land was vested in the trustees of the will of a former owner of such share (which will contained no power to invest in real estate), and a share of the proceeds was subsequently ordered to be paid to such trustees as persons "absolutely entitled," the result of the order was that such share devolved among the beneficiaries named in the will as personal estate (*Re Morgan, Smith v. May*, 1900, 2 Ch. 474). But it was said that if the fund had remained in court, it would have devolved as real estate (*Ib.* 478); compare *Re Harman, Lloyd v. Tardy*, 1894, 3 Ch. 607.

Where land in which persons under disability were interested was sold under this act, the court refused to order payment of the proceeds to trustees (*Higgs v. Dorkis*, 13 Eq. 280; see *Aston v. Meredith*, 13 Eq. 492; *Re Morgan, Smith v. May, sup.*; *Grimwood v. Bartels*, 46 L. J. Ch. 788).

9. Any person who, if this act had not been passed, might have maintained a suit for partition, may maintain such suit against any one or more of the parties interested, without serving the other or others (if any) of those parties; and it shall

31 & 32 Vict.
c. 40, s. 8.
Reconver-
sion.

Parties to
partition
suits.

31 & 32 Vict. c. 40, s. 9. not be competent to any defendant in the suit to object for want of parties; and at the hearing of the cause the court may direct such inquiries as to the nature of the property, and the persons interested therein, and other matters, as it thinks necessary or proper with a view to an order for partition or sale being made on further consideration; but all persons who, if this act had not been passed, would have been necessary parties to the suit, shall be served with notice of the decree or order on the hearing, and after such notice shall be bound by the proceedings as if they had been originally parties to the suit, and shall be deemed parties to the suit, and all such persons may have liberty to attend the proceedings; and any such person may, within a time limited by general orders, apply to the court to add to the decree or order.

Parties.

As to who may maintain an action for partition, see *ante*, p. 743.

In actions under this act, trustees represent their beneficiaries (*R. S. C. Ord. 16, r. 8; Simpson v. Denny*, 10 Ch. D. 28; *Goodrich v. Marsh*, 1878, W. N. 186; see *Stace v. Gage*, 8 Ch. D. 451). But there may be a difficulty about unborn persons claiming under legal limitations (*Miles v. Jarvis*, 1883, W. N. 203). An annuitant is not a necessary party (*Poole v. P.*, 1885, W. N. 15). As to mortgagees, see cases quoted *ante*, p. 744. An order was made where the plaintiffs were the owners of one moiety and the sole defendant a lessee for seven years of the other moiety (*Mason v. Keays*, 78 L. T. 33).

Pleading.

In pleading it is sufficient if the S. of C. asks a sale and distribution of proceeds. It need not ask partition (39 & 40 Vict. c. 17, s. 7, *post*, p. 753). It should indicate under which section of this act the sale is claimed (*Evans v. E.*, 52 L. J. Ch. 304); and if a sale is claimed under sect. 3 on the ground that it is more beneficial, this should be expressly pleaded (*Ib.*). Where the property had been misdescribed the pleading was amended, and the order post-dated so as to refer to the amended pleading (*Winkley v. W.*, 44 L. T. 572). A claim to redeem a mortgage on the plaintiff's share cannot be added to the claim for partition or sale (*Sinclair v. James*, 1894, 3 Ch. 554).

Receiver.

Before the hearing, a receiver may in a proper case be appointed (*Porter v. Lopes*, 7 Ch. D. 358). But without leave he cannot purchase even where the sale is outside the action by a mortgagee under his power (*Nugent v. N.*, 1908, 1 Ch. 546).

Hearing.

At the hearing, an immediate order for sale has been made on admission by the defendant of the title as set out in the statement of claim (*Burnell v. B.*, 11 Ch. D. 213); but where infants are interested the claim should be verified by affidavit (*Willis v. W.*, 61 L. T. 610; see *Crook v. C.*, 1890, W. N. 26). Consent to affidavit evidence can be given, without the court's sanction, by the guardian *ad litem* of a defendant of unsound mind (*Piggott v. Toogood*, 1904, W. N. 130). Where all persons interested, and who were in existence, were parties, and the title was proved by affidavit at the hearing, an immediate order for sale was made without preliminary inquiry (*Lees v. Coulton*, 20 Eq. 20). And often this is the shortest and least expensive course (*Re Stedman*, *Coombe v. Vincent*, 58 L. T. 709). But, *semble*, it can only be adopted where the property is small, and the title simple (*Wood v. Gregory*, 43 Ch. D. 82; *Hawkins v. Herbert*, 60 L. T. 142; 37 W. R. 300). The usual course is to direct inquiries, and an immediate order for sale may be made conditional on the result (*Powell v. P.*, 10 Ch. 130); the words "further consideration" in this section not being used in their technical sense (*Ib.*; see *Mildmay v. Quick*, 20 Eq. 538). The form of order usually made when (under sect. 4) persons interested in a moiety or upwards request a sale is given in Seton, 6th ed. 1855. In Seton, 6th ed. 1853, is given a form for use where a sale is requested under sect. 3 (see *Re Hardiman*, *Pragnell v.*

Batten, 16 Ch. D. 360; *Waite v. Bingley*, 21 Ch. D. 674; *Sykes v. Schofield*, 14 Ch. D. 629). Preliminary inquiries may be directed on admissions in the pleadings (R. S. C. Ord. 32, r. 6), without evidence (*Gilbert v. Smith*, 2 Ch. Div. 686). Where in such a case the defendants were infants, no affidavit was required, the court holding that the inquiries would be a sufficient protection to the infants (*Ripley v. Sawyer*, 31 Ch. D. 494); not following *Senior v. Hereford* (4 Ch. D. 494); see *Fitzwalter v. Waterhouse* (52 L. J. Ch. 83).

31 & 32 Vict.
c. 40, s. 9.

Under this section notice of the decree must be served on all necessary Service. parties who are not before the court at the hearing. Under sect. 3, however, of Partition Act, 1876 (*post*), such service may be dispensed with.

No final order for sale will be made unless all persons interested are Final order parties (*Dodd v. Gronow*, 17 W. R. 511), or have been served with notice for sale. of the judgment (*Peters v. Bacon*, 8 Eq. 125; *Peal v. Watts*, 11 Eq. 213; *Hurry v. H.*, 10 Eq. 346; see *Silver v. Udall*, 9 Eq. 227); or such service has been dispensed with under sect. 3 of the Partition Act, 1876, *post*, p. 751 (*Re Hardiman*, *Pragnell v. Batten*, 16 Ch. D. 360); or unless the absent parties can be presumed to be dead, as where they have not been heard of for a long time (*Jackson v. Lomas*, 23 W. R. 744; *Rawlinson v. Miller*, 1 Ch. D. 52). A sale before the certificate in answer to inquiries has been approved is invalid, and the purchaser is entitled to be discharged (*Powell v. P.*, 10 Ch. 130; see *Rawlinson v. Miller*, 1 Ch. D. 54). Where the action has been begun in a district registry, the inquiries may be held there, but the application for a sale must be made in the High Court (*Sykes v. Schofield*, 14 Ch. D. 629).

R. S. C. Ord. 51, r. 1a., provides that in all cases where a sale or par- Sale out of tition is ordered, the court or a judge shall, in addition to existing powers, court. have power for good reason to authorize the same to be carried out, either by laying proposals before the judge or by proceedings altogether out of court, the proceeds being dealt with as the judge may order; but no proceedings altogether out of court are to be authorized unless the judge is satisfied that all persons interested are before the court or are bound. As to when a sale is "altogether out of court," see *Cumberland Banking Co. v. Maryport Co.* (1892, 1 Ch. 92).

Under this rule an order for sale out of court may be made, even where an infant is interested (*Willis v. W.*, 61 L. T. 610); or a person of unsound mind (*Crook v. C.*, 1890, W. N. 26). Before the rule this was otherwise (*Strugnell v. S.*, 27 Ch. D. 258). A form of order for sale out of court is given in Seton, p. 1867, 6th ed.; and see *Willis v. W.*, 61 L. T. 610. The reserve price and the auctioneer's remuneration should be fixed by the chief clerk, and the money should be paid into court (*Pitt v. White*, 57 J. T. 650; *Willis v. W.*, *sup.*; *Re Stedman*, *Coombe v. Vincent*, 58 L. T. 709).

For effectuating a sale under this act, the estate tail of a lunatic may be Form of barred upon terms (*Re Pares*, *Lillingstone v. Pares*, 12 Ch. Div. 333; see order. also sect. 31 of the Trustee Act, 1893, and cases there quoted, *post*, p. 790). The court declined to sanction a sale reserving minerals (*Law v. Stoney*, 1876, W. N. 141). Various forms of orders under the act are given in Seton, p. 1853 *et. seq.*, 6th ed. For form of order when infants are interested, see *Davis v. Ingram* (1897, 1 Ch. 477). For order where there have been permanent improvements, see *Parker v. Trigg* (1874, W. N. 27); *Williams v. Williams* (1899, W. N. 66), and cases there referred to; and where there are annuitants interested, see *Poole v. P.* (1885, W. N. 15).

10. In a suit for partition the court may make such order as Costs in par- it thinks just, respecting costs up to the time of the hearing. tition suits.

The rule as to costs in a partition suit before this act was that no costs were given until the hearing; and that the costs of the partition should be borne by the parties in proportion to the value of their respective interests; without any costs of subsequent proceedings (*Agar v. Fairfax*, 17 Ves. 557; *Richardson v. Feary*, 39 Ch. D. 50).

31 & 32 Vict.
c. 40, s. 10.

In cases under this act the general rule is that the entire costs are borne by the estate, that is, by each share in proportion to its value, the shares being ascertained at the date of the chief clerk's certificate (*Belcher v. Williams*, 45 Ch. D. 510; see *Cannon v. Johnstone*, 11 Eq. 90; *Ball v. Kemp-Welch*, 14 Ch. D. 512; *Graham v. Clinton*, 81 L. T. 717). Where partition only was asked for, this rule has been followed (*Bowes v. Bute*, 27 W. R. 750); but under special circumstances the old rule may be adopted (*Richardson v. Feary*, 39 Ch. D. 50), and where partition only was granted no costs were given until the hearing (*Hills v. Archer*, 1904, W. N. 113). The court may always exercise its discretion (*Porter v. Lopes*, 7 Ch. D. 367; *Re Hawkesworth*, 1 L. R. Ir. 179; *Jennings v. Foster*, 1884, W. N. 200; see *Osborn v. O.*, 6 Eq. 338; *Miller v. Marriott*, 7 Eq. 1; *Leach v. Westall*, 17 W. R. 313; *Simpson v. Ritchie*, 16 Eq. 103). As to costs of adverse litigation in respect of one share, see *Jennings v. Foster* (1884, W. N. 200); *Mildmay v. Quicke* (46 L. J. Ch. 667); *Belcher v. Williams* (45 Ch. D. 510). When there are incumbrances on the shares only one set of costs in respect of each share will be allowed out of the fund (*Catton v. Banks*, 1893, 2 Ch. 221; *Ancell v. Rolfe*, 1896, W. N. 9; *Re Vase, Langrish v. Vase*, 1901, W. N. 124; see, however, *Belcher v. Williams*, 45 Ch. D. 510; and see *Wilkinson v. Joberns*, 16 Eq. 14). As to costs of trustees, see *Hervey v. Oliver* (57 L. T. 239). The costs must be taxed as between party and party, unless by consent of all parties (*Ball v. Kemp-Welch*, 14 Ch. D. 512). The costs of perusing the conveyance by the solicitors of the parties not conducting the sale are costs in the action, under the Solicitors' Remuneration Act, 1881 (General Order, 1882, r. 2 (c)); *Humphreys v. Jones*, 31 Ch. Div. 30). As to the lien of a solicitor on the shares for his costs, see *Lloyd v. Jones* (40 L. T. 514); and as to his costs of appearing where he had obtained a charging order, see *Mildmay v. Quicke* (6 Ch. D. 556).

[Sect. 11 of the Partition Act, 1868, read in connection with sect. 11 of 21 & 22 Vict. c. 27, gave power to make general orders for carrying this act into effect. But these provisions have been repealed by 44 & 45 Vict. c. 59, s. 3, as to England; where the power to make rules of court is now given by sect. 17 of the Jud. Act, 1875. As to Ireland and the County Palatine of Lancaster, power to make general orders was given by sect. 11 of 31 & 32 Vict. c. 40, and sects. 9 and 10 of 21 & 22 Vict. c. 27.]

Jurisdiction
of county
courts in
partition.
28 & 29 Vict.
c. 99.

12. In England the county courts shall have and exercise the like power and authority as the Court of Chancery in suits for partition (including the power and authority conferred by this act) in any case where the property to which the suit relates does not exceed in value the sum of five hundred pounds, and the same shall be had and exercised in like manner and subject to the like provisions as the power and authority conferred by section one of "The County Courts Act, 1865."

See now sect. 67 of County Courts Act, 1888. Where in a case commencing in a County Court the proceeds of sale exceeded 500*l.*, the matter was transferred to the High Court (*Rawlinson v. Miller*, 1 Ch. D. 52).

II.—THE PARTITION ACT, 1876.

39 & 40 VICT. c. 17.

39 & 40 Vict.
c. 17, s. 1.

Short title.

1. This act may be cited as the Partition Act, 1876, and shall be read as one with the Partition Act, 1868.

2. This act shall apply to actions pending at the time of the passing of this act as well as to actions commenced after the passing thereof, and the term "action" includes a suit, and the term "judgment" includes decree or order.

39 & 40 Vict.
c. 17, s. 2.

Application
of act.

3. Where in an action for partition it appears to the court that notice of the judgment on the hearing of the cause cannot be served on all the persons on whom that notice is by the Partition Act, 1868, required to be served, or cannot be so served without expense disproportionate to the value of the property to which the action relates, the court may, if it thinks fit, on the request of any of the parties interested in the property, and notwithstanding the dissent or disability of any others of them by order, dispense with that service on any person or class of persons specified in the order, and, instead thereof, may direct advertisements to be published at such times and in such manner as the court shall think fit, calling upon all persons claiming to be interested in such property who have not been so served to come in and establish their respective claims in respect thereof before the judge in chambers within a time to be thereby limited. After the expiration of the time so limited all persons who shall not have so come in and established such claims, whether they are within or without the jurisdiction of the court (including persons under any disability) shall be bound by the proceedings in the action as if on the day of the date of the order dispensing with service they had been served with notice of the judgment, service whereof is dispensed with; and thereupon the powers of the court under the Trustee Act, 1850, shall extend to their interests in the property to which the action relates as if they had been parties to the action; and the court may thereupon, if it shall think fit, direct a sale of the property and give all necessary or proper consequential directions,

Power to
dispense with
service of
notice of
decree or
order in
special cases.

There must be either service or advertisement of the judgment; the court cannot dispense with both (*Hacking v. Whalley*, 51 L. J. Ch. 944; 1882, W. N. 135; *Phillips v. Andrews*, 56 L. T. 108; see, however, *Barton v. B.* 1877, W. N. 23). For form of order dispensing with service, see *Re Hardiman*, *Pragnell v. Batten* (16 Ch. D. 360).

4. Where an order is made under this act dispensing with service of notice on any person or class of persons, and property is sold by order of the court, the following provisions shall have effect:

Proceedings
where service
is dispensed
with.

- (1.) The proceeds of sale shall be paid into court to abide the further order of the court:
- (2.) The court shall, by order, fix a time, at the expiration of which the proceeds will be distributed, and may from time to time, by further order, extend that time:
- (3.) The court shall direct such notices to be given by advertisements or otherwise as it thinks best adapted for notifying to any persons on whom service is dispensed

39 & 40 Vict.
c. 17, s. 4.

- with, who may not have previously come in and established their claims, the fact of the sale, the time of the intended distribution, and the time within which a claim to participate in the proceeds must be made (c):
- (4.) If at the expiration of the time so fixed or extended the interests of all the persons interested have been ascertained, the court shall distribute the proceeds in accordance with the rights of those persons :
 - (5.) If at the expiration of the time so fixed or extended the interests of all the persons interested have not been ascertained, and it appears to the court that they cannot be ascertained, or cannot be ascertained without expense disproportionate to the value of the property or of the unascertained interests, the court shall distribute the proceeds in such manner as appears to the court to be most in accordance with the rights of the persons whose claims to participate in the proceeds have been established, whether all those persons are or are not before the court, and with such reservations (if any) as to the court may seem fit in favour of any other persons (whether ascertained or not) who may appear from the evidence before the court to have any *prima facie* rights which ought to be so provided for, although such rights may not have been fully established, but to the exclusion of all other persons, and thereupon all such other persons shall by virtue of this act be excluded from participation in those proceeds on the distribution thereof, but notwithstanding the distribution any excluded person may recover from any participating person any portion received by him of the share of the excluded person.

(c) Where the order dispensing with service of notice of the judgment did not provide for issuing advertisements, the court, on an application to distribute, directed advertisements to issue, and postponed the distribution for six months (*Phillips v. Andrews*, 56 L. T. 108). This sub-section applies only to persons beneficially interested, not to trustees (*Crossman v. Richards*, 1888, W. N. 167).

Provision for
case of suc-
cessive sales
in same
action.

5. Where in an action for partition two or more sales are made, if any person who has by virtue of this act been excluded from participation in the proceeds of any of those sales establishes his claim to participate in the proceeds of a subsequent sale, the shares of the other persons interested in the proceeds of the subsequent sale shall abate to the extent (if any) to which they were increased by the non-participation of the excluded person in the proceeds of the previous sale, and shall to that extent be applied in or towards payment to that person of the share to which he would have been entitled in the proceeds of the previous sale if his claim thereto had been established in due time.

6. In an action for partition a request for sale may be made or an undertaking to purchase given on the part of a married woman, infant, person of unsound mind, or person under any other disability, by the next friend, guardian, committee in lunacy (if so authorized by order in lunacy), or other person authorized to act on behalf of the person under such disability, but the court shall not be bound to comply with any such request or undertaking on the part of an infant unless it appear that the sale or purchase will be for his benefit.

39 & 40 Vict.
c. 17, s. 6.

Request by
married
woman,
infant, or
person under
disability.

The authority to act on behalf of the person under disability must be to act in the action (*Rimington v. Hartley*, 14 Ch. D. 632); and the authority must be given in some special manner (*Wallace v. Greenwood*, 16 Ch. D. 365).

In the case of a married woman, or an infant, a request by counsel is not sufficient (*Wallace v. Greenwood*, 16 Ch. D. 362; *Howard v. Jalland*, 1891, W. N. 210; *contra*, *Crookes v. Whitworth*, 10 Ch. D. 289). A written request signed by the married woman, authorizing and requesting her solicitor to instruct counsel to ask for sale has been held sufficient (*Grange v. White*, 18 Ch. D. 612). The request of an infant may be made by his next friend or guardian *ad litem*, but the sale must be shown to be for his benefit (*Rimington v. Hartley*, 14 Ch. D. 630; *Miles v. Jarvis*, 50 L. T. 48; *contra*, *Platt v. P.*, 28 W. R. 533). An action may be brought or a request made by the next friend of a person of unsound mind, not so found, but it must be shown that the sale is for his benefit (*Porter v. Porter*, 37 Ch. D. 420; *Watt v. Leach*, 26 W. R. 475). A request by the committee of a lunatic was authorized in *Re Pares*, *Lillington v. Pares* (12 Ch. Div. 333).

As to the effect of a request under this section as regards conversion of the property into personal estate, see note *ante*, p. 747.

7. For the purposes of the Partition Act, 1868, and of this act, an action for partition shall include an action for sale and distribution of the proceeds, and in an action for partition it shall be sufficient to claim a sale and distribution of the proceeds, and it shall not be necessary to claim a partition.

Action for
partition to
include
action for sale
and distribu-
tion of the
proceeds.

THE APPORTIONMENT ACT, 1870.

33 & 34 VICT. C. 35.

An Act for the better Apportionment of Rents and other Periodical Payments. [1st August, 1870.]

33 & 34 Vict.
c. 35, s. 1.

WHEREAS rents and some other periodical payments are not at common law apportionable (like interest on money lent) in respect of time, and for remedy of some of the mischiefs and inconveniences thereby arising divers statutes have been passed in the eleventh year of the reign of his late Majesty King George the Second (chapter nineteen), and in the session of Parliament holden in the fourth and fifth years of his late Majesty King William the Fourth (chapter twenty-two), and in the session of Parliament held in the sixth and seventh years of his late Majesty King William the Fourth (chapter seventy-one), and in the session of Parliament held in the fourteenth and fifteenth years of her present Majesty (chapter twenty-five), and in the session of Parliament held in the twenty-third and twenty-fourth years of her present Majesty (chapter one hundred and fifty-four):

And whereas it is expedient to make provision for the remedy of all such mischiefs and inconveniences:

Be it therefore enacted as follows:

Short title.

1. This Act may be cited for all purposes as "The Apportionment Act, 1870."

Rents and periodical payments shall accrue from day to day and be apportionable in respect of time.

2. From and after the passing of this act, all rents, annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly.

As to questions of apportionment arising before 1st August, 1870, see the Apportionment Act, 1834; Shelford's R. P. Stat. 8th ed. 542; Tudor's L. C. Real Prop., 50—54, 4th ed.

The question frequently raised under the old law whether such a determination of the interest had occurred as would give rise to an apportionment (see *Shipperdson v. Tower*, 8 Jur. 485) cannot arise under the Act of 1870 (*Clive v. Clive*, 7 Ch. 433).

The fact that interest on money lent is treated as accruing from day to day

was applied as illustrating the question whether a mortgage debt payable at a future time was "producing income" in the meantime within the meaning of a will (*Re Lewis, Davies v. Harrison*, 1907, 2 Ch. 303). 33 & 34 Vict. c. 35, s. 2.

Where the event on which apportionment is claimed occurs after the passing of the act, the act applies whether the instrument comes into operation before or after the act (*Re Oline*, 18 Eq. 213). So held in the case of a will (*Lawrence v. L.*, 26 Ch. D. 795; *Patching v. Barnett*, 43 L. T. 50; see *Capron v. C.*, 17 Eq. 288; *Hasluck v. Pedley*, 19 Eq. 271; *Constable v. C.*, 11 Ch. D. 681; where codicils were executed after the act; see, however, *Jones v. Ogle*, 8 Ch. 192). So held also in the case of an order of court (*Re Thacker*, 1873, W. N. 10).

The act does not bind the Crown, against which accordingly there is no apportionment of annual sums payable as Crown debts (*Rochester v. Lefanu*, 1906, 2 Ch. 513). But the act applies as between the estate of a testator and a person claiming under a specific gift of real estate (*Hasluck v. Pedley*, 19 Eq. 271; *Constable v. C.*, 11 Ch. D. 681) and of personal estate (*Re Griffith, Carr v. Griffith*, 12 Ch. D. 655; *Pollock v. P.*, 18 Eq. 329; *Re Oppenheimer, Oppenheimer v. Boatman*, 1907, 1 Ch. 399). Similarly the act applies between tenant for life and remainderman (*Re Oline*, 18 Eq. 213; *Pollock v. P.*, *ib.* 329). For cases where the testator has given directions against apportionment, see sect. 7, *post*.

As between vendor and purchaser the words of sect. 2 seem wide enough to give rise to an apportionment of rent when not provided for by the contract. See, however, *Re Keillor* (1 R. 6 Eq. 329), where a purchaser of land was held liable to all rent payable after the purchase; and *Black v. Homersham* (4 Ex. D. 24), where a purchaser of shares was held entitled to all dividends declared after the contract. As to the apportionment of expenses, the rule which in the absence of express stipulation applies between vendor and purchaser is stated, *Re Highett and Bird*, 1902, 2 Ch. 217. See further *Dart, V. & P.* 6th ed. 915.

Where a condition on a sale of leaseholds provided that the purchaser should have possession on a certain day, all outgoings up to that day being cleared by the vendors, the vendors were held bound to pay an apportioned part of the current rent (*Lawes v. Gibson*, 1 Eq. 135).

Where land in occupation of a tenant was conveyed, it was held under the old law that while the conveyance did not pass arrears of rent previously due (*Flight v. Bentley*, 7 Sim. 151), it passed all the grantor's interest in rent not then due (*Flinn v. Cullow*, 1 M. & Gr. 589). See *Plews v. Samuel*, 1904, 1 Ch. 464).

As between landlord and tenant, where, during a quarter, a succession occurs among the persons entitled to the reversion, the case falls within the proviso at the end of sect. 4, and only one action can be brought for the entire rent. But where the succession occurs among the persons entitled to the term, the reversioner can sue each person liable for his proportion of rent, but for no greater sum. So held where the trustee of a bankrupt tenant entered and subsequently assigned over during a current quarter (*Swansea Bank v. Thomas*, 4 Ex. D. 94; 40 L. T. 558; *Hopkinson v. Lovering*, 11 Q. B. D. 92). The act, in fact, not only affects the rights of recipients of rent, but apportions the liability to pay rent (*Re Howell*, 1895, 1 Q. B. 847; *Rochester v. Lefanu*, 1906, 2 Ch. 513; see *Re Leake*, 1902, 2 I. R. 339; *Glass v. Patterson*, 1902, 2 I. R. 660). Where a tenant is evicted by title paramount during a quarter, the act applies, and the tenant is liable for an apportioned part up to eviction (*Elvidge v. Meldon*, 24 L. R. Ir. 91; see *Hartcup v. Bell*, 1 Cab. & El. 19). And the same rule seems to obtain where a landlord lawfully evicts his own tenant (see *Ellis v. Rowbotham*, 1900, 1 Q. B. 743, and sect. 3 of the act; see formerly *Oldershaw v. Holt*, 12 Ad. & El. 590); but not where the eviction is wrongful (*Clapham v. Draper*, 1 Cab. & El. 484). Where rent was payable in advance, it was not apportioned, it being said that the act was only intended to apply to sums which are accruing, but have not accrued, due when the apportionment is said to be required (*Ellis v. Rowbotham*, 1900, 1 Q. B. 744).

33 & 34 Vict.
c. 35, s. 2.

On the construction of a will, a direction to forgive a tenant all rents "due and owing" at the testator's death, was held to relate to rent not up to the death, but only to the last rent day before the death (*Re Lucas, Parish v. Hudson*, 54 L. T. 30); and it has been held that rent cannot, before it has become payable, be attached under a garnishee order (*Barnett v. Eastman*, 67 L. J. Q. B. 517). On the other hand, where a tenant becomes bankrupt during a quarter, rent up to the adjudication is rent "accrued due" within sect. 42 of the Bankruptcy Act, 1883; and the landlord upon the expiry of the quarter may distrain (*Re Howell*, 1895, 1 Q. B. 844; see *Re Wilson*, 62 L. J. Q. B. 628).

In the case of a company, a claim for rent for the expired portion of a current quarter is not a debt on which before the end of the quarter a winding-up petition can be founded (*United Club Co.*, 60 L. T. 665). Where a company holding a lease is wound up, the lessor may prove for a proportionate part of the rent up to the winding-up order or resolution as if the rent grew due from day to day. (Winding-up Rules, 1909, rule 96.) See *South Kensington Stores* (17 Ch. D. 161; *Shackell v. Chorlton*, 1895, 1 Ch. 378).

The right specially conferred by the Landlord and Tenant Act, 1851, s. 1, upon a remainderman to an apportioned part of the rent under a lease granted by a tenant for life seems now to belong to him under the general provisions of this act.

In the ordinary case of rents issuing out of land, a mortgagee entering is entitled to rents then accrued due but not paid over. And this right has not been interfered with by the act (*Anderson v. Butler's Wharf*, 48 L. J. Ch. 824).

In the case of an annuity charged on the land of a tenant for life and secured by a term, it was held under the old law that, unless the annuitant had entered into possession, he could not claim arrears of his annuity out of apportioned rents belonging to the tenant for life's estate (*Paget v. Anglesey*, 17 Eq. 283).

Payments ap-
portionable.

Under this act an apportionment has been made of rents (*Capron v. C.*, 17 Eq. 288; *Roseingrave v. Burke*, 1 R. 7 Eq. 186; see *South Kensington Stores*, 17 Ch. D. 161; *Ellis v. Rowbotham*, 1900, 1 Q. B. 740); annual sums payable by a bishop in commutation of tenths (*Rochester v. Lefanu*, 1906, 2 Ch. 513); dividends on stock (*Pollock v. P.*, 18 Eq. 329); dividends payable by a company registered under the Cos. Act, 1862 (*Re Lysaght, L. v. L.*, 1898, 1 Ch. 115); an occasional bonus on shares in an unincorporated life assurance society which was held to be a public company within sect. 5 (*Re Griffith, Carr v. Griffith*, 12 Ch. D. 655); a salary (*Treacy v. Corcoran*, 1 R. 8 C. L. 40); but not of profits arising from a newspaper (*Re Cox*, 9 Ch. D. 159); nor of the profits of a private trading partnership (*Jones v. Ogle*, 8 Ch. 192); nor of parish rates (*Re Wearmouth Co.*, 19 Ch. D. 640); nor an annuity payable in advance (*Trevalion v. Anderton*, 66 L. J. Q. B. 489).

Where directors of a company were under the articles entitled to "receive by way of remuneration in each year" 5,000*l.*, they were only entitled in respect of a complete year, and the act did not apply (*Salton v. New Beeston Cycle Co.*, 1899, 1 Ch. 775; see *Re Shaws Bryant & Co.*, 1901, W. N. 124; *Re McConnell*, 1901, 1 Ch. 728; *Inman v. Ackroyd*, 1901, 1 Q. B. 613).

No apportionment of income will be made as between tenant for life and remainderman with reference to the variation in price of stock arising from the distance of a period of sale or investment from the day of payment of dividend (*Scholefield v. Redfern*, 2 Dr. & Sm. 173; *Freeman v. Whitbred*, 1 Eq. 266; *Re Clarke, Barker v. Perowne*, 18 Ch. D. 160). Where, after the death of a life tenant, stock was sold "cum div." for distribution, the life tenant's estate was not entitled under this act to receive out of the price anything in respect of the dividend (*Bulkeley v. Stephens*, 1896, 2 Ch. 241). Where, however, capital money was invested in stock on which at the date of purchase a dividend had been earned and declared but not paid, the tenant for life was not entitled to it (*Re Peel*, 1910, 1 Ch. 389).

The apportionment contemplated by the above act is one in respect of

time. As to the apportionment (in a different sense) of rent service and rent-charges in certain cases, see Law of Prop. Amend. Act, 1859, ss. 3, 10, *ante*, pp. 531, 533; and with respect to leases granted after the 31st December, 1881, see Conv. Act, 1881, s. 12, *ante*, p. 574.

33 & 34 Vict.
c. 35, s. 2.

3. The apportioned part of any such rent, annuity, dividend or other payment shall be payable or recoverable in the case of a continuing rent, annuity, or other such payment when the entire portion of which such apportioned part shall form part shall become due and payable, and not before, and in the case of a rent, annuity, or other such payment determined by re-entry, death, or otherwise when the next entire portion of the same would have been payable if the same had not so determined, and not before.

Apportioned part of rent, &c. shall be payable when the next entire portion shall have become due.

4. All persons and their respective heirs, executors, administrators, and assigns, and also the executors, administrators, and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively; provided that persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically, but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this act, or otherwise, would have been entitled to such entire or continuing rent, and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this act to the same by action at law or suit in equity.

Persons shall have the same remedies for recovering apportioned parts as for entire portions.

Provido as to rents reserved in certain cases.

See *Swansea Bank v. Thomas*, 4 Ex. D. 94, *ante*, p. 755.

5. In the construction of this act—

The word “rents” includes rent-service, rent-charge, and rent-seck, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe.

The word “annuities” includes salaries and pensions.

The word “dividends” includes (besides dividends strictly so called) all payments made by the name of dividend, bonus, or otherwise out of the revenue of trading or other public companies (*a*), divisible between all or any of the members of such respective companies, whether such payments shall be usually made or declared at any fixed times or otherwise; and all such divisible revenue shall, for the purposes of this act, be deemed to have accrued by equal daily increment during and within the period for or in

Interpretation of terms.

33 & 34 Vict.
c. 35, s. 5.

respect of which the payment of the same revenue shall be declared or expressed to be made (*b*), but the said word "dividend" does not include payments in the nature of a return or reimbursement of capital.

(*a*) See the note to sect. 2; and in particular *Jones v. Ogle* (8 Ch. 192); *Re Griffith, Carr v. Griffith*, (12 Ch. D. 655). The words include companies registered under the Companies Act, 1862 (*Re Lysaght, L. v. L.*, 1898, 1 Ch. 115).

(*b*) It was held under the old law that for the purpose of apportionment a dividend was to be taken as payable on the day on which it was actually payable, and not on the day on which it was declared (*Hartley v. Allen*, 27 L. J. Ch. 621).

Act not to
apply to
policies of
assurance:

6. Nothing in this act contained shall render apportionable any annual sums made payable in policies of assurance of any description.

nor where
stipulation
made to the
contrary.

7. The provisions of this act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place.

It was held under the similar words of sect. 3 of Apportionment Act, 1834, that inference from the whole tenor and context of the will was not sufficient to exclude the operation of the act (*Tyrrell v. Clark*, 2 Drew. 86). But an express gift of the income of property will have that effect (*Re Cleveland, Wolmer v. Forester*, 1894, 1 Ch. 165; *Re Lysaght, L. v. L.*, 1898, 1 Ch. 115; *Re Meredith, Stone v. Meredith*, 67 L. J. Ch. 409; 78 L. T. 492; *Roseingrave v. Burke*, 7 I. R. Eq. 190; see *Jones v. Ogle*, 8 Ch. 115).

It seems that the "express stipulation" must be contained in the will or other instrument of gift. It was not found in the articles of a company in which the testator held shares (*Re Oppenheimer, Oppenheimer v. Boatman*, 1907, 1 Ch. 399).

TRUSTEES.

I. THE TRUSTEE ACT, 1893	759
II. THE TRUSTEE ACT, 1893, AMENDMENT ACT, 1894	810
III. THE LUNACY ACT, 1890, ss. 110, 120, 128, 129, 135—143, 341	810
IV. THE JUDICIAL TRUSTEES ACT, 1896	821

I.—THE TRUSTEE ACT, 1893.

56 & 57 VICT. C. 53.

An act to consolidate enactments relating to Trustees.
[22nd September, 1893.]

PART I.

INVESTMENTS.

1. A trustee may, unless expressly forbidden by the instru- 56 & 57 Vict.
c. 53, s. 1.
ment (if any) creating the trust, invest any trust funds in his hands, whether at the time in a state of investment or not, in Authorized
investments.
manner following, that is to say (*a*):
 - (a) In any of the parliamentary stocks or public funds or Government securities of the United Kingdom:
 - (b) On real or heritable securities in Great Britain or Ireland (*b*):
 - (c) In the stock of the Bank of England or the Bank of Ireland:
 - (d) In India Three and a half per cent. stock and India Three per cent. stock, or in any other capital stock which may at any time hereafter be issued by the Secretary of State in Council of India under the authority of Act of Parliament, and charged on the revenues of India:
 - (e) In any securities the interest of which is for the time being guaranteed by Parliament:
 - (f) In consolidated stock created by the Metropolitan Board of Works, or by the London County Council, or in debenture stock created by the Receiver for the Metropolitan Police District:

56 & 57 Vict.
c 53, s. 1.

- (g) In the debenture or rentcharge, or guaranteed or preference stock of any railway company in Great Britain or Ireland incorporated by special Act of Parliament, and having during each of the ten years last past before the date of investment paid a dividend at the rate of not less than three per centum per annum on its ordinary stock :
- (h) In the stock of any railway or canal company in Great Britain or Ireland whose undertaking is leased in perpetuity or for a term of not less than two hundred years at a fixed rental to any such railway company as is mentioned in sub-section (g), either alone or jointly with any other railway company :
- (i) In the debenture stock of any railway company in India the interest on which is paid or guaranteed by the Secretary of State in Council of India :
- (j) In the "B" annuities of the Eastern Bengal, the East Indian, and the Scinde Punjaub and Delhi Railways, and any like annuities which may at any time hereafter be created on the purchase of any other railway by the Secretary of State in Council of India, and charged on the revenues of India, and which may be authorised by Act of Parliament to be accepted by trustees in lieu of any stock held by them in the purchased railway ; also in deferred annuities comprised in the register of holders of annuity Class D. and annuities comprised in the register of annuitants Class C. of the East Indian Railway Company :
- (k) In the stock of any railway company in India upon which a fixed or minimum dividend in sterling is paid or guaranteed by the Secretary of State in Council of India, or upon the capital of which the interest is so guaranteed :
- (l) In the debenture or guaranteed or preference stock of any company in Great Britain or Ireland, established for the supply of water for profit, and incorporated by special Act of Parliament or by Royal Charter, and having during each of the ten years last past before the date of investment paid a dividend of not less than five pounds per centum on its ordinary stock :
- (m) In nominal or inscribed stock issued, or to be issued, by the corporation of any municipal borough having, according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, or by any county council, under the authority of any Act of Parliament or provisional order :
- (n) In nominal or inscribed stock issued or to be issued by any commissioners incorporated by Act of Parliament for the purpose of supplying water, and having a compulsory power of levying rates over an area having,

according to the returns of the last census prior to the date of investment, a population exceeding fifty thousand, provided that during each of the ten years last past before the date of investment the rates levied by such commissioners shall not have exceeded eighty per centum of the amount authorised by law to be levied:

56 & 57 Vict.
c. 53, s. 1.

(o) In any of the stocks, funds, or securities for the time being authorised for the investment of cash under the control or subject to the order of the High Court (c), and may also from time to time vary any such investment.

The Crown is not bound by this statute (*Re Taylor*, 1904, 2 Ch. 741).

(a) Sect. 1 replaces sect. 3 of the Trustee Investment Act, 1889. The questions raised under the last-mentioned act as to varying existing investments (see *Hume v. Lopes*, 1892, A. C. 112) are now set at rest. As to a trustee's liability for continuing an investment which has ceased to be authorized, see Trustee, &c. Act, 1894, s. 4, *post*; *Re Chapman, Cocks v. Chapman*, 1896, 2 Ch. 763.

Trustees are defined in sect. 50, *post*, p. 806. A corporation incorporated for a charity was a trustee of the funds within the Trustee Investment Act, 1889 (*Re Manchester Royal Infirmary*, 43 Ch. D. 420; see *Re Clergy Orphan Corporation*, 18 Eq. 280). The funds of a building society may be invested in any trustee investments (Building Societies Act, 1894, s. 17; see, before that act, *Re National, &c. Building Society*, 43 Ch. D. 431).

Who are
trustees.

Where there is an express prohibition of a particular investment by the settlor, the court will not sanction it (*Ovey v. O.*, 1900, 2 Ch. 524). But such a prohibition will not be inferred from a direction to keep trust funds and invest them in a particular way (*Re Burke, B. v. B.*, 1908, 2 Ch. 248). Apart from emergency, the court will not sanction an unauthorized change of investment merely on the ground of advantage (*Re Tollemache*, 1903, 1 Ch. 955). Where a testator directed his trustees to set apart as an annuity fund any investment authorized by his will, the Trust Investment Act, 1889, did not enable the trustees to set apart investments authorized by that act (*Re Outhwaite, Outhwaite v. Taylor*, 1891, 3 Ch. 934).

Effect of pro-
visions in the
trust docu-
ment.

By the Colonial Stock Act, 1900, s. 2, trustees may invest in any Colonial stock which is registered in the United Kingdom in accordance with the Colonial Stock Acts, 1877 and 1892, as amended by the act of 1900, and with respect to which there have been observed such conditions (if any) as the Treasury may prescribe. By the same section the restrictions of sect. 2 (2) of the Trustee Act, 1893, are applied to Colonial stocks, and provision is made for a list to be kept by the Treasury of Colonial stocks in respect of which the provisions of the act have been complied with.

Colonial
stocks.

(b) As to investments on "real securities," terms of years do not as a Real general rule answer that description (*Re Boyd*, 14 Ch. D. 627). Under the Trusts (Scotland) Amendment Act, 1884, bonds of the Greenock Harbour Trustees were held not to be "real or heritable securities" (*Hutton v. Annan*, 1898, A. C. 289). Investments by trustees on real securities are further dealt with in sects. 5, 8, and 9, *post*; Lewin, 10th ed. 361.

Real
securities.

As regards provisions in trust documents for investing in the securities of companies, the words "company incorporated by act of parliament" included a company incorporated by charter granted in pursuance of an act of parliament (*Elve v. Boyton*, 1891, 1 Ch. 501; see *Wakefield v. W.*, 1907, 2 K. B. 270); but not a company registered under the companies acts (*Re Smith, Davidson v. Myrtle*, 1896, 2 Ch. 590). On the other hand, the words "railway or other public company carrying on business in the United Kingdom" included companies registered under the Companies Acts (*Rickett v. Sharp*, 45 Ch. D. 28; see *Re Lysaght, L. v. L.*, 1898, 1 Ch. 115); and the words "company in the United Kingdom" included a company so registered

Companies.

56 & 57 Vict.
c. 53, s. 1.

Corporation
stock.

Securities.

and having its head office (where its directors met) in England, although its operations were abroad (*Re Hilton, Gibbes v. Hale-Hinton*, 1909, 2 Ch. 548). In one case the words "corporation or company" were not confined to corporations or companies formed or registered in the United Kingdom (*Re Stanley, Tennant v. Stanley*, 1906, 1 Ch. 131). In another case the words "railway or other public company" were on the context so confined (*Re Castlehow, Lamonby v. Carter*, 1903, 1 Ch. 352).

As to investments in stock issued by the corporation of a borough (sub-sect. (m)) the condition as to population was satisfied having regard to an order of the Local Government Board (*Re Druitt, Druitt v. Dehler*, 1903, 1 Ch. 446).

The word "securities" in the above section includes (under sect. 50, *post*, p. 806) stocks, funds and shares; and (in relation to payments into court) includes "Government securities and any security of any foreign state, any part of Her Majesty's dominions out of the United Kingdom, or any body corporate or company, or standing in books kept by any body corporate, company, or person in the United Kingdom and all stock funds and effects" (35 & 36 Vict. c. 44, s. 3).

In trust documents the word "securities" has a well defined primary meaning of "money secured on property" (*Re Raynor, R. v. R.*, 89 L. T. 85, note). It has also a secondary meaning, as a synonym for "investments" (*S. G.*, 1904, 1 Ch. 189). And where it was used in such secondary meaning, a power to vary "securities" authorized trustees to re-sell purchased land (*Re Gent and Eason*, 1905, 1 Ch. 386); or purchased ground rents (*Re Tapp and London Dock Co.*, 1905, W. N. 85; see as to a power to invest on ground rents, *Re Mordan, Legg v. Mordan*, 1905, 1 Ch. 515).

(c) Cash under the control of or subject to the order of the court may, under R. S. C. Ord. 22, r. 17, sub-sect. 1, and rule 17a, be invested in the following stocks, funds, or securities, namely:—

Two and Three-quarters per Cent. Consolidated Stock (to be called after the 5th April, 1903, Two and a Half per Cent. Consolidated Stock):

Consolidated Three Pounds per Cent. Annuities:

Reduced Three Pounds per Cent. Annuities:

Two Pounds Fifteen Shillings per Cent. Annuities:

Two Pounds Ten Shillings per Cent. Annuities:

Local Loans Stock under National Debt and Local Loans Act, 1887:

Exchequer Bills:

Bank Stock:

India Three and a Half per Cent. Stock:

India Three per Cent. Stock:

Indian guaranteed railway stocks or shares, provided in each case that such stocks or shares shall not be liable to be redeemed within a period of fifteen years from the date of investment:

Stocks of Colonial Governments guaranteed by the Imperial Government:

Mortgage of freehold and copyhold estates respectively in England and Wales:

Metropolitan Consolidated Stock, Three Pounds Ten Shillings per Cent.:

Three per Cent. Metropolitan Consolidated Stock:

Inscribed Two and a Half per Cent. Debenture Stock issued by the Corporation of London, and secured by a trust deed dated 24th June, 1897:

Debenture, preference, guaranteed, or rent-charge stocks of railways in Great Britain or Ireland having for ten years next before the date of investment paid a dividend on ordinary stocks or shares:

Nominal debentures or nominal debenture stock under the Local Loans Act, 1875, or under the Isle of Man Loans Act, 1880, provided in each case that such debentures or stock shall not be liable to be redeemed within a period of fifteen years from the date of the investment.

Purchase at
a premium of

2.—(1.) A trustee may under the powers of this act invest in any of the securities mentioned or referred to in section one of

this act, notwithstanding that the same may be redeemable, 56 & 57 Vict. c. 53, s. 2.
and that the price exceeds the redemption value.

(2.) Provided that a trustee may not under the powers of redeemable stocks.
this act purchase at a price exceeding its redemption value any stock mentioned or referred to in sub-sections (g), (i), (k), (l), and (m) of section one, which is liable to be redeemed within fifteen years of the date of purchase at par or at some other fixed rate, or purchase any such stock as is mentioned or referred to in the sub-sections aforesaid, which is liable to be redeemed at par or at some other fixed rate, at a price exceeding fifteen per centum above par or such other fixed rate.

(3.) A trustee may retain until redemption any redeemable stock, fund, or security which may have been purchased in accordance with the powers of this act.

3. Every power conferred by the preceding sections shall be Discretion of trustees.
exercised according to the discretion of the trustee, but subject to any consent required by the instrument, if any, creating the trust with respect to the investment of the trust funds.

4. The preceding sections shall apply as well to trusts created Application of preceding sections.
before as to trusts created after the passing of this act, and the powers thereby conferred shall be in addition to the powers conferred by the instrument, if any, creating the trust.

5.—(1.) A trustee having power to invest in real securities, Enlargement of express powers of investment.
unless expressly forbidden by the instrument creating the trust, may invest and shall be deemed to have always had power to invest—

(a) on mortgage of property held for an unexpired term of not less than two hundred years, and not subject to a reservation of rent greater than a shilling a year, or to any right of redemption or to any condition for re-entry, except for non-payment of rent; and

(b) on any charge, or upon mortgage of any charge, made under the Improvement of Land Act, 1864.

27 & 28 Vict. c. 114.

(2.) A trustee having power to invest in the mortgages or bonds of any railway company or of any other description of company may, unless the contrary is expressed in the instrument authorising the investment, invest in the debenture stock of a railway company or such other company as aforesaid.

(3.) A trustee having power to invest money in the debentures or debenture stock of any railway or other company may, unless the contrary is expressed in the instrument authorising the investment, invest in any nominal debentures or nominal debenture stock issued under the Local Loans Act, 1875.

38 & 39 Vict. c. 83.

(4.) A trustee having power to invest money in securities in the Isle of Man, or in securities of the government of a colony, may, unless the contrary is expressed in the instrument authorising the investment, invest in any securities of the

56 & 57 Vict.
c. 53, s. 5. Government of the Isle of Man, under the Isle of Man Loans Act, 1880.

43 & 44 Vict.
c. 8. (5.) A trustee having a general power to invest trust moneys in or upon the security of shares, stock, mortgages, bonds, or debentures of companies incorporated by or acting under the authority of an Act of Parliament, may invest in, or upon the security of, mortgage debentures duly issued under and in accordance with the provisions of the Mortgage Debenture Act, 1865.

28 & 29 Vict.
c. 78.

Sub-sect. 3 is an enlargement of express powers, and does not enlarge the statutory power given by sect. 1 (g) (*Re Tattersall, Topham v. Armitage*, 1906, 2 Ch. 399; see sect. 50, *post*, providing that "instrument" shall include act of parliament).

Power to
invest, not-
withstanding
drainage
charges.

10 & 11 Vict.
c. 32.

6. A trustee having power to invest in the purchase of land or on mortgage of land may invest in the purchase, or on mortgage of any land, notwithstanding the same is charged with a rent under the powers of the Public Money Drainage Acts, 1846 to 1856, or the Landed Property Improvement (Ireland) Act, 1847, or by an absolute order made under the Improvement of Land Act, 1864, unless the terms of the trust expressly provide that the land to be purchased or taken in mortgage shall not be subject to any such prior charge.

Trustees not
to convert
inscribed
stock into
certificates to
bearer.

26 & 27 Vict.
c. 73.

33 & 34 Vict.
c. 71.

38 & 39 Vict.
c. 83.

40 & 41 Vict.
c. 59.

7.—(1.) A trustee, unless authorised by the terms of his trust, shall not apply for or hold any certificate to bearer issued under the authority of any of the following acts, that is to say :

(a) The India Stock Certificate Act, 1863;

(b) The National Debt Act, 1870;

(c) The Local Loans Act, 1875;

(d) The Colonial Stock Act, 1877.

(2) Nothing in this section shall impose on the Bank of England or of Ireland, or on any person authorised to issue any such certificates, any obligation to inquire whether a person applying for such a certificate is or is not a trustee, or subject them to any liability in the event of their granting any such certificate to a trustee, nor invalidate any such certificate if granted.

Loans and
investments
by trustees
not charge-
able as
breaches of
trust.

8.—(1.) A trustee lending money on the security of any property on which he can lawfully lend shall not be chargeable with breach of trust by reason only of the proportion borne by the amount of the loan to the value of the property at the time when the loan was made, provided that it appears to the court that in making the loan the trustee was acting upon a report as to the value of the property made by a person whom he reasonably believed to be an able practical surveyor or valuer instructed and employed independently of any owner of the property, whether such surveyor or valuer carried on business in the locality where the property is situate or elsewhere, and that the amount of the loan does not exceed two

equal third parts of the value of the property as stated in the report, and that the loan was made under the advice of the surveyor or valuer expressed in the report. 56 & 57 Vict.
c. 53, s. 8.

(2.) A trustee lending money on the security of any leasehold property shall not be chargeable with breach of trust only upon the ground that in making such loan he dispensed either wholly or partly with the production or investigation of the lessor's title.

(3.) A trustee shall not be chargeable with breach of trust only upon the ground that in effecting the purchase of or in lending money upon the security of any property he has accepted a shorter title than the title which a purchaser is, in the absence of a special contract, entitled to require, if in the opinion of the court the title accepted be such as a person acting with prudence and caution would have accepted.

(4.) This section applies to transfers of existing securities as well as to new securities, and to investments made as well before as after the commencement of this act, except where an action or other proceeding was pending with reference thereto on the 24th day of December, 1888.

This section replaces sect. 4 of the Trustee Act, 1888. Before the last-mentioned act rules had been laid down as to the minimum margins which a prudent lender would require for his protection, viz. that he should not advance more than two-thirds of the value on agricultural land, or more than one-half on house or trade property. The above section, which has modified these rules, involves the principle that, within the two-thirds rule, a prudent lender may, as to the amount of an advance, rely on expert advice. But if the property is liable to deteriorate a larger margin should be required (*Shaw v. Cates*, 1909, 1 Ch. 396—398).

The words "reasonably believed" do not apply to the instructing and employing (*Re Somerset*, *Somerset v. Poulett*, 1894, 1 Ch. 253; *Re Walker*, *W. v. W.*, 62 L. T. 452; 59 L. J. Ch. 386; see *Re Stuart*, *Smith v. Stuart*, 1897, 2 Ch. 583). A trustee cannot be said to have reasonably believed a man to be an able and practical surveyor when in fact the trustee knows nothing about it (*Re Walker*, *supra*). Reports of surveyors advising have been held insufficient (*ib.*; *Shaw v. Cates*, *sup.*). The surveyor should not agree to take no fee if the transaction falls through (*Salisbury v. Keymer*, 1909, W. N. 31; *Re Dive*, *Dive v. Roebuck*, 1909, 1 Ch. 328).

By the Trustee Act, 1894, s. 4, *post*, p. 810, a trustee is not liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the instrument of trust or by the general law. Trustee Act,
1894, s. 4.

9.—(1.) Where a trustee improperly advances trust money on a mortgage security which would at the time of the investment be a proper investment in all respects for a smaller sum than is actually advanced thereon the security shall be deemed an authorised investment for the smaller sum, and the trustee shall only be liable to make good the sum advanced in excess thereof with interest. Liability for
loss by reason
of improper
investments.

(2.) This section applies to investments made as well before as after the commencement of this act except where an action or other proceeding was pending with reference thereto on the 24th day of December, 1888.

56 & 57 Vict.
c. 53, s. 9.

This section replaces sect. 5 of the Trustee Act, 1888.

To get the benefit of this section the trustee must establish the propriety of the investment independently of its value (*Re Walker, supra*; see *Blyth v. Fladgate*, 1891, 1 Ch. 353). In applying the section the court will be guided by the rule which obtained before the Trustee Act, 1888 (*Shaw v. Cates*, 1909, 1 Ch. 405). The court ascertained the "smaller sum," and held trustees liable for the excess only (*ib.*; *Re Somerset, Somerset v. Poulett*, 1894, 1 Ch. 253). See the order, Seton, 6th ed. 1144.

PART II.

VARIOUS POWERS AND DUTIES OF TRUSTEES.

Appointment of New Trustees.

Power of
appointing
new trustees.

10.—(1.) Where a trustee, either original or substituted, and whether appointed by a court or otherwise, is dead, or remains out of the United Kingdom for more than twelve months, or desires to be discharged from all or any of the trusts or powers reposed in or conferred on him, or refuses or is unfit to act therein, or is incapable of acting therein, then the person or persons nominated for the purpose of appointing new trustees by the instrument, if any, creating the trust, or if there is no such person, or no such person able and willing to act, then the surviving or continuing trustees or trustee for the time being, or the personal representatives of the last surviving or continuing trustee, may, by writing, appoint another person or other persons to be a trustee or trustees in the place of the trustee dead, remaining out of the United Kingdom, desiring to be discharged, refusing, or being unfit or being incapable, as aforesaid (*d*).

(2.) On the appointment of a new trustee for the whole or any part of trust property—

(a) The number of trustees may be increased (*e*); and

(b) A separate set of trustees may be appointed for any part of the trust property held on trusts distinct from those relating to any other part or parts of the trust property, notwithstanding that no new trustees or trustee are or is to be appointed for other parts of the trust property, and any existing trustee may be appointed or remain one of such separate set of trustees; or, if only one trustee was originally appointed, then one separate trustee may be so appointed for the first-mentioned part (*f*); and

(c) It shall not be obligatory to appoint more than one new trustee where only one trustee was originally appointed, or to fill up the original number of trustees where more than two trustees were originally appointed; but, except where only one trustee was originally appointed, a trustee shall not be discharged under this

section from his trust unless there will be at least two trustees to perform the trust; and

56 & 57 Vict.
c. 53, s. 10.

- (d) Any assurance or thing requisite for vesting the trust property, or any part thereof, jointly in the persons who are the trustees, shall be executed or done.

(3.) Every new trustee so appointed, as well before as after all the trust property becomes by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities, and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

(4.) The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will but dying before the testator, and those relative to a continuing trustee include a refusing or retiring trustee, if willing to act in the execution of the provisions of this section.

(5.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained (g).

(6.) This section applies to trusts created either before or after the commencement of this act.

This section replaces sect. 31 of the Conv. Act, 1881, sect. 5 of the Conv. Act, 1882, and sect. 6 of the Conv. Act, 1892.

(d) This section applies to trustees for the purposes of the S. L. Acts (sect. 47, *post*); and also to trustees of land held for religious or educational purposes (Trustees Appointment Act, 1890, s. 3; see *Re Coates to Parsons*, 34 Ch. 370). Where an appointment can be made under this section, application should not be made to the court (*Re Gibbons*, 45 L. T. 756; 30 W. R. 287; *Re Higginbottom*, 1892, 3 Ch. 132. See *Re Soulbey*, 21 W. R. 256; *Re Jackson*, 16 W. R. 572; *Re Shafto*, 29 Ch. D. 247).

An appointment made under this section will be free from any fetter to which a power in the trust instrument is subject (*Cecil v. Langdon*, 28 Ch. Div. 1; *Re Lloyd*, 57 L. J. Ch. 246).

Where a trustee had resided for twelve months abroad, a new trustee was appointed (*Re Walker and Hughes*, 24 Ch. D. 698); but where in such a case the trustee had been in London for one week during the twelve months the appointment was held void (*Re Walker, Summers v. Barrow*, 1901, 1 Ch. 259; see *Re Stamford, Payne v. Stamford*, 1896, 1 Ch. 288; *Re Arbib and Class*, 1891, 1 Ch. 601). It seems that a trustee who disclaims, refuses to act within this section (*D'Adhemar v. Bertrand*, 35 Beav. 19), although he has no legal estate in him (*Re Birchall, Birchall v. Ashton*, 40 Ch. Div. 436). A new trustee cannot be appointed under this section, in place of an infant (*Re Tallatire*, 1885, W. N. 191). When the trustees named in the will of a testator all die before him new trustees cannot be appointed under this section (*Nicholson v. Field*, 1893, 2 Ch. 511). As to a trustee becoming insane during the life of a testator, see *Newton v. Newton*, noticed in L. T. Jour., vol. 55, p. 56. Upon the death of a surviving trustee his executors were held to have been displaced by a new appointment (*Re Routledge, R. v. Saul*, 1909, 1 Ch. 284).

Where a deed declared that certain persons should have "power to appoint new trustees," they were held to be "persons nominated for this purpose" appoint. (*Re Walker and Hughes*, 24 Ch. D. 698). Persons nominated to appoint trustees in certain events cannot under this section appoint in any other event (*Re Wheeler and De Rochow*, 1896, 1 Ch. 315). As to the case of

56 & 57 Vict.
c. 53, s. 10.

separate sets of trustees, see *S.C.*, p. 321. Where the person nominated for the purpose of appointing is a lunatic so found, an appointment can be made under this section by the continuing trustees (*Re Blake*, 1887, W. N. 173); in which case an appointment can also be made by the committee under an order in lunacy (see p. 812, *post*). Where a power of appointment was vested in certain persons, the survivor and the heirs of the survivor, and the heir of the survivor could not be found, there was no person "nominated for the purpose and able and willing to act," and the surviving and continuing trustee could appoint under this section (*Cradock v. Witham*, 1895, W. N. 75). Where the persons nominated cannot agree, the personal representative of the last surviving trustee can appoint (*Re Sheppard*, 1888, W. N. 234). A surviving trustee who is about to retire can under sub-sect. (4) appoint (see *Re Coates to Parsons*, 34 Ch. D. 370). But where the surviving trustee is abroad and will not appoint, application must be made to the court (*Re Clift*, 27 S. J. 199). So where he is incapable (*Re Lemann*, 22 Ch. D. 633). A deceased sole trustee is a "last surviving or continuing trustee," and his executor can appoint (*Re Shafto*, 29 Ch. D. 247). The personal representative is not bound to appoint under this section (*Re Knight*, 26 Ch. D. 82). A surviving trustee cannot exercise the power given by this section by his will (*Re Parker*, 1894, 1 Ch. 707). Where a surviving trustee of a will appointed by his will general executors, and also special executors to execute the trusts of the original will, an appointment by the general executors under this section of new trustees of the original will was held valid (*Ib.*). And where the will of a surviving trustee named several executors, of whom A. alone proved, an appointment by A. was valid under sect. 27 of Lord Cranworth's Act (*ante*, p. 541, which section vests the power in the "acting executor" of the surviving trustee) and sect. 71 of the Conv. Act, 1881 (*Re Boncherett, Barne v. Erskine*, 1908, 1 Ch. 180).

Who can be
appointed.

Where the donee of the power of appointing under this section desires to appoint, the court will not interfere with him (*Re Higginbottom*, 1892, 3 Ch. 132). A judgment for the execution of the trusts will not prevent him from appointing (*Re Gadd, Eastwood v. Clark*, 23 Ch. D. 134; *Re Hall, H. v. H.*, 59 L. T. 901). But in that case his nominee must be approved by the court (*Ib.*; *Re Norris, Allen v. Norris*, 27 Ch. D. 333). Where there is no such judgment the donee might possibly appoint a person whom the court would not have sanctioned (*Re Norris*, 27 Ch. D. 341; *Re Stamford, Payne v. Stamford*, 1896, 1 Ch. 288).

As to the donee appointing himself: Where the power expressly refers to the appointment of "other persons" (as in the above section), the donee cannot appoint himself (*Montefiore v. Guedalla*, 1903, 2 Ch. 725; *Re Sampson, S. v. S.*, 1906, 1 Ch. 439). Where there is no such express reference, he can appoint himself (*ib.*); but should not do so save in exceptional circumstances (*ib.*; *Re Skeats*, 42 Ch. D. 522; *Re Newen, Newen v. Barnes*, 1894, 2 Ch. 297). As to the donee appointing his own solicitor, see *Re Stamford, sup.*

Mode of
appointment.
Number of
trustees.

A corporation can be appointed a new trustee under this section, even jointly with the surviving trustee (*Re Thompson, Thompson v. Alexander*, 1905, 1 Ch. 229). So can the public trustee (Public Trustee Act, 1906, sect. 5).

The appointment may be made "by writing." But it cannot be made by will (*Re Parker*, 1894, 1 Ch. 707).

(e) The power in this section to increase the number of trustees only applies where a vacancy is being filled (*Re Gregson*, 34 Ch. D. 209); but even where there is no vacancy the court can increase the number, either under sect. 25, *post* (*Ib.*), or under its general jurisdiction (*D'Adhemar v. Bertrand*, 35 Beav. 19). The appointment of a single trustee under sect. 27 of 23 & 24 Vict. c. 145 was held valid (*West of England Bank v. Murch*, 23 Ch. D. 138).

Separate sets
of trustees.

(f) Sub-sect. (2) (b) replaces Conv. Act, 1882, s. 5; Conv. Act, 1892, s. 6, as to which see *Savile v. Couper* (36 Ch. D. 520); *Re Moss' Trusts* (37 Ch. D. 513); *Re Paine* (28 Ch. D. 725); and the cases quoted under sect. 25, *post*, p. 782. It would seem doubtful whether separate trustees

can be appointed out of court when the trusts may ultimately coalesce (Re Hetherington, 34 Ch. D. 211). 56 & 57 Vict.
c. 53, s. 10.

(g) Where the instrument of trust contains an express power of appointing new trustees which either is subject to restrictions, or is incomplete, this does not amount to a contrary intention within sub-sect. (5), so as to prevent the statutory power from applying free from the restrictions, or in cases not mentioned in the express power (Re Lloyd, 57 L. J. Ch. 246; Cecil v. Langdon, 28 Ch. Div. 1; Re Coates to Parsons, 34 Ch. D. 370; Cradock v. Witham, 1895, W. N. 75; Re Wheeler and De Rockow, 1896, 1 Ch. 315). Contrary
intention.

11.—(1.) Where there are more than two trustees, if one of them by deed declares that he is desirous of being discharged from the trust, and if his co-trustees and such other person, if any, as is empowered to appoint trustees, by deed consent to the discharge of the trustee, and to the vesting in the co-trustees alone of the trust property, then the trustee desirous of being discharged shall be deemed to have retired from the trust, and shall, by the deed, be discharged therefrom under this act, without any new trustee being appointed in his place. Retirement
of trustee.

(2.) Any assurance or thing requisite for vesting the trust property in the continuing trustees alone shall be executed or done.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument and to any provisions therein contained.

(4.) This section applies to trusts created either before or after the commencement of this act.

This section replaces sect. 32 of the Conv. Act, 1881. The court has jurisdiction to discharge a trustee without appointing a new trustee in his place (Re Chetwynd, Scarisbrick v. Nevins, 1902, 1 Ch. 692). Where the Public Trustee has been appointed a co-trustee may retire (Public Trustee Act, 1906, sect. 5 (2)).

12.—(1.) Where a deed by which a new trustee is appointed to perform any trust contains a declaration by the appointor to the effect that any estate or interest in any land subject to the trust, or in any chattel so subject, or the right to recover and receive any debt or other thing in action so subject, shall vest in the persons who by virtue of the deed become and are the trustees for performing the trust, that declaration shall, without any conveyance or assignment, operate to vest in those persons, as joint tenants, and for the purposes of the trust, that estate, interest, or right. Vesting of
trust property
in new or
continuing
trustees.

(2.) Where a deed by which a retiring trustee is discharged under this act contains such a declaration as is in this section mentioned by the retiring and continuing trustees, and by the other person, if any, empowered to appoint trustees, that declaration shall, without any conveyance or assignment, operate to vest in the continuing trustees alone, as joint tenants, and

56 & 57 Vict.
c. 53, s. 12.

for the purposes of the trust, the estate, interest, or right to which the declaration relates.

(3.) This section does not extend to any legal estate or interest in copyhold or customary land, or to land conveyed by way of mortgage for securing money subject to the trust, or to any such share, stock, annuity, or property as is only transferable in books kept by a company or other body, or in manner directed by or under Act of Parliament.

(4.) For purposes of registration of the deed in any registry, the person or persons making the declaration shall be deemed the conveying party or parties, and the conveyance shall be deemed to be made by him or them under a power conferred by this act.

(5.) This section applies only to deeds executed after the 31st of December, 1881.

This section replaces sect. 34 of the Conv. Act, 1881.

This section applies in the case of a bare trustee (*London and County Banking Co. v. Goddard*, 1897, 1 Ch. 642). Where an equitable mortgage contained a declaration of trust by the mortgagor of the legal estate and a power to the mortgagees to appoint new trustees, and the mortgagees exercised that power and made a vesting declaration under this section, the legal estate was held to pass (*ib.*). See also as to sub-sect. (3), *S. C.*, p. 649. Compare with this section the effect of an undertaking under seal by the public trustee to administer a small estate (Public Trustee Act, 1906, sect. 3 (2)).

Purchase and Sale.

Power of
trustee for
sale to sell by
auction, &c.

13.—(1.) Where a trust for sale or a power of sale of property is vested in a trustee, he may sell or concur with any other person in selling all or any part of the property, either subject to prior charges or not, and either together or in lots, by public auction or by private contract, subject to any such conditions respecting title or evidence of title or other matter as the trustee thinks fit, with power to vary any contract for sale, and to buy in at any auction, or to rescind any contract for sale and to resell, without being answerable for any loss.

(2.) This section applies only if and as far as a contrary intention is not expressed in the instrument creating the trust or power, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

(3.) This section applies only to a trust or power created by instrument coming into operation after the 31st of December, 1881.

This section replaces sect. 35 of the Conv. Act, 1881. In the case of instruments coming into operation before the 31st December, 1881, but executed after the 28th August, 1860, see 23 & 24 Vict. c. 145, ss. 1, 2 (*ante*, p. 542). The rules which, apart from the statute, apply to trustees concurring with other persons in selling, are laid down by *Jessel, M.R.*, in *Re Cooper and Allen* (4 Ch. D. 814). Trustees for sale of leaseholds held under one lease may, where the sale is in several lots, carry it into effect by underleases (*Re Judd and Poland*, 1906, 1 Ch. 684).

14.—(1.) No sale made by a trustee shall be impeached by any beneficiary upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it also appears that the consideration for the sale was thereby rendered inadequate.

56 & 57 Vict.
c. 53, s. 14.

Power to sell
subject to
depreciatory
conditions.

(2.) No sale made by a trustee shall, after the execution of the conveyance, be impeached as against the purchaser upon the ground that any of the conditions subject to which the sale was made may have been unnecessarily depreciatory, unless it appears that the purchaser was acting in collusion with the trustee at the time when the contract for sale was made.

(3.) No purchaser, upon any sale made by a trustee, shall be at liberty to make any objection against the title upon the ground aforesaid.

(4.) This section applies only to sales made after the 24th day of December, 1888.

This section replaces sect. 3 of the Trustee Act, 1888 (see *Dunn v. Flood*, 25 Ch. D. 629; 28 Ch. Div. 586).

15. A trustee who is either a vendor or a purchaser may sell or buy without excluding the application of sect. 2 of the Vendor and Purchaser Act, 1874.

Power to sell
under 37 & 38
Vict. c. 78.

See V. and P. Act, 1874, *ante*, p. 549. This section replaces sect. 3 of that act.

16. When any freehold or copyhold hereditament is vested in a married woman as a bare trustee she may convey or surrender it as if she were a *feme sole*.

Married
woman as
bare trustee
may convey.

This section replaces sect. 6 of the V. and P. Act, 1874, *ante*, p. 550.

A married woman who was a trustee for sale was held (after order for sale and purchase-money paid into court) to be a bare trustee (*Re Docwra*, *Docwra v. Faith*, 29 Ch. D. 693; see *Re Cunningham v. Frayling*, 1891, 2 Ch. 567).

A married woman who was a mortgagee was held on payment off to be a bare trustee (*Re Brooke and Frenlin*, 1898, 1 Ch. 650; *Re Howgate and Osborn*, 1902, 1 Ch. 451; *Re West and Hardy*, 1904, 1 Ch. 145). See now M. W. P. Act, 1907, sect. 1, *ante*, p. 367.

Various Powers and Liabilities.

17.—(1.) A trustee may appoint a solicitor to be his agent to receive and give a discharge for any money or valuable consideration or property receivable by the trustee under the trust, by permitting the solicitor to have the custody of, and to produce, a deed containing any such receipt as is referred to in sect. 56 of the Conveyancing and Law of Property Act, 1881; and a trustee shall not be chargeable with breach of trust by reason only of his having made or concurred in making any such appointment; and the producing of any such deed by the

Power to
authorise
receipt of
money by
banker or
solicitor.
44 & 45 Vict.
c. 44.

56 & 57 Vict.
c. 53, s. 17.

solicitor shall have the same validity and effect under the said section as if the person appointing the solicitor had not been a trustee.

(2.) A trustee may appoint a banker or solicitor to be his agent to receive and give a discharge for any money payable to the trustee under or by virtue of a policy of assurance, by permitting the banker or solicitor to have the custody of and to produce the policy of assurance with a receipt signed by the trustee, and a trustee shall not be chargeable with a breach of trust by reason only of his having made or concurred in making any such appointment.

(3.) Nothing in this section shall exempt a trustee from any liability which he would have incurred if this act had not been passed, in case he permits any such money, valuable consideration, or property to remain in the hands or under the control of the banker or solicitor for a period longer than is reasonably necessary to enable the banker or solicitor (as the case may be) to pay or transfer the same to the trustee.

(4.) This section applies only where the money or valuable consideration or property is received after the 24th day of December, 1888.

(5.) Nothing in this section shall authorise a trustee to do anything which he is in express terms forbidden to do, or to omit anything which he is in express terms directed to do, by the instrument creating the trust.

This section replaces sect. 2 of the Trustee Act, 1888.

A trustee can execute a deed by a solicitor as attorney, and can empower that solicitor to receive trust money by producing a proper deed for the purpose. But the trustee must himself appoint the solicitor, and must himself permit the production of the deed. A deed executed by the attorney of a trustee acting under a general power is not sufficient within sub-sect. (1) (*Re Hetling and Merton*, 1893, 3 Ch. 280). See further the cases quoted under sect. 56 of the Conv. Act, 1881, *ante*, p. 605.

Sub-sect. (3) is a statutory declaration of the law as to trustees allowing trust money to be received by a solicitor. Such receipt is no part of the duty of a solicitor as such (*Wyman v. Paterson*, 1900, A. C. 280). See further the note to sect. 24 (*post*, p. 776).

Power to
insure
building.

18.—(1.) A trustee may insure against loss or damage by fire any building or other insurable property to any amount (including the amount of any insurance already on foot) not exceeding three equal fourth parts of the full value of such building or property, and pay the premiums for such insurance out of the income thereof or out of the income of any other property subject to the same trusts, without obtaining the consent of any person who may be entitled wholly or partly to such income.

(2.) This section does not apply to any building or property which a trustee is bound forthwith to convey absolutely to any beneficiary upon being requested to do so.

(3.) This section applies to trusts created either before or

after the commencement of this act, but nothing in this section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust. 56 & 57 Vict.
c. 53, s. 18.

This section replaces sect. 7 of the Trustee Act, 1888. It empowered trustees to insure against fire settled heirlooms, and to pay the premiums out of the income of capital moneys (*Re Egmont, Lefroy v. Egmont*, 1908, 1 Ch. 821; see *Re Quicke, Poltimore v. Quicke*, *ib.* 887).

19.—(1.) A trustee of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract, or by custom or usual practice, may, if he thinks fit, and shall, if thereto required by any person having any beneficial interest, present or future, or contingent, in the leaseholds, use his best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose may from time to time make or concur in making a surrender of the lease for the time being subsisting, and do all such other acts as are requisite: Provided that, where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew or to contribute to the expense of renewal, this section shall not apply unless the consent in writing of that person is obtained to the renewal on the part of the trustee. Power of
trustees of
renewable
leaseholds
to renew and
raise money
for the
purpose.

(2.) If money is required to pay for the renewal, the trustee effecting the renewal may pay the same out of any money then in his hands in trust for the persons beneficially interested in the lands to be comprised in the renewed lease, and if he has not in his hands sufficient money for the purpose, he may raise the money required by mortgage of the hereditaments to be comprised in the renewed lease, or of any other hereditaments for the time being subject to the uses or trusts to which those hereditaments are subject, and no person advancing money upon a mortgage purporting to be under this power shall be bound to see that the money is wanted, or that no more is raised than is wanted for the purpose.

(3.) This section applies to trusts created either before or after the commencement of this act, but nothing in this section shall authorise any trustee to do anything which he is in express terms forbidden to do, or to omit to do anything which he is in express terms directed to do, by the instrument creating the trust.

This section replaces sects. 10 and 11 of the Trustee Act, 1888, which latter sections replace sects. 8 and 9 of 23 & 24 Vict. c. 145. As to the apportionment of the liability for the fines as between tenant for life and remainderman, see *Re Baring, Jeune v. Baring*, 1893, 1 Ch. 61, and the cases quoted Tudor, L. C. Conv. 4th ed. 134.

56 & 57 Vict.
c. 53, s. 20.

Power of
trustee to
give receipts.

20.—(1.) The receipt in writing of any trustee for any money, securities, or other personal property or effects payable, transferable, or deliverable to him under any trust or power shall be a sufficient discharge for the same, and shall effectually exonerate the person paying, transferring, or delivering the same from seeing to the application or being answerable for any loss or misapplication thereof.

(2.) This section applies to trusts created either before or after the commencement of this act.

This section replaces sect. 36 of the Conv. Act, 1881 (see the Law of Prop. Amdt. Act, 1859, s. 23, and the note thereto, *ante*, p. 421; *Hockey v. Western*, 1898, 1 Ch. 350).

Power for
executors and
trustees to
compound,
&c.

21.—(1.) An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient.

(2.) An executor or administrator, or two or more trustees, acting together, or a sole acting trustee where by the instrument, if any, creating the trust a sole trustee is authorised to execute the trusts and powers thereof, may, if and as he or they may think fit, accept any composition or any security, real or personal, for any debt or for any property, real or personal, claimed, and may allow any time for payment for any debt, and may compromise, compound, abandon, submit to arbitration or otherwise settle any debt, account, claim, or thing whatever relating to the testator's or intestate's estate or to the trust, and for any of those purposes may enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to him or them seem expedient, without being responsible for any loss occasioned by any act or thing so done by him or them in good faith.

(3.) This section applies only if and as far as a contrary intention is not expressed in the instrument, if any, creating the trust, and shall have effect subject to the terms of that instrument, and to the provisions therein contained.

(4.) This section applies to executorships, administratorships and trusts constituted or created either before or after the commencement of this Act.

This section replaces sect. 37 of the Conv. Act, 1881, which itself replaced sect. 30 of 23 & 24 Vict. c. 145. The last-mentioned section (which was not confined to mere money claims, *Re Warren*, *Weadon v. Reading*, 51 L. T. 561; 53 L. J. Ch. 1016) justified a compromise by an executrix with the testator's surviving partner and his creditors as to the sale of partnership real estate (*West of England Bank v. Murch*, 23 Ch. D. 138; see also, *Re Owens*, *Jones v. Owens*, 47 L. T. 64). An executor can under this section compromise a claim by his co-executor (*Re Houghton*, *Hawley v. Blake*, 1904, 1 Ch. 622). As to the court's power to compromise, see *Re New* (1901, 2 Ch. 541).

Powers of
two or more
trustees.

22.—(1.) Where a power or trust is given to or vested in two or more trustees jointly, then, unless the contrary is expressed

in the instrument, if any, creating the power or trust, the same may be exercised or performed by the survivor or survivors of them for the time being. 56 & 57 Vict. c. 53, s. 22.

(2.) This section applies only to trusts constituted after or created by instruments coming into operation after the 31st day of December, 1881.

This section replaces sect. 38 of the Conv. Act, 1881. As to the execution of a power where one donee disclaims, see Conv. Act, 1882, sect. 6 (2). A power given to trustees for dealing with the trust property is prima facie presumed to be annexed to the office; and the presumption is not excluded by the fact that its exercise requires discretion, or by the use of such words as "my said trustees" (*Re Smith, Eastick v. Smith*, 1904, 1 Ch. 144; *Re Bacon, Toovey v. Turner*, 1907, 1 Ch. 475).

23. A trustee acting or paying money in good faith under or in pursuance of any power of attorney shall not be liable for any such act or payment by reason of the fact that at the time of the payment or act the person who gave the power of attorney was dead or had done some act to avoid the power, if this fact was not known to the trustee at the time of his so acting or paying. Exoneration of trustees in respect of certain powers of attorney.

Provided that nothing in this section shall affect the right of any person entitled to the money against the person to whom the payment is made, and that the person so entitled shall have the same remedy against the person to whom the payment is made as he would have had against the trustee.

This section replaces sect. 26 of the Law of Property Amendment Act, 1859.

According to the common law, a power of attorney was instantly revoked by the death of the grantor, and acts afterwards done under it, even where it was given for value, were invalid (*Watson v. King*, 4 Camp. 272). In equity, however, where a power had been given for value, acts done under it after the death of the grantor, *bonâ fide* and without notice, were valid (*Bailey v. Collett*, 18 Beav. 179, and cases there quoted; *Hatch v. Searles*, 2 Sm. & Giff. 155; *Carter v. White*, 20 Ch. D. 228). Powers of attorney issued by the Bank of England for the transfer of stock contained a clause making a transfer valid, notwithstanding the previous death of the grantor; as to which, see *Kiddill v. Farnell* (3 Sm. & Giff. 428). Where a legacy was bequeathed to a married woman abroad with her husband, and the husband required the legacy to be paid under a power of attorney, the executor was justified in paying the money into court, because until reduction into possession by the husband, the wife's right might have accrued by the death of the husband (*Re Jones*, 3 Drew, 680).

As to powers of attorney, see now Conv. Act, 1881, s. 47, Conv. Act, 1882, ss. 8 and 9, *ante*, pp. 601, 623.

24. A trustee shall, without prejudice to the provisions of the instrument, if any, creating the trust, be chargeable only for money and securities actually received by him notwithstanding his signing any receipt for the sake of conformity, and shall be answerable and accountable only for his own acts, receipts, neglects, or defaults, and not for those of any other Implied indemnity of trustees.

56 & 57 Vict.
c. 53, s. 24.

trustee, nor for any banker, broker, or other person with whom any trust moneys, or securities may be deposited, nor for the insufficiency or deficiency of any securities, nor for any other loss, unless the same happens through his own wilful default; and may reimburse himself, or pay or discharge out of the trust premises, all expenses incurred in or about the execution of his trusts or powers.

This section replaces sect. 31 of the Law of Property Amendment Act, 1859.

The indemnity clause formerly expressly inserted in instruments and now implied therein by this section, did little more than what the court would have done without the clause (*Dawson v. Clarke*, 18 Ves. 254). The right of a trustee to indemnity out of the trust estate is stated in *Re Beddoe*, *Downes v. Cottans*, 1893, 1 Ch. 558. And his right to be indemnified by the *cestui que trust* personally is explained in *Hardoon v. Belilios*, 1901, A. C. 118; *Dodson v. Downey*, 1901, 2 Ch. 620; *James v. May*, L. R. 5 H. L. 333; *Wise v. Perpetual Co.*, 1903, A. C. 139.

Acts of
co-trustees.

As regards the acts of co-trustees, a trustee may be liable (1) where he hands over trust money without securing its due application; (2) where he allows a co-trustee to receive money without making due inquiry as to his dealing with it; and (3) where he becomes aware of a breach of trust committed or meditated and does not proceed for restitution or redress (*Wilkins v. Hogg*, 8 Jur. N. S. 25). A trustee was made liable for permitting his co-trustee to retain sole possession of bonds to bearer (*Lewis v. Nobbs*, 8 Ch. D. 591). The usual indemnity clause would not protect a trustee in such cases (*Mucklow v. Fuller*, Jac. 198; *Dix v. Burford*, 19 Beav. 409; *Brumridge v. B.*, 27 Beav. 5). But where a will specially provided that any trustee who should pay over to his co-trustee or should concur in any act enabling him to receive moneys for the general purposes of the will should not be obliged to see to the application thereof, nor be rendered responsible by express notice of the misapplication thereof, trustees paying over money to a co-trustee were protected (*Wilkins v. Hogg*, 3 Giff. 116; 10 W. R. 47; *Pass v. Dundas*, 43 L. T. 665). See in general as to the right of the passive trustee to indemnity from the acting trustee, *Bahin v. Hughes* (31 Ch. Div. 390).

Acts of
bankers, &c.

As regards mercantile agents, such as bankers and brokers, a trustee cannot delegate the care of trust moneys to strangers where there is no "moral necessity from the usage of mankind" for the employment of such agency (*Speight v. Gaunt*, 9 App. Cas. 5). But it was held in equity that where, according to the usual and regular course of business, moneys ought to pass through the hands of mercantile agents, that course might properly be followed by trustees (*Ex p. Belchier*, Amb. 218; *Speight v. Gaunt*, *sup.*). The above section gives the force of statute to this doctrine of equity; and when once the propriety of employing the agent has been established, it throws the *onus probandi* on those who seek to charge a trustee with loss arising from an agent's default (*Re Brier*, *Brier v. Evison*, 26 Ch. Div. 243). The doctrine applied to a case where a co-trustee was employed as a broker under a clause in the will (*Shepherd v. Harris*, 1905, 2 Ch. 310). The liability of the trustee is not increased by his receiving remuneration (*Jobson v. Palmer*, 1893, 1 Ch. 71; compare *National Trustees v. General Finance Co.*, 1905, A. C. 381).

The trustee, however, must exercise a discretion in the choice of the agent (*Re Weall*, *Andrews v. Weall*, 42 Ch. D. 678); and the agent must not be employed out of the ordinary scope of his business (*Fry v. Tapson*, 28 Ch. D. 268). It is no part of the duty of a solicitor as such to receive trust money. And trustees were liable for permitting him to retain it for an excessive period (*Wyman v. Paterson*, 1900, A. C. 280; see sect. 17, sub-sect. 3, of the present act, *ante*, p. 772; *Evans Williams v. Byron*, 18 T. L. R. 172). Trustees could not shelter themselves under the fraud of their solicitor (*Bostock v.*

Floyer, 1 Eq. 26; *Sutton v. Wilders*, 12 Eq. 373; *Davis v. Hutchings*, 1907; 56 & 57 Vict. 1 Ch. 356; compare *Re Smith, Smith v. Thompson*, 18 Times L. R. 432), or his mistake (*National Trustees v. General Finance Co.*, 1905, A. C. 373). They were not protected by indemnity clauses (*Wyman v. Paterson, sup.*; *Knox v. Mackinnon*, 13 App. Cas. 753; *Rae v. Meek*, 14 App. Cas. 558).

See, further, the cases quoted under the Judicial Trustees Act, 1896, s. 3, *post*.

PART III.

POWERS OF THE COURT.

Appointment of New Trustees and Vesting Orders.

25.—(1.) The High Court may, whenever it is expedient to appoint a new trustee or new trustees, and it is found inexpedient, difficult, or impracticable so to do without the assistance of the court, make an order for the appointment of a new trustee or new trustees either in substitution for or in addition to any existing trustee or trustees, or although there is no existing trustee. In particular and without prejudice to the generality of the foregoing provision, the court may make an order for the appointment of a new trustee in substitution for a trustee who is convicted of felony, or is bankrupt (*h*).

Power of the court to appoint new trustees.

(2.) An order under this section, and any consequential vesting order or conveyance, shall not operate further or otherwise as a discharge to any former or continuing trustee than an appointment of new trustees under any power for that purpose contained in any instrument would have operated.

(3.) Nothing in this section shall give power to appoint an executor or administrator (*i*).

(*h*) In connection with this section see also the power of the court to appoint a judicial trustee under the Judicial Trustees Act, 1898, *post*.

The first half of sub-sect. (1) corresponds with and replaces sect. 32 of the Trustee Act, 1850, and sect. 9 of the Trustee Act, 1852. The second half replaces, as regards felony, part of sect. 8 of the Trustee Act, 1852, and, as regards bankruptcy, sect. 147 of the Bankruptcy Act, 1883. Sub-sect. (2) corresponds with sect. 36 of the Trustee Act, 1850.

Of the cases referred to in the following note many were decided under the law as it existed prior to the passing of the present act. Such decisions, however, appear to be still applicable.

When persons are only constituted trustees by an order in a suit, new trustees cannot be appointed in their place by the same order (*Lees v. Coulton*, 20 Eq. 20).

The court, upon an application under section 32 of the Trustee Act, 1850, refused to enter into the question of the validity of the instrument creating the trust (*Re Matthews*, 26 Beav. 463). Except under special circumstances, as where a vesting order was required, the court refused to appoint a new trustee where there was a valid power in the instrument of trust (*Re Davies*, 3 Mac. & G. 278; see *Re Cooper*, 4 W. R. 729; *Re Sutton*, 1885, W. N. 122); even where the donee of the power intended to exercise it corruptly (*Re Hodson*, 9 Hare, 118). Nor as a rule would the court appoint where an appointment could be made under a statutory power (*Re Soulby*, 21 W. R.

56 & 57 Vict.
c. 53, s. 25.

256; *Re Gibbons*, 45 L. T. 756; see *Re Jackson*, 16 W. R. 572; *Re Shafto*, 29 Ch. D. 247; *Re Higginbottom*, 1892, 3 Ch. 132). And, there being an existing power, it was held that a judgment for the execution of the trusts did not give jurisdiction to the court to appoint; but it was said that in such a case the person appointed by the donee of the power required to be approved by the court; and that repeated appointments of improper persons might be held to amount to a refusal to exercise the power (*Re Gadd, Eastwood v. Clark*, 23 Ch. Div. 134; *Re Hall, H. v. H.*, 51 L. T. 901). Proper persons appointed by the donee were approved by the court, although all the beneficiaries objected (*Cecil v. Langdon*, 28 Ch. Div. 1).

Where the donee of the power is a lunatic so found, it would seem that the Court of Lunacy cannot appoint (see *Re Garrod*, 31 Ch. Div. 164); but the power may be exercised by the committee under an order in lunacy (Lun. Act, 1890, ss. 128, 129, *post*, p. 812; see *Re Bowmer*, 3 De G. & J. 658; *Re Garrod, sup.*; *Re Shortridge*, 1895, 1 Ch. 278); or the trustees may appoint under sect. 10 of the present act (see *Re Blake*, 1887, W. N. 173). The Chancery Division has also jurisdiction to make an appointment (*Re Heaphy*, 18 W. R. 1070; *Re Sparrow*, 5 Ch. 662). The court refused in such a case to appoint a new trustee, until a committee had been appointed and served with the petition (*Re Parker's Trusts*, 32 Beav. 580).

Circumstances causing application to the court.

(1)
Connected with the power.

The court has appointed new trustees in the following cases. Where the donees of the power were unwilling to appoint (*Re Knight*, 26 Ch. D. 82), or could not agree (*Re Tempest*, 1 Ch. 485), or were in India (*Re Humphrey*, 1 Jur. N. S. 921); where under a settlement by a husband for the sole benefit of the wife, the husband and wife had a joint power but were judicially separated and the husband had long resided abroad (*Re Somerset*, 1887, W. N. 122); where the power was vested in the surviving trustee, "his heirs or assigns," and the heir of the last surviving trustee could not be found (*Re Freeman*, 37 Ch. D. 148; compare *Cradock v. Witham*, 1895, W. N. 75); where it was doubtful whether the power applied to the case which had occurred (*Re Woodgate*, 5 W. R. 448; *Re Armstrong's Settlement*, 5 W. R. 448; *Cooper v. Macdonald*, 14 W. R. 755). Where a continuing trustee had power, but declined, to appoint the Public Trustee the court appointed him (*Re Kensit*, 1908, W. N. 235). See the provisions as to powers of appointing new trustees, sect. 10, *ante*, p. 766.

(2)
Circumstances connected with the trustee.
Mental incapacity.

Before the Lunacy Act, 1890, orders were made under the Trustee Act, 1850, by the Court of Chancery alone, appointing a new trustee in the place of a person of unsound mind not so found, the incapacity arising from mental infirmity (*Re Martin*, 34 Ch. D. 618; *Re Davies*, 3 Mac. & G. 278; *Re Vickers*, 3 Ch. D. 112; *contra, Re Ormerod*, 3 De G. & J. 249; *Re Good Intent Society*, 2 W. R. 671). Where a vesting order was also asked, the order was in some cases made in Chancery and Lunacy (*Re Mason*, 10 Ch. 273; *Re Stewart*, 8 W. R. 297; *Re Davidson*, 20 L. J. Ch. 644; *Re Druce*, 46 L. T. 669; *Re Smyth*, 55 L. T. 37); but could not be made in Chancery alone (*Re Martin*, 34 Ch. D. 618); except where the person of unsound mind was also an infant (*Re Arrowsmith*, 6 W. R. 642; see Lunacy Act, 1890, s. 143, *post*, p. 818), or out of the jurisdiction (*Re Gardner*, 10 Ch. D. 29), or where an order for sale had been made (*Herring v. Clark*, 4 Ch. 167). Since the Lunacy Act, 1890, a new trustee has, under the Trustee Act, 1893, s. 25, been appointed in Chancery alone in the place of a person of unsound mind not so found; but a vesting order was refused (*Re M.*, 1899, 1 Ch. 79). Such a vesting order should, it seems, be applied for in lunacy (see *Re Martin*, 34 Ch. Div. 618). As to the power of appointing new trustees possessed by the Court of Lunacy, see Lunacy Act, 1890, s. 141, *post*, p. 817; *Re Owen* (4 Ch. 782); *Re Green* (10 Ch. 272); *Re Hodgson, Kenlis v. Hodgson* (11 Ch. Div. 889); *Re Rolls Hoare* (1888, W. N. 94); *Re Chauncey* (14 W. R. 849).

Physical incapacity.

In the case of a person who is incapable, the incapacity arising from physical infirmity or old age (*Re Lemann*, 22 Ch. D. 633; *Re Phelps*, 31 Ch. Div. 351; *Re Barber*, 39 Ch. Div. 187; *Re Campbell*, 1888, W. N. 176), or ill-health (*Re Chauncey*, 14 W. R. 849; *Re Weston*, 1898, W. N. 151,

see *Re Dawson*, 3 N. R. 397), the Chancery Division has appointed a new trustee. 56 & 57 Vict.
c. 53, s. 25.

The court will appoint a new trustee in the place of an infant trustee nominated by a testator (*Re Gartside*, 1 W. R. 196; *Re Porter*, 25 L. J. Ch. 482); without prejudice, however, to any application by the infant to be restored to the trusteeship when he comes of age (*Re Shelmardine*, 33 L. J. Ch. 474; *Re Brunt*, 1883, W. N. 220; *Re Tallaire*, 1885, W. N. 191). Infancy.

The court has power under this section to appoint a new trustee in place of a trustee who is permanently residing abroad, without his consent (*Re Bignold*, 7 Ch. 223; *Re Martin Pye*, 42 L. T. 247). Where a trustee was resident in Jamaica, but there was no evidence that he did not intend to return to this country, *Kindersley*, V.-C., refused to appoint a new trustee (*Re Mais*, 16 Jur. 608; 21 L. J. Ch. 875; see *Re Stamford*, *Payne v. Stamford*, 1896, 1 Ch. 288; *Re Walker*, *Summers v. Barrow*, 1901, 1 Ch. 259, cases of powers). A bookseller domiciled in New York for several years was held "incapable of acting" within the words of a power (*Mennard v. Welford*, 1 Sm. & Giff. 426; but see *Re Bignold*, *sup.*). See, further, *Re Moravian Society*, 26 Beav. 101; *Re Arbib and Class*, 1891, 1 Ch. 601; *Re Watts*, 9 Hare, 106; *Re Harrison*, 22 L. J. Ch. 69; *Re Stewart*, 8 W. R. 297. Residence abroad.

A new trustee will be appointed where a trustee absconds (*Hyde v. Benbow*, 1884, W. N. 117), or is an absconding bankrupt (*Re Renshaw*, 4 Ch. 783; *Re Druce*, 46 L. T. 669; *Re Lamb*, 28 Ch. D. 77; *Davies v. Hodgson*, 32 Ch. D. 225; *Re Gardiner*, 33 Ch. D. 590; *Re Mace*, 1887, W. N. 232). Absconding.

A new trustee can under this section be appointed in place of a bankrupt, even if unwilling to retire (*Re Dawson*, 1899, W. N. 134). Where the bankruptcy was recent, and it was not shown that the man was of good character and had the command of means, it was held that he ought to be removed (*Re Adams' Trust*, 12 Ch. D. 637; *Re Foster*, 55 L. T. 479; see *Re Bridgman*, 1 Dr. & Sm. 170); except, possibly, in a case where he has no money to receive (*Re Barker's Trusts*, 1 Ch. D. 43). A new trustee was appointed in place of a bankrupt (*Re Tweedy*, 28 Ch. D. 529). See also above cases as to absconding. Trust property does not pass to the bankruptcy trustee (Bankruptcy Act, 1883, s. 44, sub-s. 1). Bankruptcy.

A new trustee can, under this section, be appointed in place of a felon, although the latter is unwilling to retire (*Re Dawson*, 1899, W. N. 134). Felon.

Where a surviving trustee is dead intestate and no administration has been taken out, a new trustee may be appointed under this section (*Davis v. Chanter*, 6 W. R. 416). As to vesting orders in such a case, see the note to sect. 26, *post*, p. 786. A person absolutely entitled to stock was in such a case appointed trustee for his own benefit, and the stock was ordered to be transferred to him (*Re Dickson*, 1872, W. N. 223). Surviving trustee dead intestate and no administrator.

Where trustees appointed by will had died in the testator's life, an appointment was made (*Re Smirthwaite*, 11 Eq. 251; *Re Orde*, 24 Ch. Div. 271; *Re Williams*, 36 Ch. D. 231). Where the appointment of the acting trustees was void, and the donee of the power of appointment could not be found, the court appointed (*Re Freeman*, 37 Ch. D. 148). In the case of stock standing in the name of an incorporate body which had ceased to exist, the court appointed trustees and directed them to transfer (*Hanover v. Bank of England*, 8 Eq. 350). Where a limited company sold its leaseholds and became dissolved before assigning them, the court appointed a new trustee under this section, pointing out that the words "although there is no existing trustee" do not limit the previous words (*Re Bomore Road* (No. 9), 1906, 1 Ch. 364; see *Re Taylor*, 1904, 2 Ch. 741). In another case the court appointed a trustee in the place of an industrial or provident society which had been dissolved (*Re Ruddington*, 1909, 1 Ch. 701). No existing trustees.

Where no trustees were originally appointed by a testator, it was doubtful whether the court could appoint under the Trustee Acts, 1850 and 1852, but originally it could clearly appoint under its inherent jurisdiction (*Dodkin v. Brunt*, appointed. 6 Eq. 580; *Re Moore*, *McAlpine v. Moore*, 21 Ch. D. 778; *Re Gillett*, 1876,

56 & 57 Vict. c. 53, s. 25. W. N. 251; 25 W. R. 23). Where persons were declared constructive trustees of stock, trustees were appointed in their place, although no trustees had been originally named by the testatrix (*Re Davis*, 12 Eq. 214).

Trustees refusing to act.

Where a trustee who had executed the deed creating the trust declined to act, the court refused, under this section, to appoint a new trustee in his place without his consent (*Re Garty*, 10 L. T. 331); but new trustees have been appointed in the place of disclaiming trustees (*Re Sheppard*, 4 D. F. & J. 423; *Re Martinez*, 22 L. T. 403; *Re Pratt*, 55 L. T. 313); and it is sufficient that a disclaiming trustee should disclaim at the bar (*Foster v. Dawber*, 1 Dr. & Sm. 172; *Re Tyler*, 5 De G. & Sm. 56).

Trustee not removed against his will.

The court refused, under the Trustee Act, 1850, to remove a trustee who desired to continue in the trust (*Re Hodson*, 9 Hare, 121), even where he was a solicitor who misconducted himself (*Re Blanchard*, 3 D. F. & J. 131). Nor would the court remove on the ground of lunacy where the lunacy was disputed (*Re Combs*, 51 L. T. 45). To remove a trustee resident within the jurisdiction from the trust against his wish, an action was necessary (*Re Blanchard*, 3 D. F. & J. 131; *Re Bignold*, 7 Ch. 223); and the mere fact of there being a dissension between one of the several *cestuis que trusts* and the trustee was held not a sufficient ground for removal (*Forster v. Davies*, 4 D. G. F. & Jo. 133). See further, *Letterstedt v. Broers* (9 App. Cas. 371); *Assets Co. v. Trustees Corporation* (65 L. J. Ch. 74); Lewin, 800, 10th ed. But where new trustees can be appointed on petition, an action should not be brought (*Thomas v. Walker*, 18 Beav. 521; *Legg v. Mackrell*, 2 D. F. & J. 551). As to removing felon or bankrupt trustees against their will, see *Re Dawson*, *sup.*

Existing trustees will not be re-appointed.

It was finally settled, after some difference of opinion (*Re Driver*, 19 Eq. 352; *Re Dalgleish*, 4 Ch. Div. 143; *Re Pearson*, 5 Ch. Div. 982), that the court would not re-appoint existing trustees with a view to a vesting order being made under sect. 34 of the Trustee Act, 1850 (now replaced by sect. 26, sub-sect. 1, of the Trustee Act, 1893). See *Re Vicat* (33 Ch. Div. 103); *Re Dewhurst* (*id.* 416); *Re Stocken* (1893, W. N. 203).

Receiver.

Trustees were appointed although there was a receiver of the trust property (*Reeves v. Neville*, 10 W. R. 335).

Principles on which new trustees are selected.

In selecting a new trustee, it was said that the court would have regard to the wishes of the author of the trust expressed in or clearly collected from the instrument creating the trust. A person would not be appointed with a view to the interest of some of the *cestuis que trusts* in opposition to the interests of others. The court would have regard to the question whether the appointment would promote or impede the execution of the trust; but the mere fact of the continuing trustee refusing to act with the proposed trustee was not sufficient to prevent the appointment (*Re Tempest*, 1 Ch. 485).

Who will be appointed.

The court would not in general appoint a *cestui que trust* to be a trustee (*Foster v. Abraham*, 17 Eq. 356; *Re Roskell*, Seton, 1225, 6th ed.; *Re Conybeare*, 1 W. R. 458; *Ex p. Clutton*, 17 Jur. 988); but where the *cestui que trust* was absolutely entitled, and it was decided to vest the trust funds in him, he might be appointed (*Re Currie*, 10 Ch. 93; *Re Dickson*, 1872, W. N. 223; *Re Price*, 1883, W. N. 202). A *cestui que trust* was appointed under special circumstances, e.g., where there were indications in the will (*Tempest v. Camoys*, 58 L. T. 221); or where a stranger could not be found (*Re Clissold*, 10 L. T. 642); but in such cases an undertaking has been required that if the person appointed became the sole trustee, he would immediately take steps to appoint a co-trustee (*Re Burgess*, 1877, W. N. 87; *Re Lightbody*, 52 L. T. 40). The husband of a *cestui que trust* was appointed on a similar undertaking (*Re Parrott*, 1881, W. N. 158; *Re Hattatt*, 21 L. T. 781; 18 W. R. 416; see *Wilding v. Bolder*, 21 Beav. 224). Unmarried women were formerly only appointed under special circumstances (*Re Campbell*, 31 Beav. 176; *Berkley v. Berkley*, 9 Ch. 720; *Re Peake*, 1894, 3 Ch. 520; see *Brook v. Brook*, 1 Beav. 531), but recently have been frequently appointed (*Re Dickinson*, 1902, W. N. 104). As to married women, see now M. W. P. Act, 1882, ss. 18, 24, *ante*, pp. 362, 365;

Woman.

M. W. P. Act, 1907, sect. 1, *ante*, p. 367. Persons resident out of the jurisdiction were only appointed under special circumstances (*Re Freeman*, 37 Ch. D. 151; *Re Guibert*, 16 Jur. 852; *Re Curtis*, 1 R. 5 Eq. 429). In the case of personalty, where all the *cestuis que trusts* were permanently resident abroad, such persons were appointed (*Re Liddiard*, 14 Ch. D. 310; *Re Austen*, 38 L. T. 601; *Re Drewe*, 1876, W. N. 168); and where one *cestui que trust* resided in Canada, a Canadian was appointed trustee of her share jointly with the other trustee (*Re Cunard*, 48 L. J. Ch. 129; 27 W. R. 52). In the case of realty, where all the *cestuis que trusts* were resident abroad, two Canadian and one English trustee were appointed, upon an undertaking by the Canadian trustees that they would not appoint any new foreign trustee without the consent of the court (*Re Freeman*, 37 Ch. D. 148; compare *Re Simpson*, 1897, 1 Ch. 256). Where English and Irish lands were settled on the same trusts, and the English court had appointed English trustees of the English land, the Irish court appointed the same persons to be trustees of the Irish land (*Re Maberley*, 19 L. R. Ir. 341). Where the *cestuis que trusts* were resident abroad, the court appointed an alien to be trustee where no English person could be found (*Re Hill*, 1874, W. N. 228). The agent of the property was appointed and allowed to receive a commission (*Re Freeman*, 37 Ch. D. 148). The court refused to appoint the solicitor acting for the petitioner (*Re Orde*, 24 Ch. Div. 271; see *Re Stamford*, 1896, 1 Ch. 288); but this was done where there was a difficulty in finding any one else (*Re Brentnall*, 1872, W. N. 77).

A corporation can be appointed trustee, even jointly with a continuing trustee (*Re Thompson*, *Thompson v. Alexander*, 1905, 1 Ch. 229). As to the practice where a corporation is appointed executor, see *Re Hunt*, 1896, P. 288.

The court would not appoint a sole trustee (*Re Ellison*, 2 Jur. N. S. 62; *Re Porter*, *ib.* 349; *Re Dickinson*, 1 Jur. N. S. 724; see *D'Adhemar v. Bertrand*, 35 Beav. 20; *West of England Bank v. Murch*, 23 Ch. D. 146), except under special circumstances (*Re Reynault*, 16 Jur. 233). Two trustees of real estate were appointed by the court in the place of one (*Ex p. Tunstall*, 4 De G. & S. 421; see *Re Welsh*, 3 My. & Cr. 292; *Birch v. Cropper*, 2 De G. & S. 255; *Plenty v. West*, 16 Beav. 356); and new trustees were added to the original trustees (*Re Boycott*, 5 W. R. 15; *Grant v. G.*, 34 L. J. Ch. 641; *Re Brackenbury*, 10 Eq. 45; *Re Gregson*, 34 Ch. D. 209). Where the number had dropped to one, a second was appointed (*Finlay v. Howard*, 2 Dr. & W. 490). The court would not in general diminish the number of the trustees, but, under special circumstances, two were appointed in place of three (*Re Marriott*, 18 L. T. 749; *Bulkeley v. Earl of Eglinton*, 1 Jur. N. S. 994; *Re Fowler*, 1886, W. N. 183).

Prior to the Trustee Act, 1893, in a case where there was a continuing trust, and one of the trustees became an absconding bankrupt, the court would not reduce the number by appointing the other trustees to be trustees in the place of themselves and the bankrupt, and vesting the property in them alone; but held that a new trustee must be appointed (*Re Lamb*, 28 Ch. D. 77; *Re Gardiner*, 33 Ch. D. 591), following the decisions in lunacy (*Re Nash*, 16 Ch. Div. 503; *Re Aston*, 23 Ch. Div. 217). Appointments and vesting orders of this nature were, however, made under special circumstances (*Re Martyn*, 26 Ch. Div. 745; *Re Watson*, 19 Ch. Div. 384; *Davies v. Hodgson*, 32 Ch. D. 225). Since the Trustee Act, 1893, and having regard to sects. 26 and 35 of that act, the court, in a similar case, without making any fresh appointment, has vested property in three out of four trustees (*Re Lees*, 1896, 2 Ch. 508; *Dugmore v. Suffield*, 1896, W. N. 50), and in two out of three (*Re Price*, 1894, W. N. 169; *Re Fitzherbert*, 1898, W. N. 58). A similar order has been made under the Lunacy Act, 1890, ss. 135, 136 (*Re Leon*, 1892, 1 Ch. 348). In the case of a trustee desiring to retire, the court refused to discharge him under this section without appointing another in his place, but discharged him under the general jurisdiction (*Re Chetwynd*, *Scarbrick v. Nevinson*, 1902, 1 Ch. 692).

Where the Public Trustee is appointed to be custodian trustee, he is not

56 & 57 Vict.
c. 53, s. 25.

Person
resident
abroad.

Agent.

Solicitor.

A corpora-
tion.

Number of
trustees
appointed.

56 & 57 Vict. c. 53, s. 25. to be reckoned in determining the number of trustees for the purposes of this act (Public Trustee Act, 1906, sect. 4, sub-s. 2 (g)). The Public Trustee may be appointed new, or additional, or sole trustee (sect. 5).

Severance of trusts.

Where by the same instrument different parts of the property are vested in the same trustees on different trusts, the court can (independently of sect. 10, *ante*, p. 766) appoint separate new trustees of the different parts (*Re Paine*, 28 Ch. D. 725; *Re Hetherington*, 34 Ch. D. 211; *Re Grange, Cooper v. Todd*, 44 L. T. 469), or of one part only, without requiring new trustees to be appointed of the remaining part (*Re Moss*, 37 Ch. D. 513, where the existing trustees retired from part of the trusts; *Re Dennis*, 12 W. R. 575; *Re Cotterill*, 1869, W. N. 183; *Re Aston*, 25 L. R. Ir. 96; see *Re Cunard*, 48 L. J. Ch. 129). An order was refused in *Re Nesbitt* (19 L. R. Ir. 509).

Trustee of creditor's deed.

The court has appointed new trustees of a trust deed for benefit of creditors (*Re Raphael*, 9 Eq. 233; *Re Price*, 6 Eq. 460; *Re Bache*, 1868, W. N. 223; *Re Donisthorpe*, 10 Ch. 55).

Evidence on application of appointment of new trustees.

The evidence should show that the person proposed to be appointed is a fit person. One affidavit is sufficient; the costs of a second will not be allowed (*Re Arden*, 1887, W. N. 166). The deponent's position in life must be stated; "gentleman" is not sufficient (*Re Horwood*, 55 L. T. 373; *Re Orde*, 24 Ch. Div. 271). He should not be the solicitor (*Grundy v. Buckridge*, 17 Jur. 731; 22 L. J. Ch. 1007; *Re Hartley*, 1879, W. N. 169). Something should be shown as to the pecuniary means of the proposed trustee (*Re Castle Sterry*, 1888, W. N. 179). "Of independent means" is sufficient, but not "gentleman" alone (*Re Horwood*, 55 L. T. 373; see *Re Smith's Policy*, 1894, W. N. 68). In general the proposed trustee should not appear by counsel to consent (*Re Draper*, 2 W. R. 440; *Re Parker*, 21 L. T. 218). His consent to act, however, should in proceedings in Chancery and in Lunacy, be evidenced by a written consent signed by him, and verified by the signature of his solicitor (R. S. C. Ord. 38, r. 19A; *Re Hume*, 35 Ch. Div. 457). As to a consent in the case of proceedings in lunacy, see Rules in Lunacy, 1892, r. 92, and form of consent, *post*, pp. 820, 821. As to evidence on application for vesting order, see note to sect. 26, *post*, p. 783.

Form of application.

All applications under the act may be made by petition except as otherwise provided under Ord. 55 (R. S. C. Ord. 54B, r. 2). An application for the appointment of a new trustee may be made by summons (R. S. C. Ord. 55, r. 13A (a)), but the appointment must be made by the judge in person (R. S. C. Ord. 55, r. 15A). The application, if not made in any pending matter, should be entitled in the matter of the trust and of the act (R. S. C. Ord. 54B, r. 4A). If a vesting order is asked for, the application should state the sections of the act under which it is proposed that the order should be made (*Ib.*).

For forms of petitions and summons for the appointment of new trustees and for vesting orders, see Dan. Ch. Forms.

Service.

On an application to appoint new trustees in the place of two who were desirous of retiring, both the old trustees and all the *cestuis que trusts* were required to appear (*Re Sloper*, 18 Beav. 596); but service on the old trustee was not required, where he was physically incapable by reason of physical infirmity (*Re Weston*, 1898, W. N. 151), or mental infirmity (*Re Green*, 10 Ch. 272; *Re Stewart*, 8 W. R. 297; see *Re East*, 8 Ch. 735), or was permanently resident abroad (*Re Bignold*, 7 Ch. 223; *Re Martin Pye*, 42 L. T. 247; *Re Stewart, sup.*), or had absconded (*Re Nicholson's Trusts*, 1884, W. N. 76; *Hyde v. Benbow, id.* 117). Where the last trustee was dead, intestate, and a vesting order was asked, service on the heir was required (*Re Oxenham*, 1875, W. N. 6; *Re Smirthwaite*, 11 Eq. 251; see now Conv. Act, 1881, s. 30, *ante*, p. 592; and *Re Pilling*, 26 Ch. D. 432). Service on the heir was not required in *Purvis v. Abraham*, 1866, W. N. 126; *Re Stanley*, 1893, W. N. 30. Where an order had been made on petition, and two persons had been made petitioners without their consent, their names were struck out, and they were treated as not served (*Re*

Savage, 15 Ch. D. 557). Where a new trustee was appointed of a term of 56 & 57 Vict. years, service on the reversioner was required (*Re Farrant*, 20 L. J. Ch. 532; see *Re Matthew*, 2 W. R. 85). The general rule formerly was that all the *cestuis que trusts* must be served or join in the application (*Re Richards*, 5 De G. & Sm. 636; *Re Fellows*, 2 Jur. N. S. 62). But where parties were numerous service was dispensed with on some who were represented by trustees (*Re Smyth*, 2 De G. & Sm. 781; see *Re Blanchard*, 3 D. F. & J. 137), and on one who was abroad (*Re Wilson*, 31 Ch. Div. 522; *Re Lightbody*, 52 L. T. 40; see *Re Parrott*, 1881, W. N. 158). According to the present practice an express order dispensing with service is not necessary, the judge exercising his discretion according to the circumstances of each case (Practice Note, 1901, W. N. 85).

For forms of orders, see Seton, 6th ed. 1210—1218.

Forms of
orders.

(i) Compare the definition of trust contained in sect. 50, *post*, p. 806. The court has refused to appoint a person to perform the duties of executor (*Eaton v. Deanes*, 1894, W. N. 32; *Re Willey*, 1890, W. N. 1; see *Re Moore*, *McAlpine v. Moore*, 21 Ch. D. 778; and see now Judicial Trustees Act, 1896, s. 1, *post*). Sub-sect. (iii.).

26. In any of the following cases, namely:—

Vesting
orders as to
land.

(i.) Where the High Court appoints or has appointed a new trustee (*k*); and

(ii.) Where a trustee entitled to or possessed of any land, or entitled to a contingent right therein, either solely or jointly with any other person,—

(a) is an infant (*l*), or

(b) is out of the jurisdiction of the High Court (*m*), or

(c) cannot be found (*n*); and

(iii.) Where it is uncertain who was the survivor of two or more trustees jointly entitled to or possessed of any land (*o*); and

(iv.) Where, as to the last trustee known to have been entitled to or possessed of any land, it is uncertain whether he is living or dead (*p*); and

(v.) Where there is no heir or personal representative to a trustee who was entitled to or possessed of land and has died intestate as to that land, or where it is uncertain who is the heir or personal representative or devisee of a trustee who was entitled to or possessed of land and is dead (*q*); and

(vi.) Where a trustee jointly or solely entitled to or possessed of any land, or entitled to a contingent right therein, has been required, by or on behalf of a person entitled to require a conveyance of the land or a release of the right, to convey the land or to release the right, and has wilfully refused or neglected to convey the land or release the right for twenty-eight days after the date of the requirement (*r*);

the High Court may make an order (in this act called a vesting order) vesting the land in any such person in any such manner and for any such estate as the court may direct, or releasing or disposing of the contingent right to such person as the court may direct (*s*).

56 & 57 Vict.
c. 53, s. 26.

Provided that—

- (a.) Where the order is consequential on the appointment of a new trustee the land shall be vested for such estate as the court may direct in the persons who on the appointment are the trustees; and
- (b.) Where the order relates to a trustee entitled jointly with another person, and such trustee is out of the jurisdiction of the High Court or cannot be found, the land or right shall be vested in such other person, either alone or with some other person (*u*).

This section replaces sect. 34, part of sect. 7 and sects. 8—15 inclusive, of the Trustee Act, 1850, and sect. 2 of the Trustee Act, 1852.

Sub-sect. (i.). (*k*) Where the court appointed a new trustee in place of a person incapable from physical infirmity, a vesting order was made under this sub-section (*Re Weston*, 1898, W. N. 151). But where the incapacity arose from mental infirmity the Chancery Division refused to make a vesting order; which it seems should, in such a case, be applied for in Lunacy (*Re M.*, 1899, 1 Ch. 79; *Re Martin*, 34 Ch. Div. 618).

Land held by a company which is dissolved. In cases where the court has appointed a new trustee in the place of a dissolved company or society, it has made orders vesting in the new trustee real estate and choses in action previously vested in the company or society (*Re Bomore Road* (No. 9), 1906, 1 Ch. 359; *Re Ruddington*, 1909, 1 Ch. 707). If in such a case a new trustee is not appointed, there is a conflict of authority as to whether a vesting order can be made on the ground that the trustee "cannot be found." See, on the one hand, *Re General Accident Corporation*, 1904, 1 Ch. 147; *Re Richard Mills*, 1905, W. N. 36, in which cases legal interests in leaseholds and freeholds were in question. And see, on the other hand, *Re Taylor*, 1904, 2 Ch. 741, where letters patent were in question; *Re Ruddington*, 1909, 1 Ch. 707. Assuming in the case of land held by a company at the time of its dissolution (whether for years or in fee) that on the dissolution the land reverts to the lessor or grantor (see *Hastings v. Letton*, 1908, 1 K. B. 378), any vesting order should, it seems, be made in such a form as to divest the estate of the lessor or grantor.

Sub-sect. (ii.), (a). (*l*) Before the present act the case of infant trustees was dealt with in sects. 7 and 8 of the Trustee Act, 1850.

Infants. Before the Conv. Act, 1881, infants often became by devolution or devise seised of lands as trustees, and in particular where a vendor of land had died (see *Re Lowry*, 15 Eq. 78). Now, under the Conv. Act, 1881, ss. 4 and 30 (*ante*, pp. 561, 592), the legal estate devolves on the personal representative, both where there is a contract to sell freeholds binding on the heir or devisee of a deceased vendor, and in the case of trust estates; except in the latter case where they are copyhold (Copyhold Act, 1887, s. 45; see *Re Mills*, 37 Ch. D. 312; *Re Beaufort*, 1898, W. N. 148).

The Chancery Division has jurisdiction where the infant is also a lunatic (*Re Arrowsmith*, 4 Jur. N. S. 1123; 6 W. R. 642; Lunacy Act, 1890, s. 143, *post*, p. 818). A vesting order was refused as to an equitable estate vested in an infant, and which was bound by an order for sale (*Re Williams*, 5 D. G. & Sm. 515). A vesting order was made as to the estate of an infant heir in *Dewar v. Mailland*, 2 Eq. 834.

Infant tenant in tail. In the case of an infant tenant in tail, a vesting order will, if the protector consents to it, bar all estates in remainder (*Powell v. Matthews*, 1 Jur. N. S. 973; *Re Montagu, Faber v. Montagu*, 1896, 1 Ch. 549; and see *Hargreaves v. Wright*, 1 W. R. 408; *Singleton v. Hopkins*, 4 W. R. 107; *Re Breary*, 1873, W. N. 487; *Re Hambrough*; *H. v. H.*, 1909, 2 Ch. 620). For form of order appointing a person to convey property for an infant tenant in tail, see *Re Montagu, sup.*

Where a testator had agreed to grant easements, and infants were entitled to the land, a person was appointed under sect. 7 of the Trustee Act, 1850,

to convey to a releasee to uses for the purpose of granting the easements and subject thereto to the uses of the will (*Re Taylor*, 1866, W. N. 5). 56 & 57 Vict.
c. 53, s. 26.

The infant should be served (*Re Jones*, 22 W. R. 837; *Re Adams*, 1887, W. N. 175; *Re Russell*, 1866, W. N. 125; *Re Cooper*, 9 W. R. 531; *contra*, *Re Little*, 7 Eq. 323; *Re Tweedy*, 9 W. R. 398; *Re Willan*, *ib.* 689; *Re Davies' Trust*, 1889, W. N. 215). Service.

For forms of orders vesting land, in the case of infant trustees, see Seton, Forms. 6th ed. 1228 *et seq.*; 1718.

(m) Before the present act, the case of trustees of land who were out of the jurisdiction or who could not be found was dealt with in sects. 9, 10, 11, 12 (b), (c). of the Trustee Act, 1850.

If a lunatic trustee is out of the jurisdiction it would seem that the Chancery Division can make a vesting order (*Re Gardner*, 10 Ch. D. 29). A trustee will be treated as out of the jurisdiction, even where he appears by counsel (*Stillwell v. Ashley*, Seton, 6th ed. 1247). An heir who was out of the jurisdiction was declared to be a trustee and his interest vested in the executor (*Hooper v. Strutton*, 12 W. R. 367; see *Re Badcock*, 2 W. R. 386; *Re Skitter*, 4 W. R. 791). Trustees out of jurisdiction or who cannot be found.

(n) Where a mortgagee who was a trustee absconded, the land was vested in the *cestui que trust* (*Re Barber*, 58 L. T. 303). Where one out of four trustees absconded, the land was vested in the other three, no new trustee being required (*Re Lees*, 1896, 2 Ch. 508; see the note *ante*, p. 781). Where a trustee of a will disclaimed and the heir could not be found, a person was appointed to convey the land which had been sold in an administration action (*Wilkes v. Groom*, 8 D. M. & G. 205).

As to whether a company which being in the position of a trustee is dissolved can be treated as a trustee who cannot be found, see the cases quoted above under sub-sect. (i.).

Where a mortgagor under an equitable mortgage, the defendant in a foreclosure suit, had absconded, an order was made declaring him a trustee of the estate in the mortgagee (*Lechmere v. Clamp*, 30 Beav. 218; 31 Beav. 578). But the order will not be made on motion to make the foreclosure absolute; a separate application must be made (*Smith v. Boucher* 1 Sm. & G. 72). Where a mortgagor was abroad, a vesting order was refused as to the last day of the term which he had covenanted to assign to a purchaser from the mortgagee (*Re Probert*, 22 L. J. Ch. 948). Mortgagor absconding.

As regards the meaning of "solely seised" in sect. 9 of the Trustee Act, 1850, in a case where the legal interest in land was vested in A. and B., and A. was beneficially entitled to the whole, it was said that B. was solely seised of one moiety in trust for A. (*McMurray v. Spicer*, 5 Eq. 539). Trustee solely entitled.

Under sect. 10 of the Trustee Act, 1850, it was held that the words "seised jointly" were not to be construed strictly as referring to a joint tenancy at law only (*Re Greenwood*, 27 Ch. D. 359), and included co-parceners (*ib.*). A mortgagee having died intestate, the estate descended upon two co-parceners, one of whom was out of the jurisdiction, the estate was vested in the other alone (*Re Templer*, 4 N. R. 494). Where one of a bankrupt's assignees had gone abroad, the court made an order declaring him a trustee, and vesting the estate in the other assignees (*Re Joyce*, 2 Eq. 576). An order was made under sect. 10 of the Trustee Act, 1850, as to one of several trustees who was a convict (*Re Hulme*, 57 L. T. 13). Where one of several mortgagees who were trustees was abroad, his interest was vested in a transferee (*Re Walker*, 3 Ch. D. 209). But where realty was mortgaged to A. and B., and A. went abroad, it was held, upon payment off of the mortgage, that the court had no jurisdiction under the Trustee Act, 1850, to vest in the purchaser the estate of A. (*Re Osborn*, 12 Eq. 392).

In the case of a sole trustee's heir who was abroad, service was dispensed with (*Re Stanley*, 62 L. J. Ch. 469; 68 L. T. 197). In the case of persons jointly entitled, service was dispensed with on the person abroad (*Re Greenwood*, 27 Ch. D. 359). For form of orders, see Seton, 6th ed. 1230, 1231. Service and forms.

(o) Before the present act the cases of uncertainty as to which of several

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56 & 57 Vict. c. 53, s. 26. trustees the survivor or whether the last trustee was dead were dealt with in sects. 13, 14 of the Trustee Act, 1850.

(p) For form of orders, see Seton, 6th ed. 1232.

Sub-sect. (iv.).

Sub-sect. (v.).

No heir or representative.

(q) Under the Conv. Act, 1881, s. 30 (*ante*, p. 592), trust estates now devolve on the personal representative unless they are of copyhold tenure (50 & 51 Vict. c. 73, s. 45; see *Re Mills*, 37 Ch. D. 312). In the case of a bare trustee dying before 1882, see V. & P. Act, 1874, s. 5, L. T. Act, 1875, s. 48. Under the corresponding section (15) of the Trustee Act, 1850, the court vested copyholds, the sole trustee of which had died intestate without an heir, in the *c. q. t.* who was absolutely entitled (*Re Godfrey*, 23 Ch. D. 205). Where as a security for a loan land was conveyed on trust for sale and payment of the loan, and of the balance to the borrower, "his executors, administrators, and assigns," and the lender died intestate and without an heir, a vesting order was made under the same section, the deed which operated as a conversion being more than a mere mortgage (*Re Underwood*, 3 K. & J. 745; see *Re Keeler*, 11 W. R. 62). A bastard sold a reversionary interest in realty under a will, the trustees of which subsequently conveyed the legal estate to the bastard who died without children: an order was made vesting the legal estate in the purchaser (*Re Wilkinson*, 12 W. R. 522).

For form of order, see Seton, 6th ed. 1233.

Sub-sect. (vi.).

Refusal or neglect to convey.

(r) Before the present act the case of trustees refusing or neglecting to convey land was dealt with by sect. 2 of the Trustee Act, 1852. A refusal was held not "wilful" within that section where the trustee entertained *bonâ fide* doubt as to the title of the applicant to call for a conveyance (*Re Mills*, 40 Ch. Div. 14). An order was made under that section to defeat an attempt at extortion on the part of a trustee (*Re O'Donnell*, 19 W. R. 522). Where one of two trustees of mortgages absconded, and refused to transfer to the continuing and a new trustee, a vesting order was made, but the court required the new trustee to be joined as co-petitioner (*Re Keeley*, 53 L. T. 487; see *Re Grayson*, 27 W. R. 534).

A. having been declared a trustee of leaseholds for the plaintiff, and ordered to execute an assignment, refused to execute. Notice of motion for an order directing A. to execute the deed within four days, or for a vesting order, was served on A., who did not appear. The motion having stood over for twenty-eight days, a vesting order was made on an *ex parte* application (*Knight v. K.*, 1866, W. N. 114). And where the defendant had been declared a trustee for the purpose of executing a lease to the plaintiff and neglected to do so within twenty-eight days after formal demand, an order was made that on the consideration money being brought into court, the chief clerk should execute the lease (*Derham v. Kiernan*, 1 I. R. 5 Eq. 217). See also *Warrender v. Foster*, Seton, 6th ed. 1272; and the power given by Jud. Act, 1884, s. 14, for the court to nominate a person to execute an instrument in place of a person who does not comply with an order to do so. The last-mentioned power was exercised in *Howarth v. H.* (11 P. D. 68, 95); *Re Cathcart* (1893, 1 Ch. 466); *Re Lumley* (1893, W. N. 13); see *Savage v. Norton*, 1908, 1 Ch. 290).

Where a mortgagor covenanted to surrender copyholds to his mortgagee, and neglected to surrender for twenty-eight days after demand and tender of engrossment, a vesting order was made on the petition of the mortgagee (*Re Crowe*, 13 Eq. 26). As to the instrument to be tendered in the case of copyholds, see before this act *Rowley v. Adams* (14 Beav. 130). Separate orders may be made as to different parts of the property if convenient (*Brader v. Kirby*, 1872, W. N. 174).

Service and forms.

Service was not required on the recusant (*Re Crowe*, 13 Eq. 26; see *Ex p. Armstrong*, 16 Sim. 296; *Re Baxter*, 2 Sm. & Giff. App. 5). An order vesting lands, which were subject to an annuity, was made without requiring service on the annuitant (*Re Winteringham*, 3 W. R. 578). For form of order, see Seton, 6th ed. 1237.

General note as to vesting orders of land.

(s) The court has authority to make a vesting order of land though there may exist a person capable of conveying it to the trustees appointed by the court (*Re Manning*, Kay, App. 28).

Where the legal estate in land has vested in the Crown as a trustee the court has no jurisdiction under the Trustee Acts to make a vesting order (56 & 57 Vict. c. 53, s. 26.) (*Re Taylor*, 1904, 2 Ch. 741; *Re Pratt*, 55 L. T. 313; *Pryce Jones v. Williams*, 1902, 2 Ch. 522; compare *Hastings v. Letton*, 1908, 1 K. B. 386). See further *Re Martinez*, 22 L. T. 403, where the Crown consented; *Re Minchin*, 2 W. R. 179; *Re Giraud*, 32 Beav. 385; and compare the decisions as to the Crown quoted *ante*, p. 122. But sect. 5 of the Intestates Act, 1884, provided that where under that act an order for sale was made of the Crown's interest in land, sect. 1 of the Trustee Act, 1852, should apply. Sect. 30 of the present act would seem now to apply to such a case (see sect. 38 of the Interpretation Act, 1889).

Where new facts arise or are discovered after the making of a vesting order, see, as to the practice, *Re Havelock*, 14 W. R. 26, 174; *Re Clinton, Jackson v. Slaney*, 1882, W. N. 176.

The application for a vesting order consequential on the appointment of Form of a new trustee, whether the appointment is made by the court or a judge application or out of court, may be made by summons (R. S. C. Ord. 55, r. 13A (b)); for vesting see, as to allowing the costs of a petition in a complicated case, *Re Morris* order of land. (60 L. T. 96). In other cases under this section the application must be by petition (R. S. C. Ord. 54B, r. 2; see *Frodsham v. F.*, 15 Ch. Div. 317; *Smith v. Gill*, 53 L. T. 623); but may afterwards be referred to chambers (*Re Tweedy*, 28 Ch. Div. 529; *Re Pratt*, 55 L. T. 313). The application, if not made in a pending matter, should be entitled in the matter of the trust and of the act (R. S. C. Ord. 54B, r. 4A). The application should state the section or sections of the act under which it is proposed that the order shall be made (*Ib.*).

On an application for a vesting order of leaseholds, where the lease con- Service. tained no covenant against assignment, service on the reversioner was not required (*Re Matthews*, 2 W. R. 85; see *Re Farrant*, 20 L. J. Ch. 532). And where a tenant for life applied for an order vesting property in a new trustee appointed under a power, service on the remainderman was required (*Re Maynard*, 16 Jur. 1084). See, further, the cases as to service quoted above in the note to the present section, and in the note to sect. 25, *sup.*

In the case of a vesting order the beneficial title to the property may be Evidence. proved by the affidavit of a person acquainted with the facts (*Re Hoskins*, 4 De G. & J. 436); but the legal title must be strictly proved (Dan. Ch. P. 7th ed. 1792).

With regard in general to the form of orders vesting real estate the order Form of should describe the property (*Re Ord*, 3 W. R. 386). Land may be vested orders. to uses to bar dower (*Davey v. Miller*, 1 Sm. & Giff. App. 19); but a declaration against dower will not be inserted (*Ex p. Grieve*, 5 De G. & Sm. 436). Land has been vested to the use of such persons as an executor and an executrix (who was a married woman) should by deed appoint, and in default in the executor and executrix (*Re Powell*, 4 K. & J. 338); and has been vested subject to a legacy (*Re Ellerthorpe*, 18 Jur. 669). See, further, Seton 6th ed. 1228 *et seq.* For form of order in case of an infant heir of a vendor of copyholds, see *Re Beaufort* (1898, W. N. 148); and in case of an infant tenant in tail, see *Re Montagu* (1896, 1 Ch. 549).

(u) Where one of several trustees is out of the jurisdiction and a new trustee is appointed in his place, the vesting order should in form vest in the new and continuing trustees such estate as was vested in the continuing and absent trustees (*Smith v. S.*, 3 Drew. 72; see *Re Fisher*, 1 W. R. 505; *Re Bute*, Johns. 15; see *contra*, *Re Watts*, 9 Hare, 106; *Re Plyer*, *Ib.* 220). In the case of a last surviving trustee who had died without a personal representative, the vesting order should in form vest the property in the new trustees, "for all such estate as was vested in the last surviving trustee at the time of his death" (*Re Williams*, 36 Ch. D. 231; *Re Rackstraw*, 52 L. T. 612; *Re Rathbone*, 2 Ch. Div. 483; see *Re Sarum*, 55 L. T. 313; 1886, W. N. 140; *Re Pilling*, 26 Ch. D. 432).

Under the Trustee Act, 1850, the Court of Lunacy refused to vest trust Vesting property directly in a person having an absolute beneficial interest (*Re orders in the*

56 & 57 Vict. c. 53, s. 26. *Holland*, 16 Ch. Div. 672); but did so after appointing as new trustee the person so entitled (*Re Currie*, 10 Ch. D. 93). Trust property, however, was vested in persons having absolute beneficial interests where a sole trustee of copyholds died intestate and without an heir (*Re Godfrey*, 23 Ch. D. 205). See also *Re Adams* (1887, W.N. 175); *Re Barber* (58 L. T. 303); see further the decision as to vesting stock in beneficiaries quoted under sect. 35, *post*, p. 797.

Scope of Trustee Act, 1850.

The scope of the Trustee Act, 1850, was to embrace every case of inconvenience (*Bristow v. Booth*, L. R. 5 C. P. 91). But under it the court had no jurisdiction to decide a dispute as to title (*Re Draper*, 9 W. R. 805). It was said that the court, in acting under the Trustee Acts, never administered trusts (*Re Holland*, 16 Ch. Div. 672); certainly not in lunacy (*Re Currie*, 10 Ch. Div. 93).

Public trustee.

As regards the Public Trustee where he acts as custodian, vesting orders may be made (Public Trustee Act, 1906, sect. 4, sub-sect. 2 (a)). And where he undertakes to administer small estates the undertaking may operate under this section (sect. 3, sub-sect. 2).

Vesting property in winding up.

Compare with the above section the power of the Court to vest in the liquidator the real property of an unregistered company being wound up (Comp. Consol. Act, 1908, sect. 272).

Orders as to contingent rights of unborn persons.

27. Where any land is subject to a contingent right in an unborn person or class of unborn persons who, on coming into existence would, in respect thereof, become entitled to or possessed of the land on any trust, the High Court may make an order releasing the land from the contingent right, or may make an order vesting in any person the estate to or of which the unborn person or class of unborn persons would, on coming into existence, be entitled or possessed in the land.

This section replaces sect. 16 of the Trustee Act, 1850, under which section orders were made discharging in favour of purchasers the rights of unborn persons (*Hargreaves v. Wright*, 1 W. R. 408), and vesting in purchasers the interests of unborn children (*Wake v. W.*, 1 W. R. 283).

For form of order, see Seton, 6th ed. 1229.

Vesting order in place of conveyance by infant mortgagee.

28. Where any person entitled to or possessed of land, or entitled to a contingent right in land by way of security for money, is an infant, the High Court may make an order vesting or releasing or disposing of the land or right in like manner as in the case of an infant trustee.

This section replaces portions of sects. 7 and 8 of the Trustee Act, 1850; under which sections the legal estate in copyholds outstanding in the infant heir of a mortgagee was vested (*Re Franklyn*, 1888, W. N. 217).

As to service, see note to sub-sect. (ii) (a) of sect. 26, *ante*, p. 785.

For form of order, see Seton, 6th ed. 1230.

Vesting order in place of conveyance by heir, or devisee of heir, &c., or personal representative of mortgagee.

29. Where a mortgagee of land has died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of the mortgage has been paid to a person entitled to receive the same, or that last-mentioned person consents to any order for the reconveyance of the land, then the High Court may make an order vesting the land in such person or persons in such manner and for such estate as the court may direct in any of the following cases, namely.—

(a) Where an heir or personal representative or devisee of

the mortgagee is out of the jurisdiction of the High court or cannot be found; and

56 & 57 Vict.
c. 53, s. 29.

- (b) Where an heir or personal representative or devisee of the mortgagee on demand made by or on behalf of a person entitled to require a conveyance of the land has stated in writing that he will not convey the same or does not convey the same for the space of twenty-eight days next after a proper deed for conveying the land has been tendered to him by or on behalf of the person so entitled; and
- (c) Where it is uncertain which of several devisees of the mortgagee was the survivor; and
- (d) Where it is uncertain as to the survivor of several devisees of the mortgagee or as to the heir or personal representative of the mortgagee whether he is living or dead; and
- (e) Where there is no heir or personal representative to a mortgagee who has died intestate as to the land, or where the mortgagee has died and it is uncertain who is his heir or personal representative or devisee.

This section replaces sect. 19 of the Trustee Act, 1850. And inasmuch as under the Conv. Act, 1881, s. 30 (*ante*, p. 592), mortgage estates now devolve on the personal representative, unless they are of copyhold tenure (50 & 51 Vict. c. 73, s. 45; see *Re Mills*, 37 Ch. D. 312), a reference to the "personal representative" has been added to the words of the former section. Under sect. 19 of the Trustee Act, 1850, orders were made to effectuate a transfer of a mortgage (*Re Boden*, 1 D. M. & G. 57; 9 Hare, 820; *Re Quinlan*, 9 Ir. Ch. R. 396; *contra*, *Re Meyrick*, 9 Hare, 116; see *Re Lea*, 6 W. R. 482), and a sale under a power of sale (*Re White*, 1881, W. N. 115). But an order was refused where no sale or transfer was proposed (*Re Hewitt*, 27 L. J. Ch. 302).

A bastard mortgagee, having devised her real estate in terms which did not pass the legal estate in the mortgaged premises, died without issue, and the money was subsequently paid off. The Crown offering no opposition, an order was made under sect. 19 of the Trustee Act, 1850, vesting the legal estate in a purchaser (*Re Minchin*, 2 W. R. 179). As to a mortgagee's legal estate held by a company at the time of its dissolution, see *Re General Accident Corporation*, 1904, 1 Ch. 147, and other cases quoted *ante*, p. 784.

Where the will of a mortgagee was disputed but the debt had been paid, a vesting order was made under sub-sect. (e) of the present act, it being uncertain who were his personal representatives (*Re Cook*, 1895, 1 Ch. 700).

Where a mortgagee had been in possession, the legal estate outstanding in his heir was vested in his executors under sect. 9 of the Trustee Act, 1850, the heir being treated as a trustee (*Re Skitter*, 4 W. R. 791).

Where the personal representative of a mortgagee sold the mortgaged property, the legal estate outstanding in the heir of the mortgagee was vested in the purchaser, without service being required on the heir of the mortgagee or the personal representative of the deceased mortgagor (*Re Wise*, 5 De G. & Sm. 415).

For form of order, see Seton, 6th ed. 1234.

30. Where any court gives a judgment or makes an order directing the sale or mortgage of any land, every person who is entitled to or possessed of the land, or entitled to a contingent right therein *as heir, or under the will of a deceased person* Vesting order consequential on judgment for sale or mortgage of land.

56 & 57 Vict.
c. 53, s. 30.

for payment of whose debts the judgment was given or order made, and is a party to the action or proceeding in which the judgment or order is given or made or is otherwise bound by the judgment or order, shall be deemed to be so entitled or possessed, as the case may be, as a trustee within the meaning of this act; and the High Court may, if it thinks expedient, make an order vesting the land or any part thereof for such estate as that court thinks fit in the purchaser or mortgagee or in any other person.

The words in italics were repealed by the Trustee Amendment Act, 1894, *post*, p. 810.

This section, which replaces sect. 29 of The Trustee Act, 1850, and sect. 1 of the Trustee Act, 1852, corresponds in effect with those sections, but extends the power of the court to the case of an order directing a mortgage. Under the former of such sections where copyholds devised to an infant for life, remainder to his first and other sons in tail, were decreed to be sold to pay the testator's debts, the purchaser could require an order discharging the contingent rights of the unborn issue of the infant (*Wood v. Beetlestone*, 1 K. & J. 213). The latter of such sections was held to apply to orders for sale under the Partition Acts, 1868 and 1876, *ante* (*Beckett v. Sutton*, 19 Ch. D. 646); and where an order had been made for sale of a lunatic's estate (*Herring v. Clark*, 4 Ch. 167; *Re Stamper, S. v. S.*, 46 L. T. 372). By the Intestates' Estates Act, 1884, s. 5, sect. 1 of the Trustee Act, 1852, was applied to sales of the interest of the Crown in escheated estates. The above section seems now to apply to such a case. (See sect. 38 of the Interpretation Act, 1889.) To carry out a sale ordered by the court, a person was appointed to convey in lieu of a person refusing (*Beale v. Bragg*, 1902, 1 I. R. 99).

Where an order purporting to direct a mortgage (for purposes of maintenance) of an infant tenant in tail in remainder was made without jurisdiction, it had no effect and was not supported by the above section (*Re Hambrough, H. v. H.*, 1909, 2 Ch. 620).

Form of
application.

Applications under this section should be made in chambers (R. S. C. Ord. 55, r. 13A (c)).

Provisions for facilitating the conveyance of the lands of a deceased debtor, where a decree for sale has been made, are also contained in the Debts Recovery Act, 1880, c. 47, ss. 11, 12, *ante*, pp. 399, 400.

Vesting order
consequential
on judgment
for specific
performance,
&c.

31. Where a judgment is given for the specific performance of a contract concerning any land, or for the partition, or sale in lieu of partition, or exchange, of any land, or generally where any judgment is given for the conveyance of any land either in cases arising out of the doctrine of election or otherwise, the High Court may declare that any of the parties to the action are trustees of the land or any part thereof within the meaning of this act, or may declare that the interests of unborn persons who might claim under any party to the action, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which the judgment is given, are the interests of persons who, on coming into existence, would be trustees within the meaning of this act, and thereupon the High Court may make a vesting order relating to the rights of those persons, born and unborn, as if they had been trustees.

This section replaces sect. 30 of the Trustee Act, 1850, and sect. 7 of the Partition Act, 1868.

Under this section the judgment is made a condition precedent (*Re Colling*, 56 & 57 Vict. 32 Ch. D. 336). c. 53, s. 31.

A donee of a power of jointuring was ordered, in a suit by his wife for specific performance, to execute the power by a deed. On his refusal, he was declared a trustee, and the court appointed a person to execute the requisite deeds in his place (*Wellesley v. W.*, 4 D. M. & G. 537). Where there had been a decree for specific performance of an agreement to grant a lease, and the defendant had refused to execute the lease, a person was appointed to execute in his place (*Hall v. Hale*, 51 L. T. 226; see, however, *Grace v. Baynton*, 1877, W. N. 79). So where infants were entitled to land subject to an agreement for a lease (*Hodgson v. Bower*; *Howell v. Palmer*, Seton, 6th ed. 1264, 1265). A person entitled to land in Ireland agreed to convey it, and was ordered by a Scotch Court to execute a conveyance, but refused. He was declared a trustee by an Irish Court and a vesting order was made under sect. 26 (*Re Ruthven*, 1906, 1 I. R. 236).

In a partition suit, instead of giving an infant a day to show cause, the court may declare him to be a trustee of the shares allotted to other parties (*Boura v. Wright*, 4 De G. & Sm. 265). Where the shares of the parties to a partition suit were complicated, the court declared each of the parties trustees as to the shares allotted to the other of them, and by the same order appointed a new trustee in their place vesting the whole property in such new trustee and directing him to convey (*Shepherd v. Churchill*, 25 Beav. 21; see form of order, *Ib.* p. 23; and *Orger v. Sparke*, 9 W. R. 180). Where, however, upon an order for sale in a partition action the parties and their unborn issue were declared trustees, the court refused to appoint a new trustee in their place till after the order had been drawn up (*Lees v. Coulton*, 20 Eq. 20). Where an order for sale in a partition action was made contingent on the answers to certain inquiries, the court by the same order declared that on such a sale infant parties would be trustees and ordered their next friend to convey their shares (*Davies v. Ingram*, 1897, 1 Ch. 477).

In partition suits where there was no order for sale, and part of the land the subject-matter of the action was vested in a lunatic, vesting orders were made in lunacy (*Re Molyneux*, 10 W. R. 512; *Re Sherard*, 1 D. J. & S. 421; *Re Watson*, 58 L. T. 509). Whether, since the Trustee Act, 1893, these orders could be made in Chancery alone seems doubtful (see the remarks of Stirling, J., in *Re M.*, 1899, 1 Ch. 85). In any case, however, after a sale has been directed, an order can, it would appear, be made in Chancery (see *Herring v. Clark*, 4 Ch. 167; *Re Watson*, 58 L. T. 509; *Casswell v. Sheen*, 69 L. T. 854).

Sect. 30 of the Trustee Act, 1850, was said to apply to all cases where there was a judgment against an infant for an immediate conveyance (*Mellor v. Porter*, 25 Ch. D. 161). Whether this included a judgment against an infant for foreclosure of an equitable mortgage, see *S.C.* For orders in foreclosure suits declaring the mortgagor a trustee for the mortgagee, see *Lechmere v. Clamp* and *Smith v. Boucher*, quoted, *ante*, p. 785, and for a similar order as to the mortgagor's infant heir, see *Foster v. Parker* (8 Ch. D. 147). Where a sale was ordered in a foreclosure suit instituted against a mortgagor of unsound mind, an order was made vesting the property in the plaintiff as trustee for the purchaser (*Harrison v. Smith*, 17 W. R. 646).

The words "unborn persons" in a similar position in sect. 30 of the Trustee Act, 1850, were held to include living persons who might subsequently have a right to claim under a party, *e.g.*, as his heir (*Bassett v. Moxon*, 20 Eq. 182).

In the case of sales of realty, where there is only an unexecuted contract for sale, a suit is necessary to declare the vendor a trustee; but in the case of an executed contract a suit is not necessary (*Re Cuming*, 5 Ch. 72; see note, *post*, p. 807).

As to the case where a person, declared to be a trustee in a suit, refuses to convey land, see *Knight v. Knight* and *Derham v. Kiernan*, quoted in note (r) to sect. 26, *ante*, p. 786.

Applications under this section must be in chambers (R. S. C. Ord. 55,

Specific performance.

Other cases.

56 & 57 Vict. r. 13A (c)). For forms of orders, see Seton, 1261, 6th ed.; *Lees v. Coulton* c. 53, s. 31. (20 Eq. 21).

Jud. Act, 1884, s. 14, to appoint a person to execute documents on behalf of a recusant; and *Howarth v. H.*, 11 P. Div. 68, 95; *Re Cathcart*, 1893, 1 Ch. 466; *Re Lumley*, 1893, W. N. 13.

Effect of vesting order.

32. A vesting order under any of the foregoing provisions shall in the case of a vesting order consequential on the appointment of a new trustee, have the same effect as if the persons who before the appointment were the trustees (if any) had duly executed all proper conveyances of the land for such estate as the High Court directs, or if there is no such person, or no such person of full capacity, then as if such person had existed and been of full capacity and had duly executed all proper conveyances of the land for such estate as the court directs, and shall in every other case have the same effect as if the trustee or other person or description or class of persons to whose rights or supposed rights the said provisions respectively relate had been an ascertained and existing person of full capacity, and had executed a conveyance or release to the effect intended by the order.

Provisions to the same effect as the above section were contained in sects. 34 and 7—15 of the Trustee Act, 1850, and sects. 12 and 8 of the Trustee Act, 1852. In the case of an order vesting the estate of an infant tenant in tail the effect is to bar the estate tail and remainders over (*Re Montagu*, *Faber v. Montagu*, 1896, 1 Ch. 549; see *Re Hambrough*, *H. v. H.*, 1909, 2 Ch. 620).

Power to appoint person to convey.

33. In all cases where a vesting order can be made under any of the foregoing provisions, the High Court may, if it is more convenient, appoint a person to convey the land or release the contingent right and a conveyance or release by that person in conformity with the order shall have the same effect as an order under the appropriate provision.

This section replaces the first half of sect. 20 of the Trustee Act, 1850.

The Jud. Act, 1884, s. 14, gives power to order an officer of the court to execute documents.

Under sect. 20 of the Trustee Act persons were appointed to execute a lease (*Hall v. Hale*, 51 L. T. 226; *Cowper v. Harmer*, 57 L. T. 714; *Derham v. Kiernan*, 1 R. 5 Eq. 217; see *contra*, *Grace v. Baynton*, 1877, W. N. 79); and a jointure deed (*Wellesley v. W.*, 4 D. M. & G. 537). It was doubtful whether under that section a person could be appointed in place of an infant to convey in execution of a power given by statute, e.g., 1 Will. 4, c. 47, s. 11, *ante*, p. 399 (*Wood v. Beeston*, 1 K. & J. 213).

Who may be appointed.

In a foreclosure action against the infant heir of a mortgagee, his mother was appointed to convey (*Foster v. Parker*, 8 Ch. D. 147). Where the legal estate was vested in a tenant for life with remainder to an infant in tail, the agent of the vendor was appointed to convey for the infant on payment of the purchase-money into court (*Hargreaves v. Wright*, 1 W. R. 408). Where real estate devised to married women and infants was sold under a decree in lots the court appointed the plaintiffs' solicitor to convey their shares to the several purchasers (*Hancox v. Spittle*, 3 Sm. & Giff. 478; and see *Wilks v. Groom*, 6 D. M. & G. 205).

For form of orders, see Seton, 6th ed. 1236. As to the conveyance, see *Ex p. Foley*, 8 Sm. 395; *Caswell v. Sheen*, 69 L. T. 854.

Where the Public Trustee acts in the administration of small estates which

include copyholds, sects. 33 and 34 apply (Public Trustee Act, 1906, sect. 3, sub-sect. 2). 56 & 57 Vict. c. 53, s. 34.

34.—(1.) Where an order vesting copyhold land in any person is made under this act with the consent of the lord or lady of the manor, the land shall vest accordingly without surrender or admittance (*v*). Effect of vesting order as to copyhold.

(2.) Where an order is made under this act appointing any person to convey any copyhold land, that person shall execute and do all assurances and things for completing the assurance of the land; and the lord and lady of the manor and every other person shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done those assurances and things (*w*).

This section replaces sect. 28 of the Trustee Act, 1850, so far as regards the jurisdiction of the High Court.

(*v*) An order vesting copyhold lands can be made without the consent of the lord, and will not prejudice his right to fines (*Paterson v. P.*, 2 Eq. 31; *Re Flitcroft*, 1 Jur. N. S. 418; *Re Hurst*, Seton, 5th ed. 1053; see, however, *Cooper v. Jones*, 25 L. J. Ch. 240, and *Re Howard*, 3 W. R. 605). Where such an order is made without the lord's consent, the person in whom the property is vested applies for admission like an ordinary surrenderee (Lewin, 811, 10th ed.; see *Bristow v. Booth*, L. R. 5 C. P. 92). Order vesting without consent of lord.

Where a vesting order is made with the lord's consent, surrender and admission are unnecessary. For the purpose of consenting, it is not necessary for the lord to appear in court; a verified certificate of his consent is sufficient (*Ayles v. Cox*, 17 Beav. 584; see *Cooper v. Jones*, 25 L. J. Ch. 240). For form of consent and verifying affidavit, see Dan. Ch. Forms, 5th ed. p. 1080. With consent of lord.

For form of order vesting copyholds, see Seton, 6th ed. 1235; *Re Crowe*, 13 Eq. 26. Orders have been made vesting copyholds, in *Re Godfrey* (23 Ch. D. 205) and *Re Franklyn* (1888, W. N. 217).

(*w*) Where a person is appointed to convey copyholds, the person so appointed must surrender, and the surrenderee must be admitted (Lewin, 811, 10th ed.). A mandamus was granted to give effect to such an order (*Re Lane and Irving*, 12 W. R. 710). Persons have been appointed to convey in *Re Collingwood* (6 W. R. 536); *Re Cuming* (5 Ch. 72). For form of order appointing a person to convey, see *Re Hey* (9 Hare, 221); Seton, 6th ed. 1262. Order appointing person to convey copyholds.

35.—(1.) In any of the following cases, namely:—

(i.) Where the High Court appoints or has appointed a new trustee (*x*); and Vesting orders as to stock and choses in action.

(ii.) Where a trustee entitled alone or jointly with another person to stock or to a chose in action—

(a) is an infant (*y*), or

(b) is out of the jurisdiction of the High Court (*z*),

or

(c) cannot be found (*z*); or

(d) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action, according to the direction of the person absolutely entitled thereto for twenty-eight

56 & 57 Vict.
c. 53, s. 35.

days next after a request in writing has been made to him by the person so entitled (*a*), or

(e) neglects or refuses to transfer stock or receive the dividends or income thereof, or to sue for or recover a chose in action for twenty-eight days next after an order of the High Court for that purpose has been served on him (*b*); or

(iii.) Where it is uncertain whether a trustee entitled alone or jointly with another person to stock or to a chose in action is alive or dead (*c*),

the High Court may make an order vesting the right to transfer or call for a transfer of stock, or to receive the dividends or income thereof, or to sue for or recover a chose in action, in any such person as the court may appoint :

Provided that—

(a) Where the order is consequential on the appointment by the court of a new trustee, the right shall be vested in the persons who, on the appointment, are the trustees ; and

(b) Where the person whose right is dealt with by the order was entitled jointly with another person, the right shall be vested in that last-mentioned person either alone or jointly with any other person whom the court may appoint.

(2.) In all cases where a vesting order can be made under this section, the court may, if it is more convenient, appoint some proper person to make or join in making the transfer.

(3.) The person in whom the right to transfer or call for the transfer of any stock is vested by an order of the court under this act, may transfer the stock to himself or any other person, according to the order, and the Banks of England and Ireland and all other companies shall obey every order under this section according to its tenor.

(4.) After notice in writing of an order under this section it shall not be lawful for the Bank of England or of Ireland or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

(5.) The High Court may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this act is to be exercised (*d*).

(6.) The provisions of this act as to vesting orders shall apply to shares in ships registered under the acts relating to merchant shipping as if they were stock.

This section replaces (as to England) part of sect. 20 and sects. 22, 23, 24, 25, 26, 31 and 35 of the Trustee Act, 1850, and sects. 3, 4, 5 and 6 of the Trustee Act, 1852.

As to what is included in the words "stock" and "transfer," see sect. 50, *post*. Registered shares in ships may be vested as if they were stock

(sub-sect. 6 of the present section; see formerly sect. 10 of the Merchant Shipping Act, 1854).

(x) This sub-sect. replaces sect. 35 of the Trustee Act, 1850. Under the last-mentioned section orders were made vesting the right to transfer stock standing in the name of a testator who had no personal representative (*Re Herbert*, 8 W. R. 272), and stock standing in the name of two original trustees, the survivor having died without personal representative (*Re Crowe*, 14 Ch. D. 610). The court has refused to vest in new trustees unauthorized investments (*Re Harrison*, 22 L. J. Ch. 69); but in such a case the court vested the right to call for a transfer to the trustees themselves "or to any purchaser" from them (*Re Peacock*, 14 Ch. Div. 212; see *Re New Zealand Trust Co.*, 1893, 1 Ch. 403; and compare *Re De Quetteville*, 19 Times L. R. 383). For form of order where one of two new trustees died before the stock was transferred to him, see *Re Glanville* (1877, W. N. 248; 1878, W. N. 21); and see generally as to forms of orders, sub-sect. iii. (a), and note (d), *infra*; *Re Tweedy* (28 Ch. Div. 529); *Re Hopper* (54 L. T. 267); Seton, 6th ed. 1212 *et seq.*

In a case since this act the court, on an application made in Chancery alone for appointment of new trustees and a vesting order, refused to make an order vesting stock standing in the name of a lunatic trustee (*Re M.*, 1899, 1 Ch. 79).

(y) Before this act the case of infancy was dealt with by sect. 3 of the Trustee Act, 1852.

Where consols were standing in the name of an infant, who was the sole beneficial owner, but subject to an express power of maintenance, which was vested in an executor, the infant was declared a trustee, and the right to transfer the consols was vested in the executor (*Gardner v. Cowles*, 3 Ch. D. 304; see *Sanders v. Homer*, 25 Beav. 467; *Rives v. Rives*, 1866, W. N. 144). So also, where there was no express power, but only an order by a Scotch court empowering a *curator bonis* to advance part of the capital (*Re Findlay*, 32 Ch. D. 221). In the last-mentioned case, the Bank of England objecting on the ground that there was no jurisdiction to declare the infant a trustee or make a vesting order, the order was abandoned by the parties, and the income was ordered to be paid to the guardian of the infant pursuant to 11 Geo. 4 & 1 Will. 4, c. 65, s. 32 (32 Ch. D. 641; see *Re Westwood*, 6 N. R. 61, 316). In *Gardner v. Cowles* and *Sanders v. Homer*, *sup.*, the stock was ordered to be transferred into court.

Where consols are standing in the name of an infant, powers of accumulation at the request of the guardian are given by sect. 3 of the National Debt (Stockholders Relief) Act, 1892.

Where stock to which an infant was beneficially entitled was standing in the joint names of himself and another person, it was vested by an order in that other person (*Re Harwood*, 20 Ch. D. 536; *Re Barnett*, 1889, W. N. 216). In a similar case the right to transfer was vested in the guardian (who according to the law of the infant's domicile was entitled to receive the infant's stocks), such guardian undertaking to transfer the stock into court (*Re Dehaynin*, 1910, 1 Ch. 223). Where a father under a mistake transferred stock into the joint names of himself, his wife, and an infant child, the court declared the infant a trustee for the father (*Devoy v. D.*, 3 Sm. & Giff. 403; followed in *Stone v. Stone*, 3 Jur. N. S. 708). Where stock was standing in the names of three trustees and an infant, and two trustees were dead, and the third was out of the jurisdiction, the court appointed a guardian and allowed maintenance, and vested the right to receive the dividends in the guardian during the minority (*Re Morgan*, Seton, 6th ed. 1219).

For forms of orders, see Seton, 6th ed. 1238, 1243.

(z) Before this act the case of a trustee out of the jurisdiction, &c., was dealt with by sects. 22 and 25 of the Trustee Act, 1850. Under sect. 22 it was held that where a lunatic trustee was also out of the jurisdiction, the Chancery Division might alone make a vesting order (*Re Gardner*, 10 Ch. D. 29; see *Re M.*, 1899, 1 Ch. 79. See, however, *Cramer v. Cramer*, 5 D. & Sm. 312; and see *Re Smith*, I. R. 4 Eq. 180).

56 & 57 Vict.
c. 53, s. 35.

Sub-sect. (i.).

Sub-sect. (ii.)
(a).

Infant solely
entitled.

Infant jointly
entitled with
other person.

Sub-sect. (ii.)
(b) (c).
Out of the
jurisdiction,
&c.

56 & 57 Vict.
c. 53, s. 35.

Where a trustee of stock was absent from England in command of a vessel on a voyage to India, he was not out of the jurisdiction within 11 Geo. 4 & 1 Will. 4, c. 60 (*Hutchison v. Stephens*, 5 Sim. 498). A debtor in India mortgaged shares in an English company to a creditor in England; upon sale by the mortgagee the debtor was a trustee of the shares for the purchaser (*Re Angelo*, 5 De G. & Sm. 278).

Bank stock was standing in the names of four trustees, of whom one was abroad, but the parties were unwilling to remove him. Under the circumstances, and notwithstanding an objection by the Bank that the title to the dividends and the corpus of the stock would be severed, the court vested the right to receive past and future dividends in the three other trustees during their joint lives (*Re Peyton*, 25 Beav. 317; 2 De G. & J. 290).

Where one out of four trustees absconded, the trust choses in action were vested in the other three, no new trustee being required (*Re Lees*, 1896, 2 Ch. 508; see the note *ante*, p. 781). Where one of two trustees was abroad, and a new trustee had been appointed in his place, the right to transfer was vested in the continuing and new trustees (*Re Blaine*, 1886, W. N. 203; *Re Keeley*, 53 L. T. 487). The new trustee should be co-petitioner (*Re Keeley, sup.*). It should appear on the face of the order that the trustee is out of the jurisdiction (*Re Mainwaring*, 26 Beav. 172).

The case of a "personal representative" being out of the jurisdiction or impossible to find was specifically dealt with by sect. 25 of the Trustee Act, 1850, under which orders applicable to such a case were made in *Re Dickson* (1872, W. N. 223); *Re Crowe* (14 Ch. D. 304, 610); *Re Price* (1883, W. N. 202); *Re Trubee* (1892, 3 Ch. 55).

Who cannot
be found.

See the cases quoted under sect. 26, sub-sect. (ii.) (c) *ante*, p. 785.

Sub-sect. (ii.)
(d).
Neglect to
transfer after
request.

Under the present sub-section a vesting order was made in *Re Price* (1894, W. N. 169). See the forms, Seton, 6th ed. 1238 *et seq.*

(a) The case of neglect to transfer after request by beneficiary was dealt with by sects. 23, 24, and 25 of the Trustee Act, 1850; under which it was held that new trustees properly appointed were persons "absolutely entitled" (*Ex p. Russell*, 1 Sim. N. S. 404; *Re Ellis*, 24 Beav. 426; *Re Baxter*, 2 Sm. & Giff. App. 5; see *Re Stroud*, 1874, W. N. 180); but not one of such trustees, nor a tenant for life (*Mackenzie v. M.*, 5 De G. & Sm. 338). Where two executors of a surviving trustee refused to transfer to persons absolutely entitled, and the third executor was lunatic, a vesting order was made in Lunacy and Chancery (*Re White*, 5 Ch. 698; *Re Wacher*, 22 Ch. Div. 535). The right to dividends accrued before his request was vested in the beneficiary; but it was held that the court had no authority to make an order as to dividends accrued subsequent to the request (*Re Hartnall*, 5 De G. & Sm. 111).

The case of a "personal representative" refusing to transfer, &c. was specifically dealt with by sect. 25 of the Trustee Act, 1850, under which orders applicable to such a case were made in *Re Ellis* (24 Beav. 426); *Re Stroud* (1874, W. N. 180); *Re Trubee* (1892, 3 Ch. 55).

Under the present sub-section it has been held that the jurisdiction to make a vesting order does not arise before the twenty-eight days have expired (*Re Knox*, 1895, 1 Ch. 538; 2 Ch. 483). Under sects. 23 and 24 of the Trustee Act, 1850, service on the recusant trustee was not required (*Re Baxter*, 2 Sm. & Giff. App. v.; *Ex p. Armstrong*, 16 Sim. 296; see *Re Mount*, 24 L. T. 290). In a case under the present act, where the recusant trustee was served, he was ordered to pay costs (*Re Knox*, 1895, 2 Ch. 483; see sect. 38, *post*). See the forms, Seton, 6th ed. 1240 *et seq.*

Sub-sect. (ii.)
(e).
Neglect to
transfer after
service of an
order.

(b) Before this act the case of neglect to transfer after service of an order was dealt with by sects. 4 and 5 of the Trustee Act, 1852; under which it was held that the vesting order must not deal with a larger subject-matter than the previous order which it proposes to enforce (*Skynner v. Pelichet*, 9 W. R. 191). As to whether service of such previous order on the trustee personally is necessary, see *Coles v. Benbow* (1873, W. N. 60). An order was made upon motion (*Re Holbrook*, 8 W. R. 3). Applications under this sub-section

should be in chambers (R. S. C. Ord. 55, r. 13a (c)). For forms of order, see *Seton*, 6th ed., 1244. 56 & 57 Vict. c. 53, s. 35.

In connection with this sub-section, see the power given by Jud. Act, 1884, sect. 14, to appoint a person to execute documents on behalf of a recusant; *Savage v. Norton*, 1908, 1 Ch. 290.

(c) Before this act, uncertainty as to whether a trustee was alive or dead was dealt with by sect. 22 of the Trustee Act, 1850. Where stock was standing in the names of A. and B. as trustees, and it was believed that A. had died previously, but strict proof could not be furnished, an order was made upon B.'s subsequent death appointing the bank's officer to concur with B.'s executor in transferring the stock into court (*Re Bourke*, 2 De G. J. & Sm. 426). Sub-sect. (iii). Uncertainty as to death of trustee.

(d) The effect of a vesting order is to transfer to the new trustees of a will the rights and powers of the old trustees, so that administration with the will annexed will be granted to them (*Woodfall v. Arbuthnot*, L. R. 3 P. & M. 108). Sub-sects. (2) —(5). General note as to orders vesting stock, &c.

Where a vesting order is made by the Chancery Division in relation to trust stock or shares fully paid up, the order should vest in the person named the right to transfer the stock or shares. [The forms in *Seton*, 6th ed., 1212—1214, omit the words "to call for a transfer" as unnecessary.] As a rule, the order should go on to direct those persons to transfer the stock into their own names (*Re Gregson*, 1893, 3 Ch. 233; *Re Joliffe*, 1893, W. N. 84; *Re Price*, 1894, W. N. 169; *Seton*, 6th ed., 1214; compare the order made by the Court of Lunacy, *Re C. M. G.*, 1898, 2 Ch. 324). But under special circumstances (as in the case of shares not fully paid) this direction may be omitted (*Re New Zealand Trust Co.*, 1893, 1 Ch. 403; *Re Gregson*, *sup.*). The order may, under special circumstances, vest in the trustees a right to transfer the stock or shares to themselves "or any purchaser" (*Re Peacock*, 14 Ch. Div. 212; *Re New Zealand Trust Co.*, 1893, 1 Ch. 411; *Seton*, 6th ed., 1212). Form of order.

Sub-sect. (5) replaces sect. 31 of the Trustee Act, 1850, under which it was held that the court might order the person, in whom the right to transfer stock was vested, to transfer it into court (*Re Pitt*, 1 Jur. N. S. 1155; *Re Dawson*, 3 N. R. 397), *e.g.*, under the Trustee Relief Act (*Re Draper*, 9 W. R. 805; *Re Thornton*, 9 W. R. 475; see *Re Mais*, 21 L. J. Ch. 875).

As to form of application and service, see further the notes to sects. 25 Practice. and 26, *sup.*

The Bank of England are bound to comply with a vesting order in proper form, but are entitled to require that the order shall show that the statutory requirements have been satisfied (*Re Tweedy*, 28 Ch. Div. 529; see *Re Ellis*, 24 Beav. 426; *Re Gregson*, 1893, 3 Ch. 233; *Re C. M. G.*, 1898, 2 Ch. 324; *Re Mainwaring*, 26 Beav. 172). Sect. 49 (*post*) provides an express indemnity for the Bank and others acting under an order. There is also an implied indemnity to the bank acting on an order made by the court under sect. 14 of the Jud. Act, 1884 (*Savage v. Norton*, 1908, 1 Ch. 290). Where a vesting order had been made in chambers, the Bank of England refused to act on it (*Re Griffith*, 1889, W. N. 171); and a vesting order was subsequently made in motion (*Ib.*; see *Re Jones*, 1889, W. N. 196; 61 L. T. 554). Where the Bank's officer is appointed to join in making a transfer, he can only transfer for the person divested by the order. Any person jointly entitled must join (*Wade v. Hopkinson*, *Seton*, 6th ed., 1254). Bank of England.

As regards vesting the right to transfer stock in *cestui que trusts* absolutely entitled, orders of this nature were made under sect. 22 of the Trustee Act, 1850 (*Ex p. Bradshaw*, 2 D. M. & G. 900; *Re Ryan*, 9 W. R. 137; see *Re White*, 5 Ch. 698; *Re Barber*, 58 L. T. 303; see *contra*, *Re Brass*, 4 W. R. 764). Similar orders were made where the persons absolutely entitled were appointed new trustees (*Re Dickson*, 21 W. R. 220; *Re Price*, 1883, W. N. 202). The right to transfer stock was vested in a trustee who was beneficially interested, but only for the purpose of a transfer into court (*Frodsham v. F.*, 15 Ch. D. 317). Vesting stock in beneficiaries absolutely entitled.

Where the Public Trustee acts as custodian, vesting orders may be made

56 & 57 Vict. (Public Trustee Act, 1906, sect. 4, sub-sect. 2). And where he undertakes to administer small estates, the undertaking may operate as a vesting order (sect. 3 (2)).

Vesting property in winding up. Compare with the above section the power of the Court to vest in the liquidator the personal property of an unregistered company being wound up (Comp. Consol. Act, 1908, sect. 272).

Persons entitled to apply for orders.

36.—(1.) An order under this act for the appointment of a new trustee or concerning any land, stock, or chose in action subject to a trust, may be made on the application of any person beneficially interested in the land, stock, or chose in action, whether under disability or not, or on the application of any person duly appointed trustee thereof.

(2.) An order under this act concerning any land, stock, or chose in action subject to a mortgage may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the money secured by the mortgage.

This section replaces sect. 37 of the Trustee Act, 1850, under which act the following cases were decided:—

Where executors and trustees of a naturalized British subject renounced probate and declined to act, the court, on the petition of the administrator and the persons who would (if not aliens) have been co-heirs, appointed new trustees and vested the real estate in them (*Re Martinez*, 22 L. T. 403). A person who has a contingent interest in real estate may apply for the appointment of new trustees (*Re Sheppard*, 4 D. F. & J. 423; *Re Harden Chapel*, 1 W. R. 212). Where there are infants *cestuis que trusts*, it is not sufficient that the adult *cestuis que trusts* should be petitioners; the infants (by their next friend) should join (*Re Fellows*, 2 Jur. N. S. 62). A lunatic *cestui que trust* should apply by his next friend; an order will not be made on the application of the committee alone (*Re Bourke*, 2 D. J. & S. 426). In the case of a lunatic mortgagee, the application should be made by the committee (*Re Wheeler*, 1 D. M. & G. 434; see, however, *Re Sparkes*, 6 Ch. Div. 361). A woman married since 1882 can apply without her husband (*Re Outwin*, 48 L. T. 410).

Married women. In a petition for a vesting order a new trustee recently appointed by deed was required to be joined as co-petitioner (*Re Keeley*, 53 L. T. 487).

New trustee. Creditors who have obtained a decree for the administration of the estate of their debtor, under which a contract for sale of his real estate has been entered into, may apply for a vesting order (*Re Wragg*, 1 D. J. & S. 356).

Creditors who have obtained decree. And where a decree for sale had been made, it was held that a petition was properly presented by a purchaser whose money was in court (*Ayles v. Cox*, 17 Beav. 584; *Gough v. Bage*, 25 L. T. 738). Three purchasers of different lots were allowed to join in one petition (*Rowley v. Adams*, 14 Beav. 130).

Purchasers under decree. In general, proceedings under the Trustee Act, 1893, are regulated by Rules of Court. See R. S. C. Ord. 54 b, Ord. 55, r. 13 a, which will be found in the Annual Practice.

Powers of new trustee appointed by court.

37. Every trustee appointed by a court of competent jurisdiction shall, as well before as after the trust property becomes by law, or by assurance, or otherwise, vested in him, have the same powers, authorities, and discretions, and may in all respects act as if he had been originally appointed a trustee by the instrument, if any, creating the trust.

This section replaces sect. 33 of the Trustee Act, 1850, and sect. 33 of the Conv. Act, 1881. Before these sections trustees appointed by the court could not appoint others in their place (*Holder v. Durbin*, 11 Beav. 594), or exercise discretionary powers (*Newman v. Warner*, 1 Sim. N. S. 457). See further the note to sect. 22, *ante*, p. 775.

56 & 57 Vict.
c. 53, s. 37.

38. The High Court may order the costs and expenses of and incident to any application for an order appointing a new trustee, or for a vesting order, or of and incident to any such order, or any conveyance or transfer in pursuance thereof, to be paid or raised out of the land or personal estate in respect whereof the same is made, or out of the income thereof, or to be borne and paid in such manner and by such persons as to the court may seem just.

Power to
charge costs
on trust
estate.

This section replaces sect. 51 of the Trustee Act, 1850.

Costs may be charged on the inheritance (*Ex p. Davies*, 16 Jur. 882; *Mode of* Seton, 6th ed. 1217), or may be ordered to be raised by mortgage (*Re* raising costs. *Crabtree*, 14 W. R. 497), or to be paid out of the corpus of the fund (Seton, 6th ed. 1245). In the case of two trust funds the costs may be apportioned (*Re Grant*, 2 J. & H. 754; see *Re Allen*, 1889, W. N. 132). The amount of the trust fund was not alone a sufficient reason for directing costs on the higher scale (*Re Spettigue*, 32 W. R. 385).

The costs of appointing new trustees will in general be paid out of corpus (*Carter v. Sebright*, 26 Beav. 376). As to what these costs properly include, see *Harvey v. Olliver* (57 L. T. 239). But where the application is solely for the benefit of a life tenant (Seton, 6th ed. 1258), or of a reversioner (*Re Brackenbury*, 10 Eq. 45), the costs will be paid by the applicant.

Costs, by
whom pay-
able.

As to the costs of two petitions presented on the same day, see *Re Pring* (28 L. T. 467). Where a bill was filed instead of a petition under the Trustee Act, 1850, the plaintiff paid all costs (*Thomas v. Walker*, 18 Beav. 521).

On petitions under the Trustee Act, 1850, there was no jurisdiction to order respondents to pay costs (*Re Primrose*, 23 Beav. 590; see *Re Knight*, 26 Ch. D. 82, 91; *Re Mills*, 34 Ch. Div. 33). The present section, however, gives such jurisdiction (*Re Knox*, 1895, 1 Ch. 538; 2 Ch. 483). A respondent had to pay the costs of unnecessary charges in his affidavit (*Re Willis*, 12 W. R. 97); and a trustee improperly opposing a petition paid his own costs of opposition, and from his remaining costs were deducted the costs of other parties in respect of the opposition (*Re Wiseman*, 18 W. R. 574). A trustee may lose his right to costs by misconduct (*Re Knight*, 26 Ch. Div. 82).

Respondents.

A lord of the manor appearing to consent pays his own costs (*Ayles v. Cox*, 17 Beav. 584). A tenant for life in remainder appearing in his own interest pays his own costs (*Re Thornton*, 9 W. R. 475). If a respondent is improperly served, no costs will be allowed (R. S. C. Ord. 65, r. 27 (23); *Day v. Croft*, 19 Beav. 518). As to whether if he is properly served he loses his costs by having notice not to appear, see *Turner v. Mullineux* (9 W. R. 252). As to tender of costs on service, see R. S. C. Ord. 65, r. 27 (19).

As between vendor and purchaser, the costs of proceedings under this act should be paid by the vendor (*Bradley v. Munton*, 16 Beav. 294; *Ayles vendor and v. Cox*, 17 Beav. 584); but a railway company purchasing paid such costs purchaser. (*Re Nash*, 4 W. R. 111).

As to the costs of proceedings occasioned by the lunacy of a trustee, or of a mortgagee or his heir, see the note to sect. 142 of the Lunacy Act, 1890, *post*, p. 818.

39. The powers conferred by this act as to vesting orders may be exercised for vesting any land, stock, or chose in action in

Trustees of
charities.

56 & 57 Vict.
c. 53, s. 39.

any trustee of a charity or society over which the High Court would have jurisdiction upon action duly instituted, whether the appointment of the trustee was made by instrument under a power or by the High Court under its general or statutory jurisdiction.

This section replaces sect. 45 of the Trustee Act, 1850, under which an order was made in *Re Davenport* (4 D. M. & G. 839); see *Re Lincoln Chapel* (1 Jur. N. S. 1011). New trustees of charities can be appointed (1) by the parties either under an express power, or under sect. 10 of the present act (*Re Coates to Parsons*, 34 Ch. D. 370; Trustees Appointment Act, 1890, s. 3); or (2) by a judge in chambers under the Char. Trusts Act, 1853, s. 28 (see R. S. C. Ord. 55, r. 13); or (3) by the Char. Commrs. under the Charitable Trusts Act, 1860, s. 2. Enactments providing that upon the appointment of new trustees of charities the land shall vest in the new trustees without conveyance, are contained in the Trustees Appointment Acts, 1850, 1869 and 1890.

As to vesting orders where a charity trustee is a lunatic, see the Lunacy Act, 1890, s. 138, *post*, p. 817.

Orders made
upon certain
allegations to
be conclusive
evidence.

53 & 54 Vict.
c. 5.

40. Where a vesting order is made as to any land under this act or under the Lunacy Act, 1890, or under any act relating to lunacy in Ireland, founded on an allegation of the personal incapacity of a trustee or mortgagee, or on an allegation that a trustee or the heir or personal representative or devisee of a mortgagee is out of the jurisdiction of the High Court or cannot be found, or that it is uncertain which of several trustees or which of several devisees of a mortgagee was the survivor, or whether the last trustee or the heir or personal representative or last surviving devisee of a mortgagee is living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir or has died and it is not known who is his heir or personal representative or devisee, the fact that the order has been so made shall be conclusive evidence of the matter so alleged in any court upon any question as to the validity of the order; but this section shall not prevent the High Court from directing a reconveyance or the payment of costs occasioned by any such order if improperly obtained.

This section replaces sect. 44 of the Trustee Act, 1850.

Application of
vesting order
to land out of
England.

41. The powers of the High Court in England to make vesting orders under this act shall extend to all land and personal estate in Her Majesty's dominions, except Scotland.

This section replaces sect. 54 of the Trustee Act, 1850; under which vesting orders were made by the English Court of Chancery as to lands in Ireland (*Re Hewitt*, 6 W. R. 537; *Re Taitt*, 1870, W. N. 25), and in Canada (*Re Schofield*, 24 L. T. 322; *Re Groom*, 11 L. T. 336). As to the jurisdiction in lunacy over lands and personal estate in Scotland and Ireland, see now Lunacy Act, 1890, s. 110 (*post*, p. 811). Before the repeal by the last-mentioned act of sect. 56 of Trustee Act, 1850, it was held that there was no jurisdiction in lunacy over Irish lands (*Re Davies*, 3 Mac. & G. 278) or Irish railway stock (*Re Hodgson, Kentis v. Hodgson*, 11 Ch. Div. 888); but that the L.JJ. as additional judges of the Chancery Division for the purposes of lunacy applications had such jurisdiction (*Re Lamotte*, 4 Ch. Div.

325; *Re Smyth*, 55 L. T. 37); and that the petition should be entitled in lunacy and in Chancery (*Ib.*). 56 & 57 Vict.
c. 53, s. 41.

The provisions of the former Trustee Acts were extended to the private property of the sovereign in England and Ireland (25 & 26 Vict. c. 37, s. 10). See now sect. 38 of the Interpretation Act, 1889.

The acts relating to land within the jurisdiction of the Palatine Courts are stated, Shelford R. P. S., 9th ed. 570.

By the Trustee, &c. Act, 1894, s. 2 (*post*, p. 810), the powers conferred by sect. 41 of the present act were also given to the High Court in Ireland.

Payment into Court by Trustees.

42.—(1.) Trustees, or the majority of trustees, having in their hands or under their control money or securities belonging to a trust, may pay the same into the High Court; and the same shall, subject to rules of court, be dealt with according to the orders of the High Court. Payment into
court by
trustees.

(2.) The receipt or certificate of the proper officer shall be a sufficient discharge to trustees for the money or securities so paid into court.

(3.) Where any moneys or securities are vested in any persons as trustees, and the majority are desirous of paying the same into court, but the concurrence of the other or others cannot be obtained, the High Court may order the payment into court to be made by the majority without the concurrence of the other or others; and where any such moneys or securities are deposited with any banker, broker, or other depositary, the court may order payment or delivery of the moneys or securities to the majority of trustees for the purpose of payment into court, and every transfer, payment and delivery made in pursuance of any such order shall be valid and take effect as if the same had been made on the authority or by the act of all the persons entitled to the moneys and securities so transferred, paid, or delivered.

This section replaces the Trustee Relief Acts, 1847 and 1849, which are repealed by sect. 51, *post*. Under those acts it was held that where a difficulty affecting trust funds in the hands of trustees could be dealt with by means of a summons under R. S. C. Ord. 55, r. 3, the funds should not be paid into court, but a summons should be issued (*Re Giles*, 55 L. T. 51; 55 L. J. Ch. 695; see *Re Birkett*, 9 Ch. D. 576; *Re Parker*, 39 Ch. D. 303). It was said that an infant's legacy might be paid into court and would thereupon cease to carry interest (*Re Salaman, De Pass v. Sonnenthal*, 1907, 2 Ch. 46). Payment into court was held to deprive trustees of their discretion as to application of the fund (*Re Murphy*, 1900, 1 Ir. R. 145). An order was made in Chancery for the maintenance of a lunatic not so found out of the income of trust funds paid into court (*Re Carr, C. v. C.*, 1904, 1 Ch. 792; see *Re Barker*, 1904, W. N. 13). Where the money is paid into court, the course pointed out in R. S. C. Ord. 54B, r. 4, and S. C. Funds Rules, 1894, r. 41 (see Annual Practice), should be followed. The general practice under the acts is stated, Seton, 6th ed. 1191, *et seq.*

Miscellaneous.

43. Where in any action the High Court is satisfied that Power to give diligent search has been made for any person who, in the judgment in
S.

56 & 57 Vict.
c. 53, s. 43.

absence of a
trustee.

character of trustee, is made a defendant in any action, to serve him with a process of the court, and that he cannot be found, the court may hear and determine the action and give judgment therein against that person in his character of a trustee, as if he had been duly served, or had entered an appearance in the action, and had also appeared by his counsel and solicitor at the hearing, but without prejudice to any interest he may have in the matters in question in the action in any other character.

This section replaces sect. 49 of the Trustee Act, 1850.

Under the old practice a cause might be certified as fit to be set down, where a defendant trustee who had not entered an appearance could not be found (*Westhead v. Sale*, 6 W. R. 52; *Burrell v. Maxwell*, 25 L. T. 655). For the present practice, where a defendant does not appear, see R. S. C. Ord. 13, r. 12; and as to the cases in which one trustee can be sued in the absence of his co-trustee, see notes to R. S. C. Ord. 16, rr. 6 and 8 in the Annual Practice.

Power to
sanction sale
of land or
minerals
separately.

44.—(1.) Where a trustee [*or other person*] is for the time being authorised to dispose of land by way of sale, exchange, partition, or enfranchisement, the High Court may sanction his so disposing of the land with an exception or reservation of any minerals, and with or without rights and powers of or incidental to the working, getting, or carrying away of the minerals, or so disposing of the minerals, with or without the said rights or powers, separately from the residue of the land.

(2.) Any such trustee [*or other person*], with the said sanction previously obtained, may, unless forbidden by the instrument creating the trust or direction, from time to time, without any further application to the court, so dispose of any such land or minerals.

(3.) Nothing in this section shall derogate from any power which a trustee may have under the Settled Land Acts, 1882 to 1890, or otherwise.

The words in brackets were added by the Trustee Act, 1894, s. 3 (*post*, p. 810).

This section replaces sect. 2 of 25 & 26 Vict. c. 108; which act was passed in consequence of the decisions in *Buckley v. Howell* (29 Beav. 546); *Cholmley v. Paxton* (3 Bing. 207). Under the section referred to most of the following cases were decided.

The court will sanction a sale of land reserving the minerals, or of the minerals apart from the land without reference to any particular sale (*Re Willway*, 32 L. J. Ch. 226; *Re Wynn*, 28 L. T. 615; 21 W. R. 695).

Practice.

The application may be by the trustees (R. S. C. Ord. 54B, r. 3), or by the mortgagees (*Re Wilkinson*, 13 Eq. 634). A petition by mortgagees must be served on the mortgagor (*Re Hirst*, 45 Ch. D. 263); but not on subsequent incumbrancers (*Re Beaumont*, 12 Eq. 86). Where a petition is presented for the sanction of the court to a sale of the land apart from the minerals, the beneficiaries should be served or be made parties to the application (*Re Brown*, 11 W. R. 19; *Re Palmer*, 13 Eq. 408). Where trustees, with a power of sale exercisable with the consent of the tenant for life, presented a petition for leave to sell the land and minerals separately, service on beneficiaries entitled in remainder was held unnecessary (*Re Pryse*, 10 Eq. 531; *Re Nagle*, 6 Ch. D. 104; see *Re Wynn*, *sup.*; *Re Wadsworth*, 63

L. T. 217; *Re Skinner*, 1896, W. N. 68). But service on the remaindermen was required in *Re Hardstaff* (1899, W. N. 256). 56 & 57 Vict. c. 53, s. 44.

For form of petition, see Dan. Ch. Forms, and for form of orders, see Seton, 6th ed. 1748. Forms.

As to leases of land and minerals separately under the S. L. Acts, see *Re Gladstone, G. v. G.* (1900, 2 Ch. 101); and under a special power, see *Re Rutland, R. v. Bristol* (1900, 2 Ch. 206).

45.—(1.) Where a trustee commits a breach of trust at the instigation or request or with the consent in writing (*i*) of a beneficiary, the High Court may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him (*k*). Power to make beneficiary indemnify for breach of trust.

(2.) This section shall apply to breaches of trust committed as well before as after the passing of this act, but shall not apply so as to prejudice any question in an action or other proceeding which was pending on the 24th day of December, 1888, and is pending at the commencement of this act.

This section replaces sect. 6 of the Trustee Act, 1888, the language of which is supposed to have been taken from *Raby v. Ridehalgh* (7 D. M. & G. 104); see *Re Somerset, Somerset v. Poulett* (1894, 1 Ch. 262). The power of impounding is not a new power but had been exercised by the court before 1888 (see *Raby v. Ridehalgh, sup.*; *Sawyer v. S.*, 28 Ch. D. 595; *Re Somerset*, 1894, 1 Ch. 275). The earlier cases are collected in Lewin, 11th ed. 1152. The section has invested the court with a judicial discretion which it seems will be exercised on the same principles as were adopted before the statute (*Bolton v. Curre*, 1895, 1 Ch. 549; see *Re Somerset*, 1894, 1 Ch. 275).

It has been said that the section does not operate to curtail the previously existing rights and remedies of trustees or to alter the law except by giving greater power to the court (*Bolton v. Curre*, 1895, 1 Ch. 549; *Fletcher v. Collis*, 1905, 2 Ch. 34). According to the law independent of the section it seems that where a *c. q. t.* merely consented to a breach, obtaining no benefit, his interest was not impoundable to indemnify the trustee (*Fletcher v. Collis*, 1905, 2 Ch. 32; *Sawyer v. S.*, 28 Ch. D. 598). But even a mere consent (whether in writing or not) prevented the party giving it from obtaining relief against the trustee in respect of the breach (*Walker v. Symonds*, 3 Swan. 64; *Fletcher v. Collis, sup.*). Accordingly where with the consent of the tenant for life a trustee improperly dealt with and lost the trust fund, and was compelled by the remainderman to replace it, the tenant for life could not as against the trustee claim the income of the replaced fund (*Fletcher v. Collis*, 1905, 2 Ch. 24).

(i) The words "in writing" govern only the word "consent," not the words "instigation or request" (*Griffith v. Hughes*, 1892, 3 Ch. 105; *Re Somerset, Somerset v. Poulett*, 1894, 1 Ch. 265).

(k) "In order to bring a case within this section the *cestui que trust* must instigate, or request, or consent in writing to, some act or omission which is itself a breach of trust, and not some act or omission which only becomes a breach of trust by reason of want of care on the part of the trustees" (*Re Somerset*, 1894, 1 Ch. 265). The beneficiary must know the facts which rendered what he was instigating, requesting, or consenting to in writing, a breach of trust (*Ib.* 270, 274; see *Mara v. Browne*, 1895, 2 Ch. 69). Constructive notice of such facts is not sufficient (*Re Somerset*, 1894, 1 Ch. 267).

The liability of the interest of the beneficiary in the trust estate to be

56 & 57 Vict. c. 53, s. 45. impounded is not limited by the amount of the benefit, if any, which he may have derived from the breach of trust, but extends to the whole interest. It may exist even where the beneficiary derives no such benefit (*Chillingworth v. Chambers*, 1896, 1 Ch. 699, 700). The liability is not affected by the fact that the beneficiary is one of several trustees who has participated in the breach, and as such trustee would otherwise be entitled to contribution from the co-trustees. Thus where two trustees were equally to blame for a breach and after the breach one acquired a beneficial interest greater than the loss resulting from the breach, the whole loss was made good out of such interest, and a claim to make the co-trustee contribute was refused (*Chillingworth v. Chambers*, 1896, 1 Ch. 685).

In the case of a married woman restrained from anticipation, trustees have a duty to protect her, and the court will be slow to impound her interest to recoup them when they knowingly commit a breach of trust (*Bolton v. Currie*, 1895, 1 Ch. 544; see *Sawyer v. S.*, 28 Ch. D. 595; *Ricketts v. R.*, 64 L. T. 263; *Mara v. Browne*, 1895, 2 Ch. 69; in all of which cases impounding was refused). Such an interest was impounded in *Griffith v. Hughes* (1892, 3 Ch. 105).

The equity of a trustee to have the interest of a *cestui que trust* impounded will affect that interest in the hands of an assignee who purchased subsequently to the breach of trust (*Bolton v. Currie*, 1895, 1 Ch. 544). The refusal by the trustee at the time of the breach of trust of an express charge on the interest of the *c. q. t.* is not a waiver of this equity (*Ib.*).

In an action by beneficiaries against the tenant for life and the trustees for a breach of trust, the trustees claimed to impound the interest of the tenant for life, but gave no notice under Ord. 16, r. 55. At the trial leave was given to the trustees to apply in chambers with reference to enforcing their right to impound (*Re Holt, H. v. H.*, 1897, 2 Ch. 525; see *Molyneux v. Fletcher*, 1898, 1 Q. B. 656).

Jurisdiction of palatine and county courts.

46. The provisions of this act with respect to the High Court shall, in their application to cases within the jurisdiction of a palatine court or county court, include that court, and the procedure under this act in palatine courts and county courts shall be in accordance with the acts and rules regulating the procedure of those courts.

PART IV.

MISCELLANEOUS AND SUPPLEMENTAL.

Application to trustees under Settled Land Acts of provisions as to appointment of trustees.

47.—(1.) All the powers and provisions contained in this act with reference to the appointment of new trustees, and the discharge and retirement of trustees, are to apply to and include trustees for the purposes of the Settled Land Acts, 1882 to 1890, whether appointed by the court or by the settlement, or under provisions contained in the settlement.

(2.) This section applies and is to have effect with respect to an appointment or a discharge and retirement of trustees taking place before as well as after the commencement of this act.

(3.) This section is not to render invalid or prejudice any appointment or any discharge and retirement of trustees effected before the passing of this act, otherwise than under the provisions of the Conveyancing and Law of Property Act, 1881.

44 & 45 Vict. c. 41.

This section replaces sect. 17 of the S. L. Act, 1890.

48. Property vested in any person on any trust or by way of mortgage shall not, in case of that person becoming a convict within the meaning of the Forfeiture Act, 1870, vest in any such administrator as may be appointed under that act, but shall remain in the trustee or mortgagee, or survive to his co-trustee or descend to his representative as if he had not become a convict; provided that this enactment shall not affect the title to the property so far as relates to any beneficial interest therein of any such trustee or mortgagee.

56 & 57 Vict.
c. 53, s. 48.

Trust estates
not affected
by trustee
becoming a
convict.

33 & 34 Vict.
c. 23.

Compare sects. 46 and 47 of the Trustee Act, 1850.

By the Forfeiture Act, 1870, s. 1, it is enacted, that from and after the 4th July, 1870, no confession, verdict, inquest, conviction, or judgment of or for any treason or felony, or *felo de se*, shall cause any attainder or corruption of blood, or any forfeiture or escheat, but nothing in the act is to affect the law of forfeiture consequent on outlawry. The Crown is empowered to appoint an administrator, in whom the convict's property vests (sects. 9, 10), and provision is made as to the mode in which the property is to be applied (sects. 12—18).

Power is given by sect. 25 (1) (*ante*, p. 777) to the court to appoint new trustees in lieu of any trustee who has been convicted of felony.

49. This act, and every order purporting to be made under this act, shall be a complete indemnity to the Banks of England and Ireland, and to all persons for any acts done pursuant thereto; and it shall not be necessary for the bank or for any person to inquire concerning the propriety of the order, or whether the court by which it was made had jurisdiction to make the same.

Indemnity.

There is also an implied indemnity to the Bank acting on an order made by the court under sect. 14 of the Jud. Act, 1884 (*Savage v. Norton*, 1908, 1 Ch. 290). Compare the indemnity in the case of lunacy orders, *Re Spurling*, 1909, 1 Ch. 199.

50. In this act, unless the context otherwise requires,—

Definitions.

The expression "bankrupt" includes, in Ireland, insolvent:

The expression "contingent right," as applied to land, includes a contingent or executory interest, a possibility coupled with an interest, whether the object of the gift or limitation of the interest, or possibility is or is not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent:

The expressions "convey" and "conveyance" applied to any person include the execution by that person of every necessary or suitable assurance for conveying, assigning, appointing, surrendering, or otherwise transferring or disposing of land whereof he is seised or possessed, or wherein he is entitled to a contingent right, either for his whole estate or for any less estate, together with the performance of all formalities required by law to the validity of the conveyance, including the acts to be performed by married women and tenants in tail in accordance with the provisions of the acts for abolition

56 & 57 Vict.
c. 53, s. 50.

of fines and recoveries in England and Ireland respectively (*l*), and also including surrenders and other acts which a tenant of customary or copyhold lands can himself perform preparatory to or in aid of a complete assurance of the customary or copyhold land (*m*):

The expression "devisee" includes the heir of a devisee and the devisee of an heir, and any person who may claim right by devolution of title of a similar description:

The expression "instrument" includes Act of Parliament: The expression "land" includes manors and lordships, and reputed manors and lordships, and incorporeal as well as corporeal hereditaments, and any interest therein, and also an undivided share of land (*n*):

The expressions "mortgage" and "mortgagee" include and relate to every estate and interest regarded in equity as merely a security for money, and every person deriving title under the original mortgagee (*o*):

The expressions "pay" and "payment" as applied in relation to stocks and securities, and in connexion with the expression "into court" include the deposit or transfer of the same in or into court:

The expression "possessed" applies to receipt of income of, and to any vested estate less than a life estate, legal or equitable, in possession or in expectancy, in, any land:

The expression "property" includes real and personal property, and any estate and interest in any property, real or personal, and any debt, and any thing in action, and any other right or interest, whether in possession or not:

The expression "rights" includes estates and interests:

The expression "securities" includes stocks, funds, and shares; and so far as relates to payment into court has the same meaning as in the Court of Chancery (Funds) Act, 1872:

The expression "stock" includes fully paid up shares; and, so far as relates to vesting orders made by the court under this act, includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer either alone or accompanied by other formalities, and any share or interest therein (*p*):

The expression "transfer," in relation to stock, includes the performance and execution of every deed, power of attorney, act, and thing on the part of the transferor to effect and complete the title in the transferee:

The expression "trust" does not include the duties incident to an estate conveyed by way of mortgage (*q*); but with this exception the expressions "trust" and "trustee" include implied and constructive trusts (*r*), and cases

where the trustee has a beneficial interest in the trust property, and the duties incident to the office of personal representative of a deceased person (s). 56 & 57 Vict.
c. 53, s. 50.

(l) A vesting order under this act will, if consented to by the protector of the settlement, bar all estates in remainder, and not pass a base fee only under 3 & 4 Will. 4, c. 74, s. 34 (*Powell v. Matthews*, 1 Jur. N. S. 973; *Re Montagu, Faber v. Montagu*, 1896, 1 Ch. 549).

(m) As to copyholds, see *Rowley v. Adams* (14 Beav. 130).

(n) Rent-charges were held to be included in the somewhat similar definition of "lands" in the Trustee Act, 1850 (*Re Harrison*, Seton, 6th ed. 1218).

(o) As to the meaning of "mortgage," see *Re Underwood* (3 K. & J. 475); *Lawrence v. Galsworthy* (3 Jur. N. S. 1049).

(p) "Stock" in the Trustee Act, 1850, was held to include shares in a limited company, whether fully paid up or not (*Re New Zealand Trust & Loan Co.*, 1893, 1 Ch. 403; see *Re Angelo*, 5 De G. & S. 278), and annuities from a life office (*Re Tweedy*, 28 Ch. D. 529).

As to registered shares in ships, see sect. 35 (6), *ante*, p. 794.

(q) A declaration of trust in an equitable mortgage by the mortgagor of the legal estate, is a trust within the act (*London and County Bank v. Goddard*, 1897, 1 Ch. 642).

It was held under the Trustee Act, 1850, that the court had no authority to convey the estate of a mortgagee who had been paid off (*Re Osborn*, 12 Eq. 392; compare sect. 29, *ante*, p. 788); but had authority to transfer the mortgage where the mortgagees were trustees, and one was out of the jurisdiction (*Re Walker*, 3 Ch. D. 209; see *Re Nicholson*, 34 Ch. Div. 663; *Re Underwood*, 3 K. & J. 745).

(r) As to constructive trustees in the case of a sale of stock, see *Re Angelo* (5 De G. & Sm. 278); *Re Davis* (12 Eq. 214). Constructive
trustees.

In the case of a sale of land, the general doctrine of equity is that after contract the vendor is a constructive trustee of the land for the purchaser (*Shaw v. Foster*, L. R. 5 H. L. 333; see *Lysaght v. Edwards*, 2 Ch. D. 506, 510). For the purposes of the Trustee Act, 1850, however, the following distinctions were taken. Where the contract was executed by payment of the purchase-money, the vendor was a trustee (*Re Cuming*, 5 Ch. 72; *Re Colling*, 32 Ch. Div. 336; *Re Wilkinson*, 12 W. R. 522); but not where the contract was unexecuted (*Re Carpenter*, Kay, 418; *Re Faulder*, 1866, W. N. 83; see, however, *Re Badcock*, 2 W. R. 386; *Re Taylor*, 1866, W. N. 5), except in the case of a compulsory sale (*Re Russell*, 35 L. J. Ch. 461; *Re Lowry*, 15 Eq. 78; doubted, *Re Colling*, 32 Ch. Div. 336). Where only part of the purchase-money had been paid but possession had been given and the vendor was found lunatic, a vesting order was made, which was not, however, to be dated until after the payment of the balance (*Re Pagani*, 1892, 1 Ch. 236; *Re Beaufort*, 1898, W. N. 148). Where there is a doubt as to the trusteeship by reason of the title being complicated, an action should be brought (*Re Martin*, 34 Ch. D. 619). In the case of freeholds, where there is a contract binding the heir or devisee, the personal representative can now convey (Conv. Act, 1881, s. 4, *ante*, p. 561).

The following persons amongst others were also held to be constructive trustees for the purpose of the Trustee Act, 1850. An assignee of a bankrupt's estate (*Re Joyce*, 2 Eq. 576). An infant beneficially entitled to stock standing in his own name subject to trusts for maintenance (*Gardner v. Cowles*, 3 Ch. D. 304; *Re Findlay*, 32 Ch. D. 221). Infant devisees of land as to which the testator had made an agreement of compromise (*Re Taylor*, 1866, W. N. 5). The husband of a *feme covert* trustee (*Re Wood*, 3 D. F. & J. 125; *Ex parte Bradshaw*, 2 D. M. & G. 900). The heir of a person who covenanted in a marriage settlement followed by marriage (*Re Bradley*, 34 W. R. 148). A mortgagor who had covenanted to surrender

56 & 57 Vict. c. 53, s. 50. copyholds (*Re Crowe*, 13 Eq. 26). The heir of an equitable mortgagor who had agreed to execute a legal mortgage (*Re Jones & Co.*, 1888, W. N. 217). An heir who had elected to take on the trusts of a will (*Dewar v. Maitland*, 2 Eq. 834). An executor where a legacy was bequeathed to persons in succession (*Re Davis*, 12 Eq. 214).

(s) As to appointing under this act a trustee to perform the duties of a personal representative, see *Re Moore, McAlpine v. Moore* (21 Ch. D. 778); *Re Willey* (1890, W. N. 1); *Eaton v. Daines* (1894, W. N. 32). Under the Judicial Trustee Act, 1896, s. 1 (*post*, p. 822), the court can now appoint a person to perform such duties, either in place of or in addition to an existing representative (see *Re Ratcliffe*, 1898, 2 Ch. 352).

Repeal. **51.** The acts mentioned in the schedule to this act are hereby repealed except as to Scotland to the extent mentioned in the third column of that schedule.

Extent of act. **52.** This act does not extend to Scotland.

Short title. **53.** This act may be cited as the Trustee Act, 1893.

Commence-ment. **54.** This act shall come into operation on the 1st day of January, 1894.

SCHEDULE.

56 & 57 Vict. c. 53, Sched.

Section 51.

Session and Chapter.	Title or Short Title.	Extent of Repeal.
36 Geo. 3, c. 52.	The Legacy Duty Act, 1796.	Section thirty-two.
9 & 10 Vict. c. 101.	The Public Money Drainage Act, 1846.	Section thirty-seven.
10 & 11 Vict. c. 32.	The Landed Property Improvement (Ireland) Act, 1847.	Section fifty-three.
10 & 11 Vict. c. 96.	An act for better securing trust funds, and for the relief of trustees.	The whole act.
11 & 12 Vict. c. 68.	An act for extending to Ireland an act passed in the last session of Parliament, entitled "An act for better securing trust funds, and for the relief of trustees."	The whole act.
12 & 13 Vict. c. 74.	An act for the further relief of trustees.	The whole act.
13 & 14 Vict. c. 60.	The Trustee Act, 1850. . . .	Sections seven to nineteen, twenty-two to twenty-five, twenty-nine, thirty-two to thirty-six, forty-six, forty-seven, forty-nine, fifty-four and fifty-five; also the residue of the act except so far as relates to the court exercising jurisdiction in lunacy in Ireland.

Session and Chapter.	Title or Short Title.	Extent of Repeal.	56 & 57 Vict. c. 53, Sched.
15 & 16 Vict. c. 55.	The Trustee Act, 1852	Sections one to five, eight, and nine; also the residue of the act except so far as relates to the court exercising jurisdiction in lunacy in Ireland.	
17 & 18 Vict. c. 82.	The Court of Chancery of Lancaster Act, 1854.	Section eleven.	
18 & 19 Vict. c. 91.	The Merchant Shipping Act Amendment Act, 1855.	Section ten, except so far as relates to the court exercising jurisdiction in lunacy in Ireland.	
20 & 21 Vict. c. 60.	The Irish Bankrupt and Insolvent Act, 1857.	Section three hundred and twenty-two.	
22 & 23 Vict. c. 35.	The Law of Property Amendment Act, 1859.	Sections twenty-six, thirty and thirty-one.	
23 & 24 Vict. c. 38.	The Law of Property Amendment Act, 1860.	Section nine.	
25 & 26 Vict. c. 108.	An act to confirm certain sales, exchanges, partitions, and enfranchisements by trustees and others.	The whole act.	
26 & 27 Vict. c. 73.	An act to give further facilities to the holders of Indian stock.	Section four.	
27 & 28 Vict. c. 114.	The Improvement of Land Act, 1864.	Section sixty so far as it relates to trustees; and section sixty-one.	
28 & 29 Vict. c. 78.	The Mortgage Debenture Act, 1865.	Section forty.	
31 & 32 Vict. c. 40.	The Partition Act, 1868	Section seven.	
33 & 34 Vict. c. 71.	The National Debt Act, 1870	Section twenty-nine.	
34 & 35 Vict. c. 27.	The Debenture Stock Act, 1871.	The whole act.	
37 & 38 Vict. c. 78.	The Vendor and Purchaser Act, 1874.	Sections three and six.	
38 & 39 Vict. c. 83.	The Local Loans Act, 1875 .	Sections twenty-one and twenty-seven.	
40 & 41 Vict. c. 59.	The Colonial Stock Act, 1877	Section twelve.	
43 & 44 Vict. c. 8.	The Isle of Man Loans Act, 1880.	Section seven, so far as it relates to trustees.	
44 & 45 Vict. c. 41.	The Conveyancing and Law of Property Act, 1881.	Sections thirty-one to thirty-eight.	
45 & 46 Vict. c. 39.	The Conveyancing Act, 1882	Section five.	
46 & 47 Vict. c. 52.	The Bankruptcy Act, 1883 .	Section one hundred and forty-seven.	
51 & 52 Vict. c. 59.	The Trustee Act, 1888	The whole act, except sections one and eight.	
52 & 53 Vict. c. 32.	The Trust Investment Act, 1889.	The whole act, except sections one and seven.	
52 & 53 Vict. c. 47.	The Palatine Court of Durham Act, 1889.	Section eight.	
53 & 54 Vict. c. 5.	The Lunacy Act, 1890	Section one hundred and forty.	
53 & 54 Vict. c. 69.	The Settled Land Act, 1890 .	Section seventeen.	
55 & 56 Vict. c. 13.	The Conveyancing and Law of Property Act, 1892.	Section six.	

57 & 58 Vict.
c. 10, s. 1.

II.—THE TRUSTEE ACT, 1893, AMENDMENT ACT, 1894.

57 & 58 VICT. c. 10.

Amendment
of 56 & 57
Vict. c. 53,
s. 30.

1. In section thirty of the Trustee Act, 1893, the words "as heir, or under the will of a deceased person, for payment of whose debts the judgment was given or order made" shall be repealed.

Extension to
Ireland of
56 & 57
Vict. c. 53,
s. 41.

2. The powers conferred on the High Court in England by section forty-one of the Trustee Act, 1893, to make vesting orders as to all land and personal estate in Her Majesty's dominions except Scotland, are hereby also given to and may be exercised by the High Court in Ireland.

Amendment
of 56 & 57
Vict. c. 53,
s. 41.

3. In section forty-four of the Trustee Act, 1893, after the word "trustee" in the first two places where it occurs shall be inserted the words "or other person."

Liability of
trustee in case
of change of
character of
investment.

4. A trustee shall not be liable for breach of trust by reason only of his continuing to hold an investment which has ceased to be an investment authorized by the instrument of trust or by the general law.

This section is not retrospective so as to protect a trustee in the case of his having improperly retained an investment prior to the passing of the act (*Re Chapman, Cocks v. Chapman*, 1896, 1 Ch. 323). As to the duties of trustees in regard to retaining securities, especially mortgage securities, see *S. C.*, 1896, 2 Ch. 763. It would seem that there is no duty on the part of trustees who continue to hold mortgages to make periodical inspections of the properties (*Shaw v. Cates*, 1909, 1 Ch. 409).

Short title.

5. This act may be cited as the Trustee Act, 1893, Amendment Act, 1894.

III.—THE LUNACY ACT, 1890.

53 VICT. c. 5, ss. 110, 120, 128, 129, 135—143, 341.

53 Vict. c. 5.

Jurisdiction
in lunacy, in
whom vested.

The jurisdiction in lunacy in regard to trustees and mortgagees (as to which see formerly Jud. Act, 1873, s. 17, sub-s. 3; Jud. Act, 1875, s. 7), is now, under sect. 108 (1) of the Lunacy Act, 1890, exerciseable by the Lord Chancellor entrusted by sign manual with the care, and commitment of the custody, of the persons and estates of lunatics, alone or jointly with other judges of the Supreme Court entrusted as aforesaid, or any one or more of such judges. The Lord Chancellor is *ex officio* one of the judges of the Chancery Division of the High Court (Jud. Act, 1873, s. 5), and he has, under sect. 51 of the Jud. Act, 1873, requested the Lords Justices to act as additional judges of the Chancery Division, for the purpose of making orders both in Chancery and lunacy (*Re Platt*, 36 Ch. Div. 410); but this jurisdiction will only be exercised in aid of their jurisdiction in lunacy (*Re Barber*, 39 Ch. Div. 187).

Under sect. 27 (1) of the Lunacy Act, 1891, the jurisdiction of the judge in lunacy as regards administration and management may be exercised by the masters. By virtue of this sub-section a master may, under sects. 116 and 128 of the Lunacy Act, 1890, appoint a person to exercise a power of appointing new trustees vested in one detained as lunatic but not so found; and also, under sect. 129, make a vesting order of the trust property (*Re Fuller*, 1900, 2 Ch. 551). But sect. 27 (1) of the 1891 Act does not enable a master to make a vesting order under sect. 136 of the 1890 Act (*Re Langdale*, 1901, 1 Ch. 3).

53 Vict. c. 5,
s. 110.

Power of
masters.

110. The powers and authorities given by this act to the judge in lunacy shall extend to property within any British possession.

Powers to
extend to
British pos-
sessions.

120. The judge may, by order, authorize and direct the committee of the estate of a lunatic to do all or any of the following things:—

- (a) Sell any property belonging to the lunatic;
- (b) Make exchange or partition of any property belonging to the lunatic or in which he is interested, and give or receive any money for equality of exchange or partition;
- (c) Carry on any trade or business of the lunatic;
- (d) Grant leases of any property of the lunatic for building, agricultural, or other purposes;
- (e) Grant leases of minerals forming part of the lunatic's property, whether the same have been already worked or not, and either with or without the surface or other land;
- (f) Surrender any lease and accept a new lease;
- (g) Accept a surrender of any lease and grant a new lease;
- (h) Execute any power of leasing vested in a lunatic having a limited estate only in the property over which the power extends;
- (i) Perform any contract relating to the property of the lunatic entered into by the lunatic before his lunacy;
- (j) Surrender, assign, or otherwise dispose of with or without consideration any onerous property belonging to the lunatic;
- (k) Enter into any agreement touching the patronage of augmented cures under the Act one George the First, Chapter ten, which the lunatic might have entered into if he had been of sound mind;
- (l) Exercise any power or give any consent required for the exercise of any power where the power is vested in the lunatic for his own benefit or the power of consent is in the nature of a beneficial interest in the lunatic.

The above section does not extend to the capacity of releasing a power (*Re Hirst*, 1892, W. N. 177; see *Re Rose*, 1904, 2 Ch. 353; 1905, 1 Ch. 94). See further the note to sect. 128.

128. Where a power is vested in a lunatic in the character of trustee or guardian, or the consent of a lunatic to the exercise

Committee
may exercise

53 Vict. c. 5,
s. 128.

power vested
in lunatic in
character of
trustee or
guardian.

of a power is necessary in the like character, or as a check upon the undue exercise of the power, and it appears to the judge to be expedient that the power should be exercised or the consent given, the committee of the estate, in the name and on behalf of the lunatic, under an order of the judge, made upon the application of any person interested, may exercise the power or give the consent in such manner as the order directs.

The following powers have been held to fall within sect. 128, as being fiduciary powers vested in the lunatic "in the character of trustee":—a power of consenting to advancements (*Re Nevill*, 31 Ch. Div. 161); a power of appointing settled funds among children (*Re A.*, 1904, 2 Ch. 328); a power of appointing new trustees (*Re Shortridge*, 1895, 1 Ch. 278; see *Re Sheats*, 42 Ch. D. 522). And a power of leasing vested in a lunatic as tenant for life was held to fall within sect. 120, sub-s. (h) (*Re Salt*, 1896, 1 Ch. 117).

In the case of a lunatic not so found, the powers of the quasi committee were before the Lunacy Act, 1908, limited by the words of sect. 116, sub-s. 2 of the Lunacy Act, 1890; the last-mentioned sub-section providing that the quasi committee might exercise "such of the powers of this act as are exerciseable by the committee." The quasi committee accordingly could with the sanction of the judge exercise the powers which fell within sects. 120 and 128. But he could not exercise the following powers which had been held not to fall within either of those sections; that is to say, the power of sale given by the Settled Land Acts (*Re Baggs*, 1894, 2 Ch. 416); the power of sale given by sect. 7 of the L. C. C. Act, 1845 (*Re S. S. B.*, 1906, 1 Ch. 712); the power of consenting to a sale by trustees (*Re De Moleyns and Harris*, 1908, 1 Ch. 110). Now under Lunacy Act, 1908, sect. 1, the quasi committee of a lunatic not so found can (subject to the direction of the judge) exercise any powers which, if such person were a lunatic so found, could be exercised by his committee. It will be observed that the words of the act are narrower than the words suggested for enactment by Cozens-Hardy, L.J. (*Re S. S. B.*, 1906, 1 Ch. 725).

Where the court authorizes the committee to appoint new trustees, it can by the same order vest the trust property (*Re Fuller*, 1900, 2 Ch. 551; *Re Shortridge*, *sup.*). The form of an order is given in *Re Bowmer* (3 De G. & J. 658). Where the donee of a power to appoint new trustees is a lunatic, the Court of Lunacy does not itself appoint, but acts under this section (*Re Garrod*, 31 Ch. Div. 164). The Chancery Division can appoint (*Ib.*; *Re Heaphy*, 18 W. R. 1070; *Re Sparrow*, 5 Ch. 662). It is better that an appointment should be made under this section, even when it might be made under sect. 10 of the Trustee Act, 1893 (*Re Blake*, 1887, W. N. 173).

Appointment
of new
trustees
under power
to have effect
of appoint-
ments by
High Court,
and like
orders may
be made as
under Trustee
Act, 1850.

129. Where under this act the committee of the estate, under order of the judge, exercises, in the name and on behalf of the lunatic, a power of appointing new trustees vested in the lunatic, the person or persons who shall, after and in consequence of the exercise of the power, be the trustee or trustees, shall have all the same rights and powers as he or they would have had if the order had been made by the High Court; and the judge may in any such case, where it seems to him to be for the lunatic's benefit and also expedient, make any order respecting the property subject to the trust which might have been made in the same case under the Trustee Act, 1850, or any act amending the same, on the appointment thereunder of a new trustee or new trustees.

Where the donee of a power of appointing new trustees was lunatic, and the committee under the authority of the court appointed new trustees, the new trustees were under this section appointed to call for a transfer of consols subject to the trust (*Re Shortridge*, 1895, 1 Ch. 278). In a similar case a vesting order was made as to freeholds (*Re Fuller*, 1900, 2 Ch. 551).

53 Vict. c. 5,
s. 129.

135.—(1.) When a lunatic is solely or jointly seised or possessed of any land upon trust or by way of mortgage the judge in lunacy may by order vest such land in such person or persons for such estate, and in such manner, as he directs.

Power to vest lands and release contingent right of lunatic trustee or mortgagee.

(2.) When a lunatic is solely or jointly entitled to a contingent right in any land upon trust or by way of mortgage, the judge may by order release such hereditaments from the contingent right, and dispose of the same to such person or persons as the judge directs.

["(3.) An order under sub-sections one and two shall have the same effect as if the lunatic had been sane, and, if solely seised, possessed, or entitled as aforesaid, had executed, or, if jointly seised, possessed, or entitled as aforesaid with any other person or persons, he and such other person or persons had executed a deed conveying the land for the estate named in the order, or releasing or disposing of the contingent right." *Substituted for the original sub-section by sect. 2 of the Lunacy Act, 1908.*]

(4.) In all cases where an order can be made under this section the judge may, if it is more convenient, appoint a person to convey the land or release the contingent right, and a conveyance or release by such person in conformity with the order shall have the same effect as an order under sub-sections (1) and (2).

(5.) Where an order under this section vesting any copyhold land in any person or persons is made with the consent of the lord or lady of the manor, such land shall vest accordingly without surrender or admittance.

(6.) Where an order is made appointing any person or persons to convey any copyhold land, such person or persons shall execute and do all assurances and things for completing the assurance of the lands; and the lord or lady of the manor shall, subject to the customs of the manor and the usual payments, be bound to make admittance to the land, and to do all other acts for completing the assurance thereof, as if the persons in whose place an appointment is made were free from disability and had executed and done such assurances and things.

This section replaces (as to England) sects. 3 and 4 and parts of sects. 20 and 28 of the Trustee Act, 1850. Where one of four trustees became a lunatic, the trust property was, under sub.-sect. (1) of the present section, vested in the other three trustees (*Re Leon*, 1892, 1 Ch. 348). Compare the similar orders made in Chancery under sects. 26 and 35 of the Trustee Act, 1893 (*ante*, pp. 781, 785, 796). When a person who had contracted to sell leaseholds went abroad and was found lunatic there, an order was made

53 Vict. c. 5,
s. 135.

Cases under
Trustee Act,
1850, s. 3.

Whether
application
should be
made in
Chancery or
lunacy.

Practice.

under this section vesting the land in the purchaser, the order, however, not to be dated until after payment of the purchase-money (*Re Pagani*, 1892, 1 Ch. 236; see *Re Beaufort*, 1898, W. N. 148).

Under the Trustee Act, 1850, it was held that sect. 3 applied where, on an order for sale instead of partition, one part owner was a lunatic, and a person was appointed to convey for him (*Re Watson*, 58 L. T. 509). In the case of a lease, the legal term could be vested, but not the benefit of a covenant for quiet enjoyment (*Cowper v. Harmer*, 57 L. T. 714). A mere power of sale could be vested (*Re Boyce*, 4 D. J. & S. 205). Where a lunatic held land in trust for A. absolutely, the court refused to vest the land in A., but appointed a new trustee and vested the land in him (*Re Holland*, 16 Ch. Div. 672). A mortgage vested in a lunatic mortgagee could be transferred under sect. 3 (*Re Nicholson*, 34 Ch. Div. 663; *contra*, *Re Brown*, 50 L. T. 373).

Under the Trustee Acts, 1850 and 1852, questions frequently arose whether a vesting order should be made in lunacy, or in Chancery and lunacy, or in Chancery. It was held that, where a trustee or mortgagee was lunatic or of unsound mind, not so found, the vesting order could not be made in Chancery only (*Jeffryes v. Drysdale*, 9 W. R. 428; *Re Mason*, 10 Ch. 273; *Re Nicholl*, 18 W. R. 443; *Re Martin*, 34 Ch. D. 618); and, where it dealt exclusively with the estate of a lunatic trustee, should be made in lunacy only (*Re Watson*, 58 L. T. 509; see *Re Watson*, 19 Ch. D. 384; *Re Jones*, 33 Ch. Div. 414; *Re Chauncey*, 14 W. R. 849, where the fund was to come into court; see *Re Dawson*, 6 N. R. 346). Where interests of sane as well as lunatic trustees were dealt with, the order was made in both Chancery and lunacy (*Re Pearson*, 5 Ch. Div. 982; *Re Druce*, 46 L. T. 669; *Re Chell*, 49 L. T. 196; *Re Davidson*, 20 L. J. Ch. 644; *Re Batho*, 39 Ch. Div. 189). So also where part of the trust property was land in Ireland, as to which the Court of Lunacy had formerly no jurisdiction (*Re Lamotte*, 4 Ch. Div. 325; *Re Smyth*, 55 L. T. 37; see now Lunacy Act, 1890, s. 110). A vesting order might be made in Chancery only, where there had been an order for a sale (*Herring v. Clark*, 4 Ch. 167; *Stamper v. S.*, 46 L. T. 372); or where the lunatic trustee was out of the jurisdiction (*Re Gardner*, 10 Ch. D. 29), or was an infant (*Re Arrowsmith*, 4 Jur. N. S. 1123; 6 W. R. 642).

Many of the above decisions were considered in a case since the Trustee Act, 1893, where, on an application in Chancery alone, the court refused to make a vesting order as regards property vested in a sole trustee who was a lunatic not so found. As to vesting orders the older decisions appear to be still applicable (*Re M.*, 1899, 1 Ch. 79). As to appointments, however, an order appointing a new trustee in the place of the sole lunatic trustee was made in the last case in Chancery only (*Ib.*).

Where the fact of the lunacy was disputed, it was held under the Trustee Acts, 1850 and 1852, that the court had no jurisdiction (*Re Walker*, Cr. & Ph. 147; *Re Campbell*, 18 L. T. 202; see *Re Combs*, 51 L. T. 45).

As to the mode and form of application, see Rules in Lunacy, *post*. For the form of a petition by committee of lunatic mortgagor, on payment off of mortgage, see *Elmer*, Pr. Lun. 240, 5th ed. Where the mortgagee was of unsound mind, and the mortgagor wished to pay off, it was said he should pay the money into court, and would then be entitled to a vesting order (*Re Sparks*, 6 Ch. Div. 361). See *Re Wheeler* (1 D. M. & G. 434), where it was said that in the case of a mortgagee found lunatic, the committee should petition. Where of three trustees, A., B., and C., B. was lunatic, and C. was a new trustee appointed under a power, and it was desired to vest in A. and C.; A. was appointed to convey the estate of himself and B. to himself and C. (*Re Vicat*, 33 Ch. Div. 103). For vesting order in the case of a lunatic tenant in tail, see *Re Mason*, *Mason v. Mason* (7 Ch. Div. 707). See further, as to the form of orders vesting real estate, the note to sect. 26 of the Trustee Act, 1893, *ante*, p. 787. Such orders when made in lunacy are to be drawn in the form employed for similar orders in Chancery (Practice Note, 1908, W. N. 75). Forms of orders appointing new trustees and vesting the trust estate, whether made in Lunacy only or in

Lunacy and in Chancery, are given in Heywood and Massey's Lunacy Practice, 3rd ed., 222, 225. 53 Vict. c. 5, s. 135.

A petition for an order, vesting in new trustees property, a trustee of which has been found lunatic, ought to be served on his committee (*Re Saumarez*, 8 D. M. & G. 390; and see *Re Parker*, 32 Beav. 580; *Re Wyld*, 5 D. M. & G. 25); but where the trustee is a person of unsound mind not found lunatic, he need not be served (*Re East*, 8 Ch. 735; *Re Green*, 10 Ch. 272; *Re Weston*, 1898, W. N. 151). See further, p. 820, *post*. Service.

Where a mortgagee became of unsound mind, it was said that the mortgagor should bring the money into court and would then be entitled to a vesting order. The mortgagor would have to pay the costs of the necessary petition, but would not be ordered to pay any costs to the mortgagee (*Re Sparks*, 6 Ch. D. 361). Where the mortgagee had been found lunatic and the committee petitioned, the petitioner's costs came out of the lunatic's estate (*Re Wheeler*, 1 D. M. & G. 434). But in such a case the mortgagor should not be served (*Re Rowley*, 1 D. J. & S. 417); and in no case can have costs out of the lunatic's estate (*Re Phillips*, 4 Ch. 629). The stamp on the vesting order must in any case be paid by the mortgagor (*Re Thomas*, 22 L. J. Ch. 858; *Re Biddle*, 23 L. J. Ch. 23). Where the heir of a mortgagee was a lunatic the mortgagor petitioning paid all costs (*Re Stuart*, 4 De G. & J. 319; *Re Jones*, 2 D. F. & J. 554). Where the lunatic mortgagee was a trustee, the trust appearing on the face of the mortgage, the mortgagor petitioning paid all costs (*Re Lewis*, 1 Mac. & G. 23); but where the trust did not appear, the costs of a petition by the committee and the co-trustees of the lunatic were paid out of the trust estate (*Re Jones*, 2 Ch. Div. 70; see *Re Townsend*, 1 Mac. & G. 686). Costs, where mortgagee or his heir is a lunatic,

Where a trustee becomes lunatic, and an application in lunacy is made for a transfer of the trust funds, no order will be made as to costs (*Re Garden*, 6 N. R. 347). As to the practice under former acts, see *Ex p. Pearce* (T. & R. 325). where trustee a lunatic.

Sub-sect. 4 provides for the appointment of a person to convey, replacing part of sect. 20 of the Trustee Act, 1850, under which persons were appointed to convey on behalf of lunatics in the following cases. Where one of several trustees was a lunatic and a new trustee had been appointed (*Re Jones, Zineraft's Will*, 33 Ch. Div. 414; see *Re Mason*, 10 Ch. 273); in such a case the person appointed may be a continuing trustee (*Re Vicat*, 33 Ch. Div. 103); where the customary heir of a vendor who had covenanted to surrender copyholds was lunatic (*Re Cuming*, 5 Ch. 72); in a partition action when one part owner was lunatic (*Re Nicholson*, 34 Ch. Div. 663); and where after a decree for sale in a partnership action one partner was of unsound mind (*Herring v. Clarke*, 4 Ch. 167). But it was held that a conveyance under that section could not contain any contract binding the lunatic or his estate, such as (in the case of a lease) a covenant for quiet enjoyment (*Cowper v. Harmer*, 57 L. T. 714). Appointing a person to convey.

136.—(1.) Where a lunatic is solely entitled to any stock or chose in action upon trust or by way of mortgage, the judge in lunacy may by order vest in any person or persons the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action. Power to vest right to transfer stock and sue for chose in action.

(2.) In the case of any person or persons jointly entitled with a lunatic to any stock or chose in action upon trust or by way of mortgage, the judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action either in such person or persons alone or jointly with any other person or persons.

(3.) When any stock is standing in the name of a deceased

53 Vict. c. 5, person, whose personal representative is a lunatic, or when a
s. 136. chose in action is vested in a lunatic as the personal representa-

tative of a deceased person, the judge may make an order vesting the right to transfer or call for a transfer of the stock, or to receive the dividends thereof, or to sue for the chose in action in any person or persons he may appoint.

(4.) In all cases where an order can be made under this section, the judge may, if it is more convenient, appoint some proper person to make or join in making the transfer.

(5.) The person or persons in whom the right to transfer or call for a transfer of any stock is vested, may execute and do all powers of attorney, assurances, and things to complete the transfer to himself or themselves or any other person or persons according to the order, and the Bank and all other companies and their officers and all other persons shall be bound to obey every order under this section according to its tenor.

(6.) After notice in writing of an order under this section, it shall not be lawful for the Bank or any other company to transfer any stock to which the order relates or to pay any dividends thereon except in accordance with the order.

As to the meaning of "stock" and "transfer" in this section, see sect. 341, *post*, p. 818.

The jurisdiction under this section to vest trust stock which remains in the name of a lunatic trustee cannot be exercised by a master under sect. 27 (1) of the Lunacy Act, 1891; this not being administration of the lunatic's estate (*Re Langdale*, 1901, 1 Ch. 3).

Criminal lunatics are not included in the above section (Lunacy Act, 1890, sect. 340), but were included in sect. 5 of the Trustee Act, 1850, one of the provisions replaced by the above section. Accordingly in the case of a criminal lunatic, a vesting order was made in 1906 under sect. 5 of the Trustee Act, 1850, the repeal of the last-mentioned section by Lunacy Act, 1890, sect. 342, not affecting the jurisdiction (*Re R.*, 1906, 1 Ch. 730).

The above section replaces (as to England) sects. 5, 6, and parts of sects. 20, 26, 27 and 31 of the Trustee Act, 1850, and part of sect. 6 of the Trustee Act, 1852. The following cases were decided under those acts.

The wife of a lunatic was sole surviving trustee of stock. An order was made, appointing new trustees in the place of the married woman and the deceased trustees, and vesting in the new trustees the right to transfer the stock (*Re Wood*, 3 D. F. & J. 125). The sole surviving trustee of stock being of unsound mind, the beneficiaries were appointed trustees and the stock vested in them (*Re Currie*, 10 Ch. Div. 93).

The executors of an executor, one of whom was lunatic, were held to be "entitled" within the Trustee Act, 1850, when the stock was standing in the name of the original testator (*Re Wachter*, 22 Ch. Div. 535). Where one of the three executors of a surviving trustee of shares was of unsound mind, and the other two refused to act, an order was made vesting the right to transfer the shares in the beneficiaries (*Re White*, 5 Ch. 698).

Where one of several trustees was lunatic the court vested the right to transfer stock in the remaining trustees (*Re Watson*, 19 Ch. Div. 384); and made such an order as to the whole fund when it was immediately divisible (*Re Martyn*, 26 Ch. Div. 745; see *Re Wachter*, 22 Ch. Div. 535); and as to a part which was immediately payable (*Re Hodgson, Kenlis v. Hodgson*, 11 Ch. Div. 888). But where there was a continuing trust it was said that a new trustee must be appointed (*Re Nash*, 16 Ch. Div. 503; *Re Aston*, 23 Ch. Div. 217; *Re Ray*, 47 L. T. 500; *Re Hodgson, sup.*; see *Re Lamb*, 28 Ch. Div. 77; *Re Gardiner*, 33 Ch. Div. 590; *Re Peacock*, 14 Ch. Div.

212; and the note, *ante*, p. 781). See now *Re Leon*, 1892, 1 Ch. 348, *ante*, 53 Vict. c. 5, p. 813. Where a lunatic was entitled jointly with a person out of the jurisdiction, and it was desired to vest in two new trustees already appointed, the stock was vested in the person out of the jurisdiction and then in the new trustees (*Re Batho*, 39 Ch. Div. 189; see *Re Druce*, 46 L. T. 669; *Re Rolls Hoare*, 1888, W. N. 94).

Where two trustees transferred trust stock into the names of strangers, and one of the trustees subsequently became lunatic, the court would not, under the Trustee Act, 1850, make an order as to the retransfer of the stock (*Re Stewart*, 8 W. R. 297).

Where a person of unsound mind was entitled to a sum of stock, as to Vesting part as trustee, and as to the residue beneficially, an order was made orders as to enabling new trustees to receive the arrears of dividends on the whole sum stock. of stock, upon an undertaking to invest in the name of the old trustee the dividends to which he was entitled beneficially (*Re Stewart*, 2 D. F. & J. 1; as to the indivisibility of dividends, see also *Skynner v. Pelichet*, 9 W. R. 191). The form of an order vesting the right to transfer stock was settled in *Re Gregson*, 1893, 3 Ch. 233; see *Re C. M. G. Spinster*, 1898, 2 Ch. 324; and the rules given in the note to sect. 35 of the Trustee Act, 1893, *ante*, p. 797.

As to the mode and form of application, see Rules in Lunacy, *post*, p. 819.

Sub-sect. 4 replaces part of sect. 20 of the Trustee Act, 1850. As to its operation, see sect. 137; *Re C. M. G. Spinster*, 1898, 2 Ch. 324.

137. Where a person is appointed to make or join in making a transfer of stock, such person shall be some proper officer of the Bank, or the company or society whose stock is to be transferred. Person to be appointed to transfer.

This section applies, so far as sect. 136 is concerned, only to sub-sect. 4 thereof (*Re C. M. G. Spinster*, 1898, 2 Ch. 324).

138. The powers conferred by this act as to vesting orders may be exercised for vesting any land, stock, or chose in action in the trustee or trustees of any charity or society over which the High Court would have jurisdiction upon suit duly instituted, whether the appointment of such trustee or trustees was made by instrument under a power or by the High Court under its general or statutory jurisdiction. Charity trustees.

See sect. 39 of the Trustee Act, 1893, *ante*, p. 799.

139. The judge in lunacy may make declarations and give directions concerning the manner in which the right to any stock or chose in action vested under the provisions of this act is to be exercised. Declarations and directions.

140. The fact that an order for conveying any land or releasing any contingent right has been founded upon an allegation of the personal incapacity of a trustee or mortgagee shall be conclusive evidence of the fact alleged in any court upon any question as to the validity of the order, but this section shall not prevent a judge of the High Court from directing a re-conveyance of any lands or contingent right dealt with by the order, or from directing any party to any proceeding concerning such land or right to pay any costs occasioned by the order when the same appears to have been improperly obtained. Order to be conclusive evidence of allegation on which it is founded.

53 Vict. c. 5,
s. 141.

Power to
appoint new
trustees.

141. In every case in which the judge in lunacy has jurisdiction to order a conveyance or transfer of land or stock, or to make a vesting order, he may also make an order appointing a new trustee or new trustees.

This section replaces sect. 10 of the Trustee Act, 1852. In cases decided under the Trustee Acts, 1850 and 1852, and before the Lunacy Act, 1890, it was held that an order might be made in lunacy alone appointing new trustees in the place of former trustees, of whom some were dead and one a person of unsound mind not so found (*Re Owen*, 4 Ch. 782; *Re Rolls Hoare*, 1888, W. N. 94; see *Re Green*, 10 Ch. 272; *Re Ormerod*, 3 De G. & J. 249); and it was also held that an order might be made in Chancery alone appointing a new trustee in the place of a person of unsound mind not so found (*Re Vickers*, 3 Ch. D. 112; *Re Martin*, 34 Ch. D. 618). In a case decided since the Trustee Act, 1893, an order has been made in Chancery alone appointing a new trustee in a similar case (*Re M.*, 1899, 1 Ch. 79).

As to the consent of the new trustee to act, see r. 92 and Form 12, *post*, pp. 820, 821.

Costs.

142. The judge in lunacy may order the costs of and incident to obtaining an order under the provisions of this act as to vesting orders and carrying the same into effect to be paid out of the land or personal estate or the income thereof in respect of which the order is made, or in such manner as the judge may think fit.

See rules under this act, No. 110 (*post*, p. 820), and the note to sect. 38 of the Trustee Act, 1893, *ante*, p. 799.

As to ordering payment of costs by the Bank of England, see *Re Shortridge*, 1895, 1 Ch. 278; *Re C. M. G. Spinster*, 1898, 2 Ch. 324; *Re Spurling*, 1909, 1 Ch. 206.

Saving of
power of
High Court.

143. The provisions of this act as to vesting orders shall not affect the jurisdiction of the High Court as to any lunatic trustee or mortgagee who is an infant.

See sects. 26 and 35 of the Trustee Act, 1893 (*ante*, pp. 783, 793), and *Re Arrowsmith* (6 W. R. 642); and the remarks of Stirling, J., *Re M.* (1899, 1 Ch. 84).

Definitions.

341. In this act, if not inconsistent with the context—

“The Bank” means the Governor and Company of the Bank of England:

“Contingent right,” as applied to lands, includes a contingent and executory interest, a possibility coupled with an interest whether the object of the gift or limitation of such interest, or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent:

“Convey” and “conveyance” include the performance of all formalities required to the validity of conveyances by married women and tenants in tail under the “Act for the abolition of fines and recoveries, and for the substitution of more simple modes of assurance,” and also surrenders and other acts which a tenant of

copyhold lands can perform preparatory to or in aid of a complete assurance of such copyhold lands : 53 Vict. c. 5,
s. 341.

"Dividends" includes interest and other annual produce :

"Land" includes an undivided share of land :

"Lunatic" means an idiot or person of unsound mind :

"Mortgage" includes every estate, interest, or property in real or personal estate, which is a security for money or money's worth :

"Stock" includes any fund, annuity, or security transferable in books kept by any company or society, or by instrument of transfer alone, or by instrument of transfer, accompanied by other formalities, and any share or interest therein, and also shares in ships registered under the Merchant Shipping Act, 1854 : 17 & 18 Vict.
c. 104.

"Transfer" includes assignment, payment, and other disposition, and execution, and performance, of every assurance and act to complete a transfer :

"Trust" and "trustee" include implied and constructive trusts, and cases where the trustee has some beneficial interest, and also the duties incident to the office of personal representative of a deceased person, but not the duties incident to an estate conveyed by way of mortgage.

As to constructive trustees, see note (r), *ante*, p. 807.

THE RULES IN LUNACY, 1892.

Mode of Application.

After Rule 16, which provides for applications for an order for an inquiry by petition, the subsequent rules are as follows :— **Lunacy Rules,
1892.**

17.—(a) Applications for a traverse and for a supersedeas shall be made by petition.

(b) Applications under that portion of the Lunacy Act, 1890, which relates to "vesting orders" shall be made by summons, unless the judge in lunacy or a master directs a petition to be presented.

This rule was substituted for the old rule in October, 1900.

19. All other applications under the Lunacy Acts, 1890 and 1891, or under those acts and also in the Chancery Division, shall, unless the judge or masters shall in any particular case otherwise direct, be made by summons at chambers before the masters.

20. In all cases in which the judge has, under the Lands Clauses Acts, the Settled Estates Act, 1877, the Settled Land Acts, 1882 to 1890, or any other enactment, jurisdiction to make an order upon petition affecting the property of a lunatic, the application for the order shall, unless the judge or master in any particular case otherwise directs, be made by summons at chambers before the masters.

21. If in any case in which the application is not by these rules or by the judge or masters directed to be made by petition, a petition is presented without the direction of the judge or masters, no further costs shall be allowed than would be allowed upon a summons.

23. All matters which require to be brought before the judge, shall be brought before him out of court. The judge may make an order upon any

Lunacy Rules, 1892. summons or petition without the attendance of counsel, solicitors, or parties, or after such attendance, or may adjourn the summons or petition into court, or refer the same to the masters for inquiry, or further inquiry, upon any matter. Any matter may be adjourned from court for consideration by the judge out of court.

24. The judge and masters respectively may direct any person to be served with notice of any application, and may dispense with service on any person.

Vesting Orders.

57. Applications under that portion of the Lunacy Act, 1890, which relates to "vesting orders" may be made—

- (a) Where the application is for the appointment of new trustees, or relates to property subject to a trust, by any person beneficially interested in the property, whether under disability or not, or by any duly appointed trustee thereof.
- (b) Where the application relates to any property subject to a mortgage, by any person beneficially interested in the equity of redemption or in the mortgage money, whether under disability or not.

58. The application shall be intitled in the matter of the trust or mortgage, and of the particular lunacy, and in the matter of the Lunacy Act, 1890. Compare *Re Purvis*, 1904, 1 Ch. 373.

59. The applicant shall serve any such application upon the person or persons who, according to the practice of the Chancery Division of the High Court, would be required or entitled to be served in similar cases.

When the next of kin of a lunatic ought to be served but are unknown, the Attorney-General should be served (*Re Bourke*, 2 De G. J. & S. 426).

A Practice Note issued in 1908 provides that upon applications to vest or procure the conveyance or transfer of outstanding property in or to trustees, it shall not be necessary (unless otherwise directed) to deduce the beneficial title or to serve beneficiaries (1908, W. N. 75).

As to the practice of the Chancery Division on applications for vesting orders, see *ante*, p. 787. Forms of summonses are given Heywood and Massey, *Lunacy Practice*, 3rd ed., 212, 214.

Evidence.

92. The consent of a new trustee to act shall be sufficiently evidenced by a written consent signed by him and verified by a solicitor.

Costs.

110. The rules of the Supreme Court as to costs for the time being in force shall, subject to these rules, apply to the costs of proceedings under the Lunacy Acts, 1890 and 1891, taken after the commencement of these rules in any matter.

FORMS *in* SCHEDULE TO RULES *to be used "with such variations as the circumstances require."* R. 9.

Form 1.—Title of Proceedings.

- (a) *Application as to Alleged Lunatic.*
In Lunacy.

In the matter of A. B., a person alleged to be of unsound mind.

- (b) *Application as to Lunatic so found by Inquisition.*
In Lunacy.

In the matter of A. B., a person of unsound mind.

- (c) *Application as to Lunatic not so found by Inquisition.*
In Lunacy.

Lunacy Rules,
1892.

In the matter of A. B., a person of unsound mind not so found by inquisition.

- (d) *Application in Lunacy and in the Chancery Division.*
In Lunacy
and

In the High Court of Justice,
Chancery Division.

In the matter of A. B., a person of unsound mind [*or as the case may be*].

- (f) *Application for Vesting Orders* (compare *Re Purvis*, 1904, 1 Ch. 373).
In Lunacy.

In the matter of the trusts of an indenture dated , and
made between

and

In the matter of A. B., a person of unsound mind [*or as the case may be*].

and

In the matter of the Lunacy Acts, 1890 and 1891.

Form 12.—Consent to Act.

I, A. B., of , hereby consent to act as trustee of the
[*describe the instrument*].

Dated the day of . (Signed) A. B.

I, C. D., of , solicitor, hereby certify that the above-written
signature is the signature of A. B., the person mentioned in the above-
written consent.

Dated the day of . (Signed) C. D.

Form 13.—Summons before the Masters.

(*For Title, see Form 1.*)

Let all parties concerned attend the Master in Lunacy in Chambers
[*or, in the case of a person through mental infirmity arising from disease or
age incapable of managing his affairs, the Master in Chambers at Room*

No.], at the Royal Courts of Justice, London, on day, the
day of , at o'clock in the noon, on the hearing of
an application on the part of [*here state on whose behalf the application is
made and its object*].

Dated the day of , 19 .

This summons was taken out by , of , solicitor for .
To .

IV.—THE JUDICIAL TRUSTEES ACT, 1896.

59 & 60 VICT. c. 35.

1.—(1.) Where application is made to the court by or on behalf of the person creating or intending to create a trust, or

59 & 60 Vict.
c. 35, s. 1.

59 & 60 Vict.
c. 35, s. 1.

Power of
court on
application to
appoint
judicial
trustee.

by or on behalf of a trustee or beneficiary, the court may, in its discretion, appoint a person (in this act called a judicial trustee) to be a trustee of that trust, either jointly with any other person or as sole trustee, and, if sufficient cause is shown, in place of all or any existing trustees (*a*).

(2.) The administration of the property of a deceased person, whether a testator or intestate, shall be a trust, and the executor or administrator a trustee, within the meaning of this act (*b*).

(3.) Any fit and proper person nominated for the purpose in the application may be appointed a judicial trustee, and, in the absence of such nomination, or if the court is not satisfied of the fitness of a person so nominated an official of the court may be appointed, and in any case a judicial trustee shall be subject to the control and supervision of the court as an officer thereof (*c*).

(4.) The court may, either on request or without request, give to a judicial trustee any general or special directions in regard to the trust or the administration thereof (*d*).

(5.) There may be paid to a judicial trustee out of the trust property such remuneration, not exceeding the prescribed limits, as the court may assign in each case, subject to any rules under this act respecting the application of such remuneration where the judicial trustee is an official of the court, and the remuneration so assigned to any judicial trustee shall, save as the court may for special reasons otherwise order, cover all his work and personal outlay (*e*).

(6.) Once in every year the accounts of every trust of which a judicial trustee has been appointed shall be audited, and a report thereon made to the court by the prescribed persons, and, in any case where the court shall so direct, an inquiry into the administration by a judicial trustee of any trust, or into any dealing or transaction of a judicial trustee, shall be made in the prescribed manner.

Appointment
of trustees.

As to the appointment of trustees generally, see the Trustee Act, 1893, s. 10 (*ante*, p. 766), dealing with appointments by the parties, and sect. 25 (*ante*, p. 777), dealing with appointments by the court.

Cases under
sub-sect. (1).

(*a*) Upon an application under the present sub-section, where a testator appointed his wife sole executrix, and gave her a life interest in his estate, but appointed no trustees, the court refused at the request of the residuary legatee, to appoint a judicial trustee, but appointed an ordinary trustee under the Trustee Act, 1893 (*Re Ratcliff*, 1898, 2 Ch. 352).

In *Re Martin* (1900, W. N. 129) it was said that the union of a judicial trustee and an ordinary trustee was not desirable; and having regard to the opposition of the majority of the beneficiaries the appointment of a judicial trustee to act with a sole executor and trustee was refused, but an ordinary trustee was appointed.

Sect. 4 of this act gives power to make rules regulating the practice under the act. This power has been exercised, and the rules are stated at length in the Annual Practice, Vol. II., and also in the current indexes to the Law Reports, 1897 and 1899. See also Seton, 6th ed. 1279.

Rules 2—4 provide for applications to the court; and under r. 6 the court may upon an appointment make vesting orders.

As to the removal and suspension, resignation, &c. of judicial trustees, see rr. 7 (2), (4), 20—24.

(b) Having regard to this sub-section the court can remove an executor and appoint a judicial trustee in his place (*Re Ratcliff*, 1898, 2 Ch. 352). See also r. 25. Compare the cases under the Trustee Acts, *ante*, p. 808. 59 & 60 Vict. c. 35, s. 1.

(c) When the court is not satisfied of the fitness of the person nominated by the applicant, it is not necessary to appoint an official of the court, but any fit person may be appointed (*Douglas v. Bolon*, 1900, 2 Ch. 749). The court may appoint as judicial trustee a beneficiary or relative of a beneficiary, a solicitor or other person connected with a trust, a married woman, or a person already trustee (see rules under the act, r. 5). Rules 7 and 26 provide for appointing officials of the court, and r. 26 provides for appointing judicial trustees in connection with companies or clubs, or to carry on trades. Sub-sect. (2).
Sub-sect. (3).

(d) Rules 8—16 provide for the administration of a trust by a judicial trustee. Except where a summons is required by the rules the communication between a judicial trustee and the court is made by letter (r. 28). Sub-sect. (4).

(e) Rules 17—19 provide for remuneration, and r. 14—16 provide for accounts. Sub-sects. (5) and (6).

2. The jurisdiction of the court under this act may be exercised by the High Court, and as respects trusts within its jurisdiction by a palatine court, and (subject to the prescribed definition of the jurisdiction) by any county court judge to whom such jurisdiction may be assigned under this act. Court to exercise jurisdiction.

The jurisdiction under the act may be exercised by a master of the High Court or by a registrar of a district registry, or of a palatine or county court (rr. 27, 33; see *Re Martin*, 1901, W. N. 129).

See also as to district registries, and palatine and county courts, rr. 29, 30 and 31.

3.—(1.) If it appears to the court that a trustee, whether appointed under this act or not, is or may be personally liable for any breach of trust, whether the transaction alleged to be a breach of trust occurred before or after the passing of this act, but has acted honestly and reasonably, and ought fairly to be excused for the breach of trust and for omitting to obtain the directions of the court in the matter in which he committed such breach, then the court may relieve the trustee either wholly or partly from personal liability for the same. Jurisdiction of court in cases of breach of trust.

(2.) This section shall come into operation at the passing of this act.

It is not necessary to plead the act, but *semble* it is better to do so (*Singlehurst v. Tapscott Co.*, 1899, W. N. 133). Where inquiries are ordered in an administration action, the trustee should see that such directions are inserted as will insure that proper evidence on any question intended to be raised under the act shall be before the court (*Re Stuart, Smith v. Stuart*, 1897, 2 Ch. 588). In the last case the question of relieving the trustee was considered, though only raised for the first time on further consideration.

The words "or may be liable" appear to point to doubtful questions of construction (*Re Grindey, Clews v. Grindey*, 1898, 2 Ch. 598). "May be liable."

As regards the section generally, a narrow construction ought not to be adopted (*Re Grindey, Clews v. Grindey*, 1898, 2 Ch. 601; *Re Kay, Mosley v. Kay*, 1897, 2 Ch. 524); and it should be carefully but not grudgingly construed in favour of trustees (*Re Robert, Knights v. Roberts*, 76 L. T. Cases on section generally.

59 & 60 Vict.
c. 35, s. 3.

485). In view of the fact that a trustee cannot now as of course procure a trust to be executed by the court, the act was passed to enable the court in a proper case to remedy the hardship of the previous law (*Perrins v. Bellamy*, 1899, 1 Ch. 800, 802; *Re Roberts, Knights v. Roberts*, 76 L. T. 484). The fact that the trustee does not apply to the court for directions is important (*Re Kay, Mosley v. Kay*, 1897, 2 Ch. 523). But in a proper case he may be excused for omitting to apply (*Re Grindey, Clews v. Grindey*, 1898, 2 Ch. 593; see *Perrins v. Bellamy*, 1899, 1 Ch. 802; *Re Tollemache*, 1903, 1 Ch. 466). The section has not enlarged the extraordinary jurisdiction of the court to sanction irregular dealings with trust property (*Re Tollemache, sup.*). Such extraordinary jurisdiction is confined to cases of emergency (*S. C.*, 1903, 1 Ch. 955).

"Honestly."

To obtain relief the trustee must have acted "honestly and reasonably." It was said by *Kekewich, J.*, in one case, that a trustee who does nothing and accepts without explanation what is said by his co-trustee, is dishonest (*2nd Dulwich, &c. Society*, 68 L. J. Ch. 198; see *Re Smith, Hands v. Andrews*, 1893, 2 Ch. 11). But this seems inconsistent with the ruling of the C. A. in the last-mentioned case (1893, 2 Ch. 18).

"Reasonably."

"Reasonably" means reasonably as trustees (*Re Grindey, Clews v. Grindey*, 1898, 2 Ch. 601). In some cases a test, apparently applied to ascertain whether a trustee has acted reasonably, has been to see whether he would have so dealt with his own money (*Re Stuart, Smith v. Stuart*, 1897, 2 Ch. 590; *Re Turner, Barker v. Ivimey*, 1897, 1 Ch. 542; see *Shaw v. Cates*, 1909, 1 Ch. 405). It has been said, however, that it is not enough to show this, though it would be a point in his favour (*Re Barker, Ravenshaw v. Barker*, 77 L. T. 714). It was said in another case that this would not be material except as to *bona fides* (*Re De Clifford, De Clifford v. Quilter*, 1900, 2 Ch. 716; compare *Rae v. Meek*, 14 App. Cas. 569, 570; *Leaoyd v. Whiteley*, 12 A. C. 733). In the case of investments on mortgage, the requirements of sect. 8 of the Trustee Act, 1893, constitute a standard by which reasonable conduct is to be judged; though non-compliance with them is not necessarily fatal to an application for relief (*Re Stuart, Smith v. Stuart*, 1897, 2 Ch. 591, 592; see *Waite v. Parkinson*, 85 L. T. 456). Trustees who did not obtain the reports required by the section were held not to have acted reasonably (*Re Dive, Dive v. Roebuck*, 1909, 1 Ch. 328; *Shaw v. Cates*, 1909, 1 Ch. 389). The conduct of a trustee investing on mortgage was held not reasonable (*Chapman v. Browne*, 1902, 1 Ch. 805).

Ought to be excused.

Proof that a trustee has acted honestly and reasonably does not alone entitle him to relief; he must show that under all the circumstances he ought fairly to be excused (*National Trustees v. General Finance Co.*, 1905, A. C. 373). Where trustees had improperly paid over money, the court refused to excuse them on the ground that their solicitors had committed a mistake (*National Trustees Co. v. General Finance Co., sup.*) or a fraud (*Davis v. Hutchings*, 1907, 1 Ch. 356; compare *Re Smith, Smith v. Thompson*, 18 Times L. R. 432). The position of a company performing the duties of a trustee for reward is in these matters different from that of a gratuitous trustee (1905, A. C. 381).

Instances in which relief has been granted.

Relief has been granted under the section in the following cases:—Where an executor had paid legatees, and the assets subsequently proved insufficient for the debts, the relief being given as to some only of the payments (*Re Kay, Mosley v. Kay*, 1897, 2 Ch. 518); where a testator directed his trustees to maintain his estate in the investments existing at his death, and they did not call in a promissory note (*Re Grindey, Clews v. Grindey*, 1898, 2 Ch. 593); where an executor abstained on reasonable grounds from attempting to recover a debt due to the estate (*Re Roberts, Knight v. Roberts*, 76 L. T. 479); where an executor compromised the claim of a co-executor (*Re Houghton, Hawley v. Blake*, 1904, 1 Ch. 626); where trustees having no power of sale sold leaseholds on the advice of their solicitor that they had such a power (*Perrins v. Bellamy*, 1899, 1 Ch. 797); where executors paid money to their solicitors in reliance on their statements that it was required for the purposes of administration (*Re De Clifford, De*

Clifford v. Quilter, 1900, 2 Ch. 707); where a trustee lived in the country and money was lost by the fraud of her London solicitor's clerk (*Re Smith, Smith v. Thompson*, 18 Times L. R. 432). 59 & 60 Vict. c. 35, s. 3.

Relief has been refused where, after a writ has been issued against him, a trustee continued to make payments to a tenant for life without applying to the court for directions (*Re Kay, Mosley v. Kay*, 1897, 2 Ch. 518); also in the case of a trustee who was party to an investment on mortgage held to be improper from the nature and value of the property, though he acted in reliance on his co-trustee who was solicitor to the trust (*Re Turner, Barker v. Ivimey*, 1897, 1 Ch. 536; see *Re Stuart, Smith v. Stuart*, 1897, 2 Ch. 583; and also *Waite v. Parkinson*, 85 L. T. 456, where no costs were given against the trustee; *Chapman v. Brown*, 1902, 1 Ch. 785); where a trustee allowed his co-trustee, a member of the firm of solicitors acting for the trust, to receive trust funds which were paid into the account of the firm (*Wynne v. Tempest*, 1897, W. N. 43, in which case the trustee was not charged with interest); where trustees for the purpose of investment allowed trust money to be under the control of their solicitor who misappropriated it (*Evans Williams v. Byron*, 18 T. L. R. 172; see *Wyman v. Paterson*, 1900, A. C. 280); where a sole executrix postponed for fourteen years the sale of investments which ought to have been sold within a year from the death, the executrix not being allowed to set off against the loss suffered on some investments the gain on others (*Re Barker, Ravenshaw v. Barker*, 77 L. T. 712). And see cases quoted above as to "reasonably."

[Sect. 4 gives power to make rules for carrying into effect this act. Rules were made in 1897, which will be found in the *Annual Practice*, Vol. 2; also in the current indexes to the *Law Reports* for 1897 and 1899; and see *Seton*, 6th ed. 1279.]

5. In this act—

The expression "official of the court" means the holder of such paid office in or connected with the court as may be prescribed. Definitions.

The expression "prescribed" means prescribed by rules under this act.

6.—(1.) This act may be cited as the Judicial Trustees Act, 1896. Short title, extent, and commencement of act.

(2.) This act shall not extend to any charity, whether subject to or exempted from the Charitable Trusts Acts, 1853 to 1894.

(3.) This act shall not extend to Scotland or Ireland.

(4.) This act, except as by this act otherwise provided, shall come into operation on the 1st day of May, 1897.

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